

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

**Vol. 1: The Attempted Capture of the  
National Treasury  
EOH HOLDINGS and the City of JHB  
Alexkor**



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. 1



**PART IV:**

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Judicial Commission  
of  
Inquiry into Allegations

of

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

Report: Part IV

Vol. 1: The Attempted Capture of the  
National Treasury

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

## The Attempted Capture of the National Treasury

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# The Attempted Capture of the National Treasury

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## INTRODUCTION

1. This part of the Report deals with the attempted capture of the National Treasury. This topic refers to various attempts that were made by President Zuma, Minister Joemat-Pettersson and Ms Dudu Myeni, the Chairperson of the Board of South African Airways from some time in 2012 to sometime in 2017, to get the National Treasury to approve certain transactions that were not in the interests of the country or that were not financially affordable for the country or that might not have been objectionable in principle but were rendered objectionable by reason of certain terms and conditions to which the National Treasury was urged to agree.
2. The National Treasury, under, initially, Minister Pravin Gordhan as Minister of Finance from May 2009 to May 2014, under Minister Nhlanhla Nene as Minister of Finance from May 2014 to 9 December 2015 and, once again, under Minister Gordhan as Minister of Finance in his second term from 13 December 2015 to 31 March 2017 put up great resistance to repeated attempts by President Zuma, Ms Dudu Myeni and others to get them to engage in wrongdoing concerning various transactions.
3. The stance taken by Minister Gordhan and Minister Nene during their respective terms of office as Ministers of Finance in terms of which they were not prepared to approve wrong or unlawful projects or transactions did not endear them to President Zuma and some of their Colleagues in the Cabinet. In fact they both testified that some of their Colleagues in the Cabinet became hostile to them and the National Treasury.<sup>1</sup> The reason for that hostility by members of the Cabinet towards the National Treasury may have been because they identified themselves with President Zuma's wishes with

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<sup>1</sup> Exhibit K1, p 26, para 76.

regard to those transactions or projects because their Departments also had had transactions or projects that they wanted the National Treasury to approve which the National Treasury did not approve.

4. From May 2009 to May 2014 Mr Nhlanhla Nene was the Deputy Minister of Finance. This is when Mr Pravin Gordhan was the Minister of Finance. Mr Nene gave evidence to the effect that, while he was Deputy Minister of Finance, he visited the Gupta residence six times and the offices of Sahara Computers two times.<sup>2</sup> He said that during his interactions with the Guptas, the Guptas never asked him to do any favours for them.<sup>3</sup> It is difficult to believe that the Guptas would have had a relationship with the Deputy Minister of Finance and never asked him to do anything for them. However, there is not enough evidence to make a finding that Mr Nene's evidence that the Guptas never asked him for any favours is not true. Mr Nene said that they never asked him while he was the Deputy Minister nor did they ask him when he was Minister of Finance.
  
5. After Mr Nene's first appearance before the Commission, it emerged that he had not been truthful in the evidence he had previously given in how many times he had been to the Gupta residence and he had to return to the Commission to deal with this issue. He returned to the Commission, admitted that he had not been truthful in certain respects and apologised to the nation. He resigned as Minister of Finance. The Commission became aware of a media statement that was issued by the Economic Freedom Fighters in which it was alleged that Mr Nene had had an agreement with the Guptas when he was still Deputy Minister to work with the Guptas and that that was why he was made Minister of Finance but he had later not kept his part of the bargain with the Guptas and that is why they no longer wanted him.

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<sup>2</sup> Exhibit K1, p 16-17, paras 44-5.

<sup>3</sup> Exhibit K1, p 18, para 51.



6. On my direction the Secretary of the Commission sent a letter to the EFF requesting it to furnish the Commission with any information or evidence to back up the allegation in their media statement because the Commission would like to investigate the matter. The EFF never furnished the Commission with any information or evidence to back up their allegation against Mr Nene nor did they respond to the Commission's letter.
7. After the general election in May 2014 President Zuma appointed Mr Gordhan as Minister of Co-operative Governance and Traditional Affairs. He then appointed Mr Nene as the Minister of Finance. He appointed Mr Mcebisi Jonas as the Deputy Minister of Finance.
8. The important features of the attempts to capture the National Treasury were:
  - (a) the offer of the position of Minister of Finance and money by the Guptas to Deputy Minister Mcebisi Jonas in return for him working with them;
  - (b) the *dismissal* of Minister Nene as Minister of Finance on 9 December 2015;
  - (c) the appointment of Mr Douglas Van Rooyen as Minister of Finance on 9 December 2015 to replace Mr Nene;
  - (d) the appointment by Mr Douglas Van Rooyen of advisors linked to the Guptas or their *associates*;
  - (e) the transfer of Mr Douglas Van Rooyen to the Ministry of Co-operative Governance *and* Traditional Affairs and the re-appointment of Minister Gordhan as Minister of Finance.
  - (f) the *harassment* of Minister Gordhan by the HAWKS during his second term as Minister of Finance.

(g) the dismissal of Minister Gordhan and Deputy Minister Jonas on 31 March 2017 and Mr *Gordhan's* replacement by Mr Malusi Gigaba.

9. The transactions in respect of which Minister Gordhan and Minister Nene showed their resistance to wrongdoing were, collectively, the following:

(a) the *Nuclear Deal*;

(b) the Airbus transaction at SAA;

(c) the Khartoum Route for SAA;

(d) the Petro SA transaction; and

(e) the Denel Asia Venture.

10. These transactions and the topics representing the important features of the attempts to capture the National Treasury will not necessarily be discussed in the sequence given above but will be dealt with within the context of:

(a) the events leading to and the ultimate dismissal of Minister Nhlanhla Nene and his replacement by Mr D Van Rooyen;

(b) the re-appointment of Mr Gordhan as Minister of Finance;

(c) the events leading to and the ultimate dismissal of Mr Gordhan and Mr Jonas as, respectively, Minister of Finance and Deputy Minister of Finance; and

(d) the replacement of Mr Gordhan by Mr Malusi Gigaba.

## MR FUZILE'S EVIDENCE

11. During at least part of the period of the attempts to capture the National Treasury, the Director-General of National Treasury was Mr Lungisa Fuzile. As Mr Fuzile's evidence was undisputed except in the respects in which it was disputed by Mr Des Van Rooyen, it is convenient to let Mr Fuzile tell the story through his statement submitted to the Commission which he confirmed under oath to be true and correct. *When Mr Fuzile's evidence in relation to Mr Van Rooyen is discussed, Mr Van Rooyen's version will also be taken into account.* Mr Fuzile in a statement furnished to the Commission, had this to say:

### "INTRODUCTION

2. As the former Director General ("DG") of the National Treasury ("National Treasury" or "Treasury"), I have knowledge of projects and events, discussions and decisions that occurred during my tenure that have implications for the country or that impacted certain persons in consequential ways.
3. I was also told about discussions and events that occurred in my absence, but which had relevance to and implications for my work as DG. Some of these appear to have led to some of the people I mention in this submission being summarily and, in some cases, unceremoniously removed from their positions.
4. During my tenure as DG at the National Treasury I witnessed the growing dissatisfaction by President Zuma with the National Treasury – in particular Minister Gordhan and Minister Nene. There were several issues that were central to this dissatisfaction especially since these Ministers were unwilling to sign-off on decisions that risked jeopardising the country's fiscus and sovereignty. This statement deals with the following issues:
  - 4.1 nuclear procurement;
  - 4.2 a purchase of shares in the oil and petroleum company Engen by PetroSA;
  - 4.3 the financial and governance decisions being taken by SAA;
  - 4.4 the social security grant contract;
  - 4.5 the Denel Asia matter;
  - 4.6 the Closure of Gupta accounts by the banks; and

- 4.7 the events leading to my resignation as DG.
5. All of these issues either involved significant spending by the government or would place the fiscal and financial integrity of the government at risk. When these events are viewed together, they build a picture of how:
  - 5.1 The Ministry of Finance and the Treasury became a stumbling block to the erosion (corruption) of due process in policy and decision making in the state;
  - 5.2 The Ministry of Finance and Treasury (sometimes with support from some members of Cabinet and officials in relevant departments) played a role in stopping or delaying some of the (poor or bad) decisions that would have had dire consequences for South Africa, fiscally and otherwise, including by elevating the debt burden on future generations; and
  - 5.3 In selected cases, processes of making decisions of government were changed or manipulated deliberately to get specific outcomes or decisions which were not in the national interest or the interest of the institutions concerned (in the case of SOCs). Had some of the decisions been taken and executed the country would most likely have been bankrupt at some point in the future.
6. I use some examples to illustrate my point as part of helping the Commission to do its work. I hope this will also help the nation to draw lessons from my experience.
7. At the outset, I would emphasise that like the running of any institution with a vast and complex mandate such as Treasury, no single person can provide a full picture of all events, developments, policy issues and decisions involving Treasury and the national fiscus.
8. The statement (in large measure) corroborates evidence already provided by my former political principals Mr Gordhan, Mr Nene and Mr Jonas. It also adds elements of what occurred among officials (at a technical level) on some of the matters that the former Ministers and Deputy Minister had presented before the Commission.
9. My history at National Treasury, in brief, is as follows.
  - 9.1 I joined National Treasury in January 1998 as a Deputy Director in what was then called the Department of Finance. The Department was later merged with the Department of State Expenditure in 2001 to form the National Treasury of today.
  - 9.2 As I had summarised during my first appearance, over time, I rose within the ranks until I was appointed as DG in May 2011. At that time Mr Gordhan was the Minister. I continued in that role until May 2017 when I exited civil service.

- 9.3 Although I exited when Mr Gigaba was the Minister, I had resigned a few days before his appointment, on 29 March 2017, and was serving notice of about six weeks after he got appointed.
- 9.4 As the above summary of my timeline at the Treasury indicates, I served in the administrations of President Mandela, Mbeki, Motlanthe and Zuma. I had the opportunity to work closely with and observe how each one of these Presidents related with their Ministers of Finance and Treasury. Obviously, the regularity of such interactions and their intensity increased as one rose within the ranks of the civil service.
10. To put my submission into proper perspective, I first set out the role of the National Treasury, and more importantly, the role of the DG of the National Treasury before turning to the events I refer to in paragraph 4.

### **The Role of the National Treasury**

11. The role and function of the National Treasury is set out in the statement by former Minister Nhlanhla Nene, in paragraphs 11 to 21. In summary, he points out that the National Treasury is established in terms of Chapter 13 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The Constitution sets out the role of the National Treasury in driving the budget process, procurement, borrowing, treasury norms and standards, the management of the National Revenue Fund, the division of revenue between the three spheres of government and overseeing financial management in all three spheres of government, including state-owned and public entities.
12. The National Treasury is not constitutionally independent of government. It is an integral part of the national government. Whilst it is expected to provide objective and critical assessment of government proposals, and assess for any fiscal or long-term sustainability impact, it defers to the policies adopted by Cabinet, where such policies are legal.
13. Of direct relevance to some of the matters ventilated in this submission in section 217 of the Constitution which directs that organs of state must contract for goods and services " . . . in accordance with a system which is fair, equitable and transparent, competitive and cost-effective."
14. The Public Finance Management Act, 1999 is the law that gives expression to section 216 and other sections of the Constitution with regard to establishing the National Treasury. The PFMA is also the law that set[s] out legal

requirements on matters such as government guarantees and procurement both of which are relevant to this submission.

15. The PFMA is contemplated by its regulations and other pieces of legislation such as the Preferential Procurement Policy Framework Act, 5 of 2000 and the Regulations and instruction notes governing procurement in giving full expression to the spirit and letter of the Constitution insofar as the role of the National Treasury is concerned. The National Treasury also supports the Minister in formulating the laws governing the financial sector such as the Financial Sector Regulation Act; the Financial Intelligence Act, etc.
16. The effect of the legislative framework that governs National Treasury is that it is involved in multiple government processes, across departments, and it is required to oversee financial matters and fiscal sustainability of all organs of state to ensure that they comply with all relevant prescripts. As explained by the former Ministers before this Commission, this makes National Treasury unpopular at times. For example, the imposition of taxes, user payments, allocation of budgets and the enforcement of compliance with budget law, procurement and the PFMA and MFMA means that the Treasury often has to deliver difficult decisions including tough action against an organ of state or specific officials, which does not earn Treasury friends: this is the nature of the role. Such difficult decisions became even more unpopular when there was persistent low economic growth, as was the case for much of 2009 and after, following the 2008 global financial crisis, and during the Presidency of Mr Zuma when few difficult decisions were made, and the budget constraints were seen as a mere irritant.

### **The Role of the Director-General of the National Treasury**

17. The Director-General of the National Treasury is the accounting officer of the Department. An accounting officer's role in any government department is primarily to implement policies that are required by the law, guided by Minister as executive authority. It is also about running the Department: ensuring that it has internal policies, systems, processes, the people and other resources it requires to deliver on its mandate and that legislation, especially the PFMA, is complied with.
18. The DG of the National Treasury may be described as the "chief advisor" to the Minister. He/she works with the rest of the experts in the Treasury to, amongst others, undertake rigorous, evidence-base technical analysis and research to

understand the impact of macroeconomic policy changes (especially changes in taxes and expenditure) and microeconomic policy changes on the entire economy and the citizens.

19. Examples of such research would include the study titled "the long-term fiscal report" which modelled various scenarios for Gross Domestic Product (GDP) growth and overlaid these with changes in social policies such as social security and the National Health Insurance (NHI) among others. I attach an example of these long-term fiscal reviews hereto as annexure "LF1".
20. Such work assists the Treasury staff to advise the Minister of Finance and the government broadly on what our government can afford, sustainability, under different economic contexts – the amount of debt that it can put on its books and afford to service as opposed to what would lead to the country falling into what is often called the debt trap.
21. I would like to emphasise that while such technical work is rigorous, it relies, as all forward-looking assessments must, on assumption and judgment calls. Sometimes these have to be made based on the limited information that is available at that point in time. It also draws on the experience of other nations and technical work by other experts the world over, while reality, as it unfolds, may deviate from what was expected, it would be unwise to dismiss it without clear evidence or arguments to counter it.

#### The Budget Process

22. Potentially the most important function of the Treasury is to produce an annual budget and to ensure that government always has money (cash) so that:
  - 22.1 It can pay salaries, social grants and other spending commitments that arise from its daily activities; and
  - 22.2 It can service its debts and not default on any interest payments or payments of the principal debt, which in turn avoids triggering an acceleration of all debt. Most governments run deficits and run up debt, which ideally is to fund infrastructure which enables economic growth and makes such debt sustainable. Nations that indebt themselves to fund consumption expenditure almost invariably end up in a debt trap. This requires that countries have to undertake painful reforms to return to sustainability and if not, can end up on an IMF programme and might lose their sovereignty.
23. The DG of Treasury (and his/her team led by the DDG in the Budget Office) coordinates the year-long process of producing the annual budget and in any in-year adjustments to it.

24. Over the years, concerted and deliberate effort went into developing mechanisms for ensuring alignment of the budget to the priorities as set by government as well as to ensure the necessary buy-in and ownership of this very important process. To this end, successive Ministers of Finance have sought to:
  - 24.1 Make the budget process more participatory and consultative by providing for broader and deeper political oversight and leadership of the budget process. This was done by establishing structures such as the Ministers' Committee on the Budget which is chaired by the Minister of Finance and comprises of Ministers appointed by the President on recommendation from the Minister of Finance. Other structures established are the Budget Council and Budget Forum, to facilitate participation of provinces and organized local government. These committees are all supported by a technical committee of officials, chaired by the DG of Treasury (or sometimes a DDG) and involving Directors-General of other departments or heads of provincial treasuries;
  - 24.2 Introduce a so-called "Budget strategy paper", before the start of the annual budget process, the aim was to provide a platform for a focused political and strategic conversation that would arrive at a few priorities that can be used effectively to guide the resource allocation process. Unfortunately, this did not yield the intended outcome; and
  - 24.3 Prepare and present transparent and comprehensive budget documents that allow the South African public, analyst, labour, organised community formations, rating agencies and investors to assess the country's fiscal stance and creditworthiness, among other things.
25. In my view, the coordination of the budget process has been the most difficult part of the work of the Treasury for the following reasons:
  - 25.1 First, where government does not have a proper, well-calibrated and disciplined process for setting priorities, everything is a priority. Sometimes new programmes get adopted with insufficient attention to their financial consequences. Consequently, the trading off of one priority against the other/s is left to the various budget – making structures (technical and Ministerial) with the Treasury and the Minister of Finance and his deputy being "the face" of those processes.
  - 25.2 Second, unlike the situation where the Treasury is assigned the job of producing the budget, there is no institution assigned the very important role of setting a few priorities and removing programmes that are deemed to be of low or no priority. The National Development Plan sets out a long-term vision for the country but provides limited guidance on how resources should best



be allocated where they are limited. Likewise, broad election promises tend not to specify priorities. The difficult job of deliberating on and making the trade-offs involved in allocating scarce resources is largely left to the Ministers' Committee on the Budget, the Budget Council and the technical officials.

- 25.3 Thirdly, traditionally departments are responsible for determining how to priorities spending across their programmes within their budget allocations, including deciding where to scale down or close low priority programmes or change services delivery models to reduce costs. Nevertheless, departments still frequently seek additional funding, which they expect the National Treasury to find. Moreover, despite consultation between Ministers and their accounting officers, there may not always be consensus on the priorities. On occasion, Ministers would be surprised that their departments have submitted proposals to scale back one and not the other programme. Often when there is disagreement the Treasury would be conveniently blamed.
- 25.4 Fourth, the budgeting process provides for consultation across departments with a view to reaching agreement on where savings can be made by one department to allow another department to implement a higher priority programme. However, the incentives for departments to propose where they can make sacrifices is sometimes limited, again leaving the National Treasury (and its provincial and local government counterparts) to play a key role in identifying potential savings and proposing to Ministers the reprioritisation of spending.
26. I should add that the problems enumerated above were not unique to President Zuma's administration. What was unique though about President Zuma's administration was that:
- 26.1 President Zuma's era was characterised by protracted constrained economic growth and poor revenue performance implied that resource allocation was even more challenging.
- 26.2 The period was largely characterised by an unwillingness to face up to the reality that budgeting is about making hard choices. Evidently, there was an overriding desire to always announce new programmes without curtailing or terminating old and poorly performing ones. Treasury was repeatedly expected to just find the money to fund more and more new programmes. With the imposition on an explicit expenditure ceiling, it became harder and harder to add new programmes without stopping others and this bred resentment and saw the Treasury being used as a scape goat for the constrained fiscal situation.

- 26.3 What was largely a macroeconomic problem affecting the country was conveniently made out to be the fault of a few individuals, particularly the Treasury and those who served in it. Those who asked tough questions were labelled as enemies of (a somewhat distorted form of) radical economic transformation in an attempt to silence them, even if asking the questions was their core job as is the case for the Minister and Deputy Minister of Finance and the Treasury and the technical and political committees that deal with the budget.
- 26.4 Masked by the rhetoric of promoting transformation was an insidious objective of repurposing of the state to enable rent seeking for themselves.
27. One of our last efforts at strengthening the political/executive leadership of the budget process was to propose **the budget strategy paper**. The aim was to use the paper as a platform for a focused political and strategic conversation that would arrive at a few priorities that can be used effectively to guide the resource allocation process.
28. This too did not yield the desired outcome of getting most of government to own the budget process and its outputs. Instead there were new developments which appeared calculated to pile more pressure on the Treasury.
29. Evidence from across the world shows that it is often the poorest of the poor who are most negatively impacted when a country becomes over-indebted, as the government is unable to pay for the pro-poor redistributive programmes. Contrary to the assertion that National Treasury was opposed to transforming the economy, it was seized with the need to find ways to ensure that funds were reprioritised to those programmes that would best contribute to promoting real, durable, meaningful and rapid transformation in a manner that was fiscally sustainable, in line with the government priorities.

#### **Attempts to move the Budget to the Presidency**

30. In the second half of 2015, I started to hear rumours that President Zuma was very unhappy with the budget process and the budget.
31. In November 2015, three of my colleagues: the DG's of the Department of Planning, Monitoring and Evaluation (DPME), and the Department of Public Service and Administration (DPSA) AND THE Head of the School of government, did a presentation titled "Political considerations of budget choices and issues around the macro-organisation of the state".

32. There were several ironies about this presentation:
- 32.1 First, the Treasury, which ran the budget process had not been asked to prepare an input on its own assessment of the budget and its alignment or otherwise to the political priorities.
  - 32.2 Second, two of the DGs who took part in preparing the critique of the budget process and the budget were themselves part of the committee of officials who advise the Ministers' Committee on the Budget on budget decisions. They were also very experienced DGs who had been DGs for several years longer than me.
  - 32.3 Third, the presentation proposed moving the task of allocating resources to DPME contrary to the Constitution and the PFMA as no other Minister could introduce Budget bills to Parliament.
  - 32.4 Fourth and last, while the DGs might have had genuine concerns about the budget process and whatever flaws they perceived it to have, they appeared oblivious to the broader political context and how the presentation was feeding the narrative that Treasury was the problem that "needed to be fixed".
33. The Treasury was always of the view that the Presidency, and cross-cutting departments like DPME, DPSA should be more involved with the Treasury in guiding the budget allocation process. Resources were also allocated to the Department to help it reinforce its capacity meaningfully to participate in the budget process. However, such departments and their Ministers were reluctant to make the hard choices that had to be made, for fear of being less popular with their colleagues or certain constituencies.

The President asks the National Planning Commission to evaluate the budget process

- 34. I began to hear that the President was saying that the budget process was not giving expression to the National Development Plan.
- 35. While I did not dismiss this view, I felt it was not a very serious contention because the President had presided over every budget that was produced during my tenure. The budget is a process that involves decisions at various points, and Cabinet itself is required to approve decisions during the various stages of this process (e.g. in May to set priorities, in August/September for MTBPS and, in December for national allocations). Further, every year prior to taking the final budget to Cabinet in February, we (the Minister, the DDG in the

Budget Office, the DDG for Public Finance and I) would brief the President and his Deputy on ALL major decisions relating to the budget and would seek his approval/support thereof.

36. In November 2015, I met Mr Khulekani Mathe who was working at the National Planning Commission (NPC) at the time. He told me about discussions that had taken place at the Presidency and in the NPC about the budget process and the Treasury.
37. In summary it emerged that:
  - 37.1 There was wide sharing of sensitive budget documents with persons "outside" government and not involved in the budget process. The documents were intended for internal discussions within government and within the budget-making structures of government. The documents contained market-sensitive information. Sharing them with people other than this for whom they were originally intended could lead to leaks. For this reason, the officials involved in the preparation and handling of the budget documents are required to follow budget-confidentiality conventions and all the documents are classified as 'secret' until the announcement of the budget. In most instances, such documents are taken back at the end of the meeting.
  - 37.2 To my knowledge Minister of Finance's permission was never sought before sharing his department's information beyond the members of the Ministers' Committee on the Budget (MinComBud). Yet at every meeting Ministers were reminded that the information in the documents circulated in the meetings contained market-sensitive information that had to be handled with due care relative to the applicable classification.
  - 37.3 These documents which were intended for MinComBud were, in my view, inappropriately used to show misalignment between the budget and the NDP.
38. Mr Mathe said that in the discussions that had taken place where President Zuma was involved, he had expressed grave unhappiness at the Treasury. The President suggested that the Treasury was treated like the best department, yet it was failing to align the budget to the NDP.
39. Mr Mathe said the President asked the NPC (sub-committee) to present him with evidence that confirmed that Treasury was failing him. Indicating that he will not hesitate to act. Apparently, he used the metaphor that he "will shake the tree, if it fall, so be it".
40. I asked Mr Mathe what he understood this to mean. He said that he thought the President was readying himself to fire Mr Nene and possibly some of us (senior

members of the Treasury). From the way Mr Mathe said this it was as though it might happen soon.

41. Given that it was November, I thought it was implausible. I was clearly wrong, Mr Nene was removed about a month later. Mr Mathe's assessment was right.

## **Events that occurred during my tenure and the removal of Ministers**

### **Nuclear procurement**

42. Former Finance Ministers Gordhan and Nene testified before the Commission in relation to what became known as "the nuclear deal". I agree with the statements made by these former Ministers. In order to avoid repetition, I refer the Commission to paragraphs 38 to 49 of Mr Gordhan's written statement and paragraphs 58 to 98 of Mr Nene's written statement. In what follows I add to their statement by describing the events that I was personally witnessed to, and I give the context of these events from my perspective.
43. South Africa's energy development is guided by the Integrated Resource Plan (IRP). For the period covered in this submission, the relevant IRP would be the one referred to as the IRP 2010, which was promulgated in March 2011. The plan was for the period 2010 to 2030. Appropriately, the plan is clear on the need to approach its implementation with circumspection and due care as technology in this area is changing very fast.
44. In this regard, the plan required that there should be biennial reviews to assess its (the plan's) continued relevance and appropriateness.
45. When I assumed my role as DG at Treasury, I was broadly aware of government's energy plans. I was acutely aware of the role of Eskom in the execution of the plan because, in my previous capacity as the DDG for Asset and Liability Management (ALM), I chaired the Fiscal Liability of Committee ("FLC"). The FLC is a committee comprising of a number of the National Treasury's DDGs that was established by the Minister of Finance to, inter alia, advise on any guarantee applications that are received. In this capacity I had been closely involved in the Minister of Finance's decision to provide Eskom with a guarantee facility of about R176 billion as well as the decision to increase it to R350 billion. This followed on from the R60 billion subordinated loan that had been provided to Eskom prior to my assuming the role of DDG; ALM. When I was DG government also had to allocate a further R23 billion to reinforce

Eskom's balance sheet which had been determined to be very weak. This was financed by selling the government's remaining share in Vodacom.

46. From around 2007/08 electricity tariffs had increased quite markedly, in the initial (three) years by about 23-25 per cent on average per annum. As these raised the cost of doing business and the cost of living for households, there was understandable reluctance to raise tariffs as a means of funding the building programme.

47. Moreover, this happened in the wake of the 2008 global financial crisis, where government had sought to mitigate the negative impact through increasing government spending. While South Africa had had strong fiscal metrics prior to the global financial crisis (where SA had significantly reduced debt to GDP to about 22 per cent and ran a fiscal surplus), the country had quickly accumulated substantial amounts of debt relative to GDP after 2009. There was limited capacity for the state to inject additional funding into Eskom at that point in time.

This is illustrated in the table of deficits, debts and guarantees from 2008/09 through to 2016/17 below:

Total debt of government	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
R million										
Gross loan debt	628 975	804 929	990 572	1 187 790	1 365 689	1 584 758	1 789 915	2 018 971	2 232 889	2 506 116
Net loan debt	525 626	673 040	820 409	989 731	1 181 607	1 379 454	1 584 207	1 884 638	2 098 274	2 284 711
Total as percentage of GDP										
Gross domestic debt	22,0%	27,7%	31,6%	34,8%	37,4%	39,9%	42,2%	44,1%	45,9%	48,7%
Net domestic debt	17,8%	23,5%	27,7%	30,6%	34,2%	36,5%	39,1%	41,4%	43,4%	46,3%
Gross foreign debt	4,0%	3,9%	3,5%	3,8%	3,8%	4,0%	4,3%	4,8%	4,8%	4,7%
Net foreign debt	4,0%	2,9%	1,4%	1,6%	1,3%	1,6%	1,9%	2,4%	2,2%	2,4%
Gross loan debt	26,0%	31,5%	35,1%	38,6%	41,1%	43,8%	46,5%	49,0%	50,7%	53,3%
Net loan debt	21,8%	26,4%	29,0%	32,2%	35,8%	38,2%	41,0%	43,8%	45,6%	48,6%

## Source: Various NT Budget Reviews

Source: Various NT Budget Reviews

R million	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Total revenue	481 197,0	682 999,2	616 999,2	586 113,1	672 751,5	745 291,3	800 142,2	887 366,2	965 456,9	1 076 234,4	1 137 896,4	1 194 585,0
Total expenditure	470 192,5	542 219,0	640 237,4	747 868,0	805 979,1	889 911,5	985 495,6	1 047 758,6	1 131 900,1	1 244 622,9	1 305 485,7	1 411 929,9
Main budget balance	10 228,9	20 425,2	-23 238,3	-161 754,9	-133 227,7	-144 820,2	-185 353,3	-160 392,4	-166 443,2	-168 388,5	-167 589,3	-217 344,9
Percentage of GDP	0,6%	1,0%	-1,0%	-6,3%	-4,7%	-4,7%	-5,0%	-4,4%	-4,3%	-4,1%	-3,8%	-4,6%

Source: Various NT Budget Reviews

48. It was against this backdrop that fiscal policy was being calibrated during the period I was DG.

The draft co-operation agreement with Russia

49. Around September 2014, I received a call from the then DG of Energy, Ms Nelisiwe Magubane asking for my advice on how to handle a part of a draft agreement between South Africa and Russia relating to nuclear cooperation, including the design, construction. Operation and decommissioning of nuclear power plants in South Africa.

50. She sought my advice because parts of the agreement related to proposed tax exemptions for the nuclear programme.

51. My response to her was in two parts:

51.1 First, I gave her a preliminary view about the proposed tax exemptions using my previous experience of how we dealt with such proposals in the past, namely that as a country we did not like giving such exemptions as they compromise the integrity of the tax system by allowing too much discretion and risks eroding the tax base by allowing too many exclusions which undermine the equity/fairness of the tax system. We had had to deal with similar challenges during the 2010 World Cup. We were very unhappy with what we considered to be FIFA undermining the country's sovereignty in demanding tax exemptions purely because we wanted to host the world cup. Importantly, it is only the Minister of Finance who can grant such exemptions.

- 51.2 Second, I expressed misgivings about the extent to which the process that was being followed was complying with relevant South African legal prescripts and regulations of which Treasury is the custodian.
52. Having raised these concerns, I asked that she should send a formal request for the advice or approval sought. It is important to add that the conversation was very easy in that Ms Magubane and I were agreeing.
53. Around 21 August 2013 the Department of Energy officials shared the draft agreement with officials at the National Treasury in order to get their inputs, specifically on the proposed tax exemption. However, when the detail of the agreement was reviewed, the National Treasury's concerns extended far beyond just this matter. Consequently, I sent a detailed letter to Ms Magubane 13 October 2013 setting out all the issues, which included highlighting the requirement that the Department of Energy must adhere to the provisions of the Constitution, PFMA, Treasury Regulations, PPPFA, Broad Based Black Economic Empowerment (BBBEE) Act and Electricity Regulation Act when undertaking any procurement. Moreover, the importance of ensuring a proper public consultation process was underlined. I attach a copy of this letter as annexure "LF2".
54. From records that later emerged, it appears that in the face of these issues that we had raised, the Minister of Energy went on to conclude the agreement with Russia, which still provided for a "...special favourable regime in determining tax and non-tax payments, fees and compensations, which will be applied to the projects implemented in the Republic of South Africa..." In addition, cooperation agreements were concluded with several other countries between October and December 2015. However, the content of these agreements was very different to that concluded with Russia, specifically, they did not suggest a commitment to procure a nuclear programme and did not provide for tax incentives.
55. In the letter I had sent to Ms Magubane, I had proposed that a joint task team be established, Ms Magubane quickly agreed to the establishment of the task team. Unfortunately, this was followed by a period of turbulence at the Department of Energy. In March 2014 Ms Magubane stepped down as the DG, ostensibly for health reasons. Mr Tseliso Maqubela acted as the DG for a short period before being replaced by Dr Wolsey Barnard, who acted until a new DG, Mr Thabane Zulu, was appointed in October 2015. At each point, I proposed to the successive DGs that we establish a joint task team between our two Departments to deal with this matter, but the rapid changes meant that the task team did not get off the ground until July 2015.



The meeting with the President and the advisor

56. One Friday during the second half of 2013 I received a call from Mr Dondo Mogajane who was Mr Gordhan's Chief of Staff at the time enquiring about my plans for that afternoon. After I told him that I would be in Pretoria and that I was not planning to go out of town he asked me to be on standby because the President would like to see Mr Gordhan and I on his return from a trip abroad,
57. He said the meeting would be held at Mahlaba Ndlophu residence. No time was set, and we were not told what the meeting was about.
58. Around 15h00 or slightly later I received a call from Mr Gordhan or Mr Mogajane to go to the President's residence. I proceed as asked.
59. Mr Gordhan and I arrived at about the same time at the main gate of the Government Estate and the Minister got into my vehicle and we drove on to the residence together. On our way I asked the Minister what he thought was the reason for our being there. He did not know but speculated that it might be about nuclear procurement because he had spotted someone, he knew to be a nuclear physicist at the gate where we met. The person was Mr Senti Thobejane who later introduced himself as advisor to the Minister of Energy and the President on energy matters.
60. The Minister also speculated that the President might be wanting to talk about funding for the training of intelligence personnel because he (the President) had raised the same with him at one point.
61. We arrived at the residence, left our phones in the lockers as is the practice and waited in one of the rooms. Mr Thobejane arrived at more or less the same time.
62. Mr Gordhan started to ask Mr Thobejane whether he knew why we were all there. The latter explained that he thought it was about nuclear procurement. That led to a 50-70 minute conversation on the subject.
63. The essence of that discussion was about:
  - 63.1 The fact that SA had technical capacity to operate nuclear reactors as reflected in the good record of Koeberg.
  - 63.2 The appropriateness of nuclear as a technology for SA in light of our country's rich endowment with uranium.
  - 63.3 The new generation nuclear reactors, and which country is the world leader in that kind of technology.
  - 63.4 Mr Thobejane also explained the approach to procurement that was being contemplated by the Department of Energy which would entail a two-stage

process: (i) stage one would be about deciding which countries would compete to supply reactors and that South Africa would sign bilateral agreements with those countries, and (ii) stage two would entail the evaluation of competing bids from the countries selected in the first stage.

64. Mr Gordhan and I had some reservations about the procurement approach that was contemplated and we signalled these concerns and the need to be meticulous in designing the process for procuring something as big as nuclear reactors.
65. While the initial exposition by Mr Thobejane appeared neutral towards the end, I got the impression that he liked the Russian technology. He talked about it last and took much longer to explain a number of its advantages, including how the cooling system of their reactors worked and that Russia was the only country that seems prepared to train South Africans in their technology such that parts of the equipment would be manufactured in SA. In other words, there would be some transfer of intellectual property to SA and/or an industrial participation of sorts.
66. Around that point the President arrived. After exchanging pleasantries Mr Gordhan advised the President that we had been there for some time and we had used the time quite fruitfully to discuss aspects of nuclear: different technologies, which country offered these and ideas on procurement.
67. The President retorted that that was good. He had wanted just that because the process had to move forward with urgency.
68. Mr Gordhan then went on to make the following points that I considered very important:
  - 68.1 That IF SA were to proceed with nuclear it would have to follow every rule in the book: Section 217 of the Constitution and all relevant laws and regulations governing procurement. He went on to caution that failure to follow due process would "...turn the arms deal problems into a Sunday school picnic".
  - 68.2 That Mr Thobejane and I should exchange numbers so that we – and other relevant officials from Treasury and Department of Energy, could meet soon to go through the nuclear procurement process in details.
69. Mr Thobejane and I did exchange SMS messages, but no meeting took place between the two of us. Later we encountered one another in meetings of the technical team that did work on nuclear procurement. This affidavit covers what happened at those meetings.

**The Technical Task Team on Nuclear Procurement and the meeting Of 8 December 2015**

70. A National Nuclear Energy Executive Coordinating Committee (NNEECC) was established in November 2011.
71. The NNEECC was initially chaired by Deputy President Motlanthe. Later the Committee was converted into a sub-committee of Cabinet and President Zuma took over the chairing of the reconstituted Committee.
72. The NNEECC was supported by the Nuclear Energy Technical Committee (NETC). The technical committee had sub-committees whose composition depended on the work they were assigned and the relevance of this work to each department. Naturally, National Treasury chaired a committee that dealt with finance and procurement matters, which had the Department of Public Enterprises as the Deputy Chair. The Constitution and the PFMA together with its regulations prescribe a central role for National Treasury in these areas.
73. In December 2013, the Department of Energy submitted a draft feasibility for the nuclear programme to the National Treasury for review. This essentially comprised all the documents that had been concluded as at that date by the various sub-committees of the NETC. Following a review by the responsible National Treasury officials, they informed me that this did not constitute a proper, fully-fledged feasibility study, which still needed to be undertaken, and that amongst other aspects, the procurement strategy still needed to be clarified.
74. In June 2015, the Department of Energy presented Cabinet with a proposal to procure 9.6GW of nuclear. Given Eskom's inability to fund the programme, it was proposed that the South African Nuclear Energy Corporation (NECSA) replace Eskom as the implementing agent and the Department of Energy take responsibility for the procurement. It is important to note that NECSA is largely a research institution which receives a significant proportion of its funding from the government. At that point, NECSA itself was not in a sound financial position and in any event did not have the balance sheet strength to undertake, construct and operate a massive nuclear programme. Nevertheless, Cabinet approved that NECSA become the implementing agent.
75. Although the National Treasury was aware that nuclear procurement was being contemplated by government, we had not had prior sight of the memorandum on nuclear procurement. So, there had been no detailed work done by the Treasury to estimate the affordability of the project and how it would be funded. This is in spite of the stipulated requirement that all Cabinet memoranda must

have a section titled "Financial Implications". Under this heading Cabinet memoranda ought to state the cost of implementing what they are proposing and how the cost would be financed.

76. Consequently, Cabinet required that the Department of Energy and Treasury should undertake detailed work to estimate the cost of 9.6GW nuclear build, assess whether South Africa could afford it and how it could be funded.
77. Around mid-July 2015, Minister Nene returned from Ufa, Russia and gave me a report of what had transpired there between him, his colleague Ministers and President Zuma. It became clear that we needed to detail our concerns regarding the financial and fiscal feasibility of the nuclear programme more clearly.
78. Accordingly, I asked Mr Dondo Mogajane (who headed the Public Finance Division which deals with the allocation of funding among national departments) to be the lead person for the discussion and Mr Michael Sachs (who headed the Budget Office which is responsible for settling the overall fiscal framework) to support him.
79. The two gentlemen were a level more senior than the previous representatives, which I expected to assist in the negotiations, and it did.
80. Following a lot of rigorous modelling various scenarios, in September 2105 the technical team prepared a power point presentation to put before the two Ministers and to take to the sub-committee and ultimately Cabinet. This presentation is attached as "LF3". The key aspects of the report were the following:
  - 80.1 Given the very high upfront cost of nuclear (estimated to be between R576 billion to R1 trillion), the weak fiscal position of government, and that for any entity (existing or new) to procure nuclear reactors it would need support from the sovereign in the form of guarantees or a cash injection, it was abundantly clear that SA could not afford 9.6GW worth of nuclear reactors at one go. We were very clear on this conclusion which was a direct response to the question asked of us by Cabinet on affordability or otherwise of the nuclear Programme.
  - 80.2 If we were going to go ahead with nuclear, we should instead recommend a phased approach to procurement whereby only 2.4GW would be procured in the first phase and that no public commitment should be made to procure 9.6GW because such a public pronouncement could be misconstrued to suggest that the country was about to buy something it could not afford. So, rather than present the Committee and Cabinet with a response that nuclear was simply unaffordable, we looked at what could

be feasible. We understood this to be our job: offering sound technical advice. Admittedly, there were arguments about the economies of scale, that is, that the unit cost would be lower if SA bought all 9.6GW reactors at once. We were not convinced that these considerations outweighed the importance of preserving the country's sound public finances.

- 80.3 That construction should only begin once the fiscal position of the sovereign showed improvement, through the stabilization of the national debt – i.e. at a point where national debt was no longer increasing year after year as a share of GDP. We estimated that such a position could be reached after 2017, if the necessary fiscal actions were taken first, and a faster momentum of economic growth achieved.
- 80.4 That Cabinet needed to decide which entity would be the procurer and operator of the nuclear reactors and that if this necessitated a new law or an amendment to existing laws this should be done.
- 80.5 That a detailed procurement process/approach that was consistent with the Constitution and all relevant laws and regulations should be agreed upfront and all relevant documentation developed.
- 80.6 The team also identified a number of risks that could hamper nuclear procurement such as:
- 80.6.1 Construction risks leading to delays and cost overruns;
  - 80.6.2 Litigation from competitors and environmental lobbies;
  - 80.6.3 Impact that the required tariff increases, and balance of payment effects of the nuclear programme would have on the economy;
  - 80.6.4 Slowdown in economic growth relative to the projections, negatively impacting the fiscal sustainability of the commitments;
  - 80.6.5 Developments in the energy landscape, leading to the emergence of more cost-effective technologies;
  - 80.6.6 Changes in energy demand patterns, resulting in lower than anticipated revenues;
  - 80.6.7 Increase in interest rates of an exchange rate depreciation in the face of large upfront cost with about 60 per cent import content of the programme.

- 80.6.8 Increase in interest rates and exchange rate depreciation, when combined with the large upfront cost with about 60 per cent import content of the programme, would increase the cost of the programme.
- 80.6.9 Announcement risks: negative perceptions associated with the programme.
- 80.6.10 Specific risks associated with nuclear technology, for example, nuclear catastrophe, etc.

81. All of the above are contained in the presentation that is attached to this statement. While the Department of Energy colleagues had started the negotiations firmly believing that SA should make an upfront commitment to procure 9.6GW, in the end, we believed that they had come to accept the logic of Treasury's recommendation.
82. This is a summary of a very detailed exposition on the modelling of nuclear cost, proposals on financing and procurement thereof as well as some risks that would need to be borne in mind throughout the process. We believed that even the detailed report at best constituted a preliminary analysis, which for such a massive programme should be expanded into a full, detailed feasibility assessment. In or around the first week of September 2015, we were told that we should be on standby for a possible meeting of the energy security sub-committee and Cabinet that would discuss nuclear procurement. This was before the Ministers of Finance and Energy could meet to consider the recommendations of the task team. The meeting was later cancelled. From that point onwards, things went quiet on nuclear for about two and half months until December 2015.
83. On Monday 7 December 2015 Mr Nene, Mr Mogajane, Mr Sachs and myself went to brief President Zuma on national departmental allocations for the 2016 MTEF. The meeting went very well: we were all participating in the discussion and agreeing that the 2016 Budget was going to be a difficult balancing act.
84. The economy was slowing, students were demanding free higher education and the country's rating had been under pressure for some time. So, the budget needed to strike the delicate balance between demonstrating fiscal rectitude while balancing the need to spend more on education with some support for growth.

85. The budget did not make any provision for nuclear build except for an allocation of R200 million to fund the technical work that was necessary to prepare for nuclear procurement.
86. A meeting of the Energy Security Cabinet Sub-committee that was chaired by President Zuma was scheduled to take place in the afternoon of 8 December 2015 at the President's official residence in Pretoria.
87. Less than an hour before the scheduled time, while we were already on our way to the meeting, we were told that the meeting had been rescheduled to start an hour later. We (Mr Mogajane, Mr Sachs and I) decided to proceed to the meeting venue regardless.
88. Upon arrival at the venue we noticed that there were many cars in the parking lot, but this did not bother us until we realised that all or most of the other persons (Ministers and officials) who were to attend the same meeting as us had been there presumably for a preparatory meeting whose purpose was to become apparent later.
89. Just before the meeting of the sub-committee began Mr Nene arrived. He and the others (ministers and officials) were ushered into a room where the meeting was to take place. Officials from Treasury were left out for a while and then we were called in. We learnt later that we were called because Mr Nene had asked that we be called in.
90. Coincidentally, everyone at the meeting sat on one side and we (Minister Nene, officials from Treasury) and President Zuma sat on the other side.
91. The Department of Energy led with a presentation of what they claimed to be our (Energy and Treasury) joint recommendation to the meeting. This was not true as I will explain shortly.
92. After the Department of Energy had finished the presentation, the President turned to Mr Nene who was seated on his immediate left and asked him if he had anything to say.
93. Mr Nene pointed out that the assumptions in relation to the exchange rate were very optimistic. It was presented as R10, 00 to the dollar when in fact the exchange rate at the time was R14.57 to the dollar. He also pointed out that the concerns expressed by Treasury had not been included in the presentation. He then looked to me to provide further input.
94. I prefaced what I was going to say by pointing out that Cabinet had asked for:
- 94.1 An estimated cost of 9.6GW of nuclear reactors, and

- 94.2 Options for financing the cost of nuclear build and risk mitigation strategies.
95. I indicated that our job was to advise, and members of the executive have the authority to decide. They can take our advice, modify it or ignore it. We had been asked a specific question and we were ready to answer it.
96. Before I could say anything further the Ministers across the table lamented that I was wasting the time of the meeting and that a decision had already been made.
97. President Zuma directed that I should be allowed to respond to the questions Cabinet had previously asked.
98. I will summarise the comments I made as follows:
- 98.1 I pointed out that we were disappointed that what was presented by the Department of Energy was not exactly what we had discussed and agreed.
- 98.2 In particular, I highlighted the following discrepancies:
- 98.2.1 First, the modelling we had done led us to the firm conclusion that SA could not afford 9.6GW;
- 98.2.2 Second, while the cost could not be known with absolute certainty before financial close (that is, before a contract had been signed with a supplier), I pointed out that the presentation had grossly understated the cost of nuclear by about 40 per cent. We felt that this was very significant. The presentation by the Department of Energy had assumed that the weakest the rand could be to the US dollar was R10.00. On that specific day the rand was trading around R14.57 to the dollar;
- 98.2.3 Third, informed by the above considerations, we had proposed that nuclear procurement should be undertaken in a phased manner, only committing to 2.4GW at a time; and
- 98.2.4 Fourth, we had recommendations about how procurement would best be run to litigate the risk of litigation.
99. I acknowledge that while the Department of Energy colleagues had not enthusiastically accepted the above line of thinking and recommendations, we had persuaded each other on the merits thereof.



100. Yet their exposition at the meeting created the wrong impression that we had agreed to their original proposal, which was not the case.
101. At that point the President turned toward me and commented that "you and your former Minister had stopped the Engen Petro-SA project". He also said something to the effect that "in other countries of the world Finance Ministers don't tell the President that there is no money. Their job is to find the money, so that what has been decided can be implemented, but alas this was not the approach of Finance Ministers in South Africa".
102. The President's comment left me shocked. The meeting resolved to take the recommendation of the 9.6GW as presented by the Department of Energy to Cabinet the following day.

#### **After the removal of Minister Nene**

103. During the course of 2015 a number of engagements took place with the Department of Energy (DOE) regarding the process for procuring the nuclear programme, which culminated in the Chief Procurement Officer (CPO) writing to the DOE setting out National Treasury's view on the proposed approach.
104. The DOE intended to undertake a government –to-government procurement. They intended to follow a two-stage approach: prequalification of bidders followed by a competitive closed bidding process. This implies that competition would be among the pre-selected bidders. According to the DOE, the prequalification was being done through vender parade workshops and the signing of intergovernmental agreement.
105. However this approach was not in line with the principles of Section 217 of the Constitution which requires a state institution to procure goods or services using a system that is fair, equitable, transparent, competitive, and cost-effective.
106. During 2016, a number of engagements took place between the Department of Energy, the National Treasury and the CPO's office, which were led by Mr Mogajane. In addition, two legal opinions were obtained. After initial resistance from the DoE, the Department shifted its approach towards an open competitive bidding process. Nevertheless, there were still concerns raised, which had not been addressed. These were:
  - 106.1 The legal competency and basis for the DOE to carry out the procurement on behalf of other state-owned entities that were to be implementing agents was not properly established.

- 106.2 The DOE's procurement strategy lacked specificity around the requirement of localisation. While the document explained the need for localisation in order to build the South African nuclear industry, it stopped short of setting out the procurement processes which would give effect to this requirement. In addition, it was not clear whether it was intended that the successful bidder would ultimately be required to enter into contract/s with a local consortium and, if so, what selection processes or procurement processes would be employed to select the members of the consortium.
107. Using the funding that had been allocated in the 2015 MTBPS, the DOE had appointed advisors to assist them in developing a Request for Proposals (RFP). Although the advisors as well as National Treasury highlighted numerous gaps and weaknesses in the RFP documentation that the DOE had developed, the DOE appeared determined to proceed regardless.
108. The engagements with the DOE came to an end, when in November 2016, Cabinet approved that Eskom be the owner, operator and procurer of nuclear. Shortly afterwards, the DOE gazetted a Section 34(1) determination providing for the procurement of 9.6GW of nuclear power by Eskom. Eskom indicated that they intended to issue the RFP. This was stymied by the legal challenge launched by Earthlife Africa, on which the courts eventually ruled in their favour, setting aside the determinations and inter-governmental agreements which had been entered into, as they were found to be unlawful and unconstitutional.

## **Conclusion**

109. My conclusions with regard to the nuclear procurement process are as follows:
- 109.1 It was the biggest ever financial commitment that the SA government was about to make, with an estimated cost of around R1 trillion. Yet there was a rush to sign the contract with the potential supplier even before SA had determined how to pay for it. Had it proceeded, nuclear would have led to excessive increases in electricity prices for all users and would have further elevated the cost structure of the SA economy and eroded the competitiveness of SA firms.
- 109.2 The process had serious flaws which risked causing several government institutions and persons working for it (Ministers and DGs) to make an irrational and illegal decision with very serious consequences for their reputations.

- 109.2.1 Although nuclear had been part of the IRP 2010, in the face of a changed energy generation technology landscape (e.g. improved reliability and lower cost of renewable and discovery of new gas reserves in Mozambique) it was no longer clear that procuring nuclear at the scale proposed was the best solution to the energy challenge the country faced,
- 109.2.2 the two-stage procurement process as proposed was not aligned to the SA Constitution and procurement laws and regulations,
- 109.2.3 technical processes were deliberately undermined, and their outcomes were suppressed so that the decisions that were made were predominantly "political". While political office bearers have the final say on policy, due technical processes have a lot of value to add to and an important role and place in a properly run government. A blending of political considerations with sound technical analysis and advice is what makes for a good government and governance.
- 109.3 Even when there was a genuine effort to follow proper and due process, deliberate derailment and manipulation of the process was brought to bear. The manipulation of the outcome of the work of the technical task team up to the last day (the 8 December) is a good example of this.
- 109.4 Our efforts were in vain and the nuclear programme was adopted the next day at the last Cabinet meeting of the year. Coincidentally it was also the day that Mr Nene was fired.

#### The Engen-PetroSA deal

110. From about 2012, the Department of Energy had been exploring the possibility of having PetroSA acquire a substantial share or 100 per cent of Engen. As the documents relating to the matter show, the rationale was that this would be in the strategic interest of SA. Engen was owned by a Malaysian company called Petronas. These documents are annexed to Mr Gordhan's statement as Annexure 11.
111. As some of the correspondence between the Ministers of Finance and Energy shows, this potential transaction had been a subject of discussion during a visit by former President Zuma to Malaysia during 2013.

112. From the information we had at our disposal, the processes pertaining to the transaction appear to have gathered some momentum following that visit as evidenced by the letter from Minister Martins to Minister Gordhan. This letter is attached as annexure "LF4".
113. During the first quarter of 2014, the National Treasury received an application for a guarantee amounting to R13.4 billion from the Department of Energy. The guarantee was meant to enable PetroSA to raise money to pay for an acquisition of 100 percent of the shares in Engen.
114. The structure of the transactions was as follows:
- 114.1 PetroSA was to acquire 100 per cent of the Engen shares for a total enterprise value of R18.67 billion (i.e. this included the Pembani shareholding);
- 114.2 Petronas had accepted PetroSA's offer subject to a letter of guarantee being provided for 100 percent of the offer price and a fully committed funding plan being in place prior to executive definitive transaction agreements by 31 March 2014. This date was later extended to 18 April 2014;
- 114.3 Initially, PetroSA planned to fund the transaction through contributing R5.6 billion of their own funding, raising debt of R5.28 billion, comprising acquisition funding supported by Engen's cash flows and have Development Finance Institutions (DFIs) warehouse an amount of R3.93 billion. The shortfall of R4.21 billion was to be contributed by government or raised using a special purpose vehicle with funding to be serviced and repaid by government.
- 114.4 A government guarantee of R13.42 billion was requested to cover the full purchase consideration, less PetroSA's equity contribution. It was envisaged that this guarantee would step down as the funding was secured. Should the envisaged funding not be secured, Government would remain liable for the shortfall. This would allow PetroSA to fulfill the condition set by Petronas.
- 114.5 PetroSA had identified SONANGOL as a potential equity partner which would acquire a 49 per cent shareholding in a joint venture company that would hold 100 per cent of the shares in Engen. The amount that SONANGOL were to contribute was to be determined after a due diligence had been completed.
- 114.6 At the time PetroSA had not yet secured any of the funding.
115. Some of the concerning matters about the proposed acquisition were that:

- 115.1 PetroSA's balance sheet (the size of the business) was relatively small with revenue stream neither buoyant nor large enough to enable it to pay for Engen.
- 115.2 From the correspondence received there was no evidence that a due diligence exercise had been done to allow PetroSA to ascertain the status of the business they were about to acquire. Such due diligence would typically assess the quality of the assets held by Engen, its liabilities, revenue streams, any binding contracts that could give rise to tax, legal and/or financial commitments in the future, including the state of its assets – are they new, would they require replacement or repair, at what cost, etc. The purpose of the due diligence is to determine the worth of the asset or business one is investing in. It could also include checking whether other buyers who had been interested in the asset who have since pulled out and the reasons why that happened. Buying a large business without a due diligence is like taking a big leap of faith.
- 115.3 There had been a significant increase in the offers made by PetroSA to acquire the business. The Boards of the Central Energy Fund (CEF) and PetroSA acknowledged that the most recent increase at that time of R1.29 billion from R17.38 billion to R18.67 billion was not economically justifiable. None of these offers was underpinned by a robust valuation based on a due diligence.
- 115.4 There was no support for PetroSA's ambitions to become a National Oil Company in the National Development Plan or the Industrial Policy Action Plan.
- 115.5 PetroSA asserted that there was a risk that the independent oil companies would divest from the market thereby creating a need for government to invest in order to ensure security of supply. However, the retail market was well serviced by existing, privately owned petroleum companies and there was little indication that they intended to divest. (Indeed 5 years later, this was still not the case).
- 115.6 A number of other assertions justifying the transaction were made by PetroSA which the National Treasury considered flawed.
116. On the 31 March 2014 several officials of the National Treasury and the Minister Gordhan joined colleagues from SARS to prepare for the press conference on the revenue collected for the financial year ending that day.,
117. Minister Gordhan called me aside and advised me that he had had a telephone conversation with former President Zuma about the Engen-PetroSA

transaction. Mr Zuma was enquiring about the progress with the guarantee application lodged by Minister Martins.

118. We recapped our views about the transaction: that I would not be judicious to proceed with it in the face of the risks we had identified.
119. The following day Minister Gordhan and Minister Martins met at SARS to discuss the transaction early on 1 April, before the scheduled press conference. The outcome of the meeting was captured in the letter Minister Gordhan sent to Minister Martins on the same day. LF5"
120. A delegation comprising of representatives from the CEF and PetroSA including Mr Senti Thobejane, advisor to Minister Martins, Mr Tseliso Maqubela the responsible DDG at the Department of Energy, Mr Sizwe Mncwango, the Chief Executive Officer (CEO) of CEF and the Ms Nosizwe Nokwe-Macamo the CEO of PetroSA came to meet us at the Treasury to explain the rationale for the deal and how it would be funded.
121. The Treasury was represented at the meeting by Mr Thuto Shomang who was the DDG responsible for Asset and Liability Management, Ms Avril Halstead who was responsible for overseeing the SOEs among others, and myself.
122. The meeting took place on 7 April 2014 at the National Treasury office on 40 Church Square.
123. Some of the documentation that the delegation led by the Department of Energy brought included:
  - 123.1 Several letters mainly from international banks that were signalling willingness to fund the transaction subject to certain conditions. Contrary to the delegation's assertions, these did not construe an irrevocable commitment to fund the transaction.
  - 123.2 There was also a letter from SONANGOL of Angola confirming that it would buy the 49 per cent share as described above, subject to a due diligence being done.
124. With all of the above, we were not convinced that the deal was workable. It appeared extremely risky and we communicated the same to Minister Gordhan.
125. Subsequent to that, several meetings and discussions took place between officials of Treasury and those of the Department of Energy to further examine the contemplated transaction in greater detail.
126. Following these meetings, Minister Gordhan wrote to Minister Martins approving the guarantee to the total amount of R9.5 billion with several conditions intend to safeguard the national revenue fund and the interests of

SA. These are clearly set out in my letter of 25 April 2015. This letter is attached as annexure "LF6".

127. I raise the matter of this transaction because, to me, just like the nuclear deal, it reflects:

127.1 The lack of due care evinced when dealing with matters involving substantial sums of state funds and exposing the state to potentially huge fiscal risks.

127.2 A cavalier attitude to due process. Why was a transaction that ought to begin with a thorough and proper due diligence taken to the point of a near financial close without a due diligence being undertaken? Moreover, this reached a point where those who were asking for what was standard in the normal course of doing business were themselves made to look and feel awkward.

127.3 The pressure brought to bear on Minister Gordhan (and possibly Minister Martins) to provide the guarantee was inappropriate, especially at a time when there was going to be a new Cabinet constituted after the elections which were due to take place on 7 May 2014, less than a fortnight after the guarantee was issued. In these circumstances one would not be blamed for inferring that the timing of the deal was calculated to "extract": the required responses and action from potentially vulnerable Ministers facing the risk of not being reappointed or being shuffled out of their portfolios.

#### **Matters relating to South African Airways (SAA)**

128. During my tenure as DG of Treasury one of the matters I helped successive Ministers deal with was SAA.

129. This included providing technical support to the Ministers with regard to the approval of guarantees that were required to ensure that the airline remained a going concern. By the time I left government in May 2017, the cumulative guarantees totalled R17.9 billion which was a substantial contingent liability for the sovereign.

130. I also assisted the Ministers in evaluating the various applications from SAA in terms of section 54 (2) of the PFMA. These include applications for scarring or leasing aircrafts. In this regard, we would undertake, the analysis required to assess, amongst other things, the ability of SAA to honour its obligations as they pertain to those transactions. This became increasingly important as the guarantee exposure to SAA was rising and any failure by the airline to meet its

own obligations would have cross triggered a cross-default on the Arline's other obligations and a call on the government guarantees. It would also have had wider implications for the entire government, by triggering some kind of "contagion" for other SOCs and government itself, including pushing up borrowing costs, making it more difficult to secure funding, etc.

131. National Treasury's monitoring of SAA intensified further after the executive authority (shareholder) responsibility was transferred from the Minister of Public Enterprise to the Minister of Finance through a Presidential minute of gazette on 19 December 2014 ostensibly because the business was experiencing financial challenges and needed to be under a department that better understood finance. My own view is that the following were the real reasons and implications of the move:

131.1 It was intended to put Treasury under pressure to find the money to give to SAA because the belief was that once the airline was under Treasury it would cease to ask tough questions. As events proved, this was not the case.

131.2 One of the effects of the transfer was that the credibility of the National Treasury was undermined. Although the term of the board was supposed to have ended in March 2015, it took a further 18 months for a board to be appointed. Given that the failings of the existing board were patently obvious, I had the impression that investors began to question whether National Treasury recognised the problem or at least whether we had the ability to appoint capable board. This would risk undermining the strong reputation that National Treasury had slowly built up over the years for being reliable and capable of delivering on its promises and would have negatively impacted on even the sovereign's ability to raise funding cost-effectively.

132. Needless to say, we continued to ask the same questions as we were asking when the airline was under the DPE.

133. The assignment of SAA to the Minister of Finance meant that the Treasury was responsible for approving everything for which the airline needed shareholder approval. For purposes of assisting the Commission, two matters warrant special mention. These are (a) the application for the leasing of Airbus aircrafts and (b) the appointment of the board of SAA.

### **The Application for the Leasing of the Airbus Aircrafts**



134. In July 2015 SAA applied to the Minister of Finance (Mr Nene) for approval to enter into operating leases on five A330 aircrafts instead of purchasing 10 A320 aircraft. The aircraft purchase related to a contract concluded in 2002 and which, in the intervening period, had resulted in the purchase price becoming extremely onerous: having acquired the aircraft, SAA would have immediately had to write off an amount in the order of R1 billion because the purchase price far exceeded the market value of the aircraft. Treasury evaluated the deal and found it to be beneficial to the airline. The Minister duly approved the transaction as per the letter of 30 July 2015, subject to the airline providing additional information. The letter is attached at annexure "LF7". This information was provided in September 2015 and the Minister confirmed his approval of the transaction.
135. Later in the month, on 29 September 2014, the Minister received a letter from the chairperson of SAA, Ms Dudu Myeni ("Ms Myeni") seeking approval to pull out of the original deal and to enter into a new deal.
136. To put the new deal in proper perspective it is important to begin by summarising how SAA had ended up with Airbus as a supplier in the first place:
- 136.1 Around 2002 SAA contemplated renewing its fleet. It went on a procurement process which culminated in Airbus being the preferred supplier of 15 A320-200 aircrafts (A320s). I understand that the number of aircrafts was later increased to 20.
- 136.2 As per the agreed structure of the transaction, SAA was required to make a pre-delivery payment (PDP) of about R1.3 billion. A portion of these PDPs were paid, although I can't recall how much and by when. The remaining amount was still payable at some later date, with one of the payments falling due in November 2015.
- 136.3 SAA had already taken delivery of 10 A320s.
137. Before the transaction had run its full course, two main factors changed materially, thus rendering the original (A320s) purchase transaction undesirable:
- 137.1 Escalations in the purchase contract had resulted in the contractual purchase price increasing more quickly than the market price. This was exacerbated by the introduction of new model of A320 aircraft (the A320 Neo) into the market, further depressing the market prices of the older model that SAA had contracted to purchase.
- 137.2 The difference between the purchase price and the market price meant that SAA would have had to impair part of the value of the aircraft on the

date of receiving them. This would have hurt their already weak balance sheet.

138. In addition, the financial position of the airline had deteriorated and had become quite perilous.
139. Airbus was prepared to enter into a new deal that would see SAA leasing more modern and fuel-efficient aircrafts in exchange for cancelling the original purchase transaction (of A320s).
140. In the new lease deal, SAA was going to lease five long haul A330-300 aircrafts from Airbus, the purchase of the remaining 10 A320s that had yet to be delivered was to be cancelled and SAA was going to get back the amount already paid in pre-delivery payments on the 10 A320s and SAA would no longer be required to make the remaining payments. For an airline that was experiencing liquidity challenges the deal looked good.
141. It was in this context that having done our technical analysis of the application from SAA, we recommended to Minister Nene and he approved the transaction and communicated the same in his letters of 30 July and September 2015.
142. In an about turn, SAA, through its chairperson Ms Myeni wrote back to the Minister proposing to enter into a sale and lease back of the aircraft through a local supplier. Limited details were provided. This letter is attached as annexure "LF8".
143. Treasury tried to understand why such an approach would be superior and in the best interest of SAA than the direct lease from Airbus. We made SAA aware of the risk that Airbus could simply revert to the original A320 structure. The only explanation I remember was that the new approach would prevent foreign exchange from flowing out of SA, which did not make sense at all: the local lessor would still have needed to purchase or lease the aircraft that were supplied to SAA, which would have resulted in a foreign currency outflow from the country.
144. Having repeatedly requested SAA to provide additional information explaining why they believed it was in the best interests of the airline, with little having been forthcoming, the Minister decided not to approve the proposed amendment. Throughout this period, we had been extremely cognisant of the risks of which SAA was exposing itself and indeed the fiscus. If Airbus walked away from the swap transaction, then SAA would have been forced to pay the outstanding pre-delivery payments - something they were not in a position to do. This would have triggered a default by the airline on its government guaranteed obligations, requiring that government repay immediately repay the debt on SAA's behalf.

Almost immediately after the Minister declined the amendment, he was unexpectedly removed on 9 December 2015.

145. For a very short time Mr van Rooyen was the Minister of Finance, but he too was removed and replaced by Minister Gordhan on 13 December 2015. On his reappointment Mr Gordhan had to take over from where Mr Nene had left. He decided to allow SAA one more opportunity to demonstrate the benefit of the alternative deal they had been proposing. Airbus had reluctantly agreed to allow additional time for consideration of the deal, but a decision had to be made by 21 December 2015.
146. My original plan was to go on my annual leave on 11 December 2015, but I had to delay this by a day or so following the sudden change of Ministers. Minister Gordhan, the Governor of the Central Bank, My Lesetja Kganyago and I had a press conference on Monday, 14 December 2015, at the GCIS.
147. On Wednesday 16 December, which as the Commission know is the public holiday in SA, a group of us (including Mr Ismail Momoniat, who was going to act in my place while I was on leave, Ms Avril Halstead and I) met a team from SAA including the then acting CEO Mr Musa Zwane and the A acting CFO Ms Phumzeka Nhantsi to discuss the Airbus matter.
148. After a detailed comparison of the two options that SAA had and taking due regard of the possibility that Airbus could have reverted to the original transaction to the disadvantage of SAA and SA, we agree that the new deal (purchase, sale and lease back) had too many unknowns and was thus inappropriate.
149. I recall the SAA team asking us if we could assist them to explain the matter to the chairperson. They were visibly concerned that they were going to have to face up to her and explain that they could not convince us about the merits of what they were proposing.
150. I went on leave from 17 December 2015. I am advised that Mr Avril Halstead and Mr Momoniat (who was acting DG in that period) dealt with the matter on 21 December 2015. Around this time I received a call from Minister Gordhan asking me to give him a run-down of the SAA matter, which I did. He told me that he had received a call from Mr Zuma earlier asking him about the Airbus deal. I recall Mr Gordhan and I reflecting that people were trying everything to push through something that did not make financial/business sense. Part of the proposal was to have a South African Company coming between SAA and Airbus under guise that such an arrangement would "protect SAA from foreign currency risk.

151. Around the same time there had been a threat that one member of the board (Ms Yakhe Khwinana) had resigned because Treasury was not agreeing to the deal. The Minister had asked to be furnished with her letter of resignation. I attach this letter of resignation as annexure "LF9".

## **Conclusion**

### **The Appointment of the Board of SAA**

152. In October 2014, the Minister of Public Enterprises, who was still the Executive Authority (shareholder) at the time appointed what was intended to be an interim SAA board comprising of 4 non-executives.
153. The non-executive board members were: Ms Dudu Myeni, the chairperson, Ms Yakhe Kwinana who was chairing the Audit Committee, Dr Tambi (an international aviation expert) and Mr Anthony Dixon. Mr Dixon resigned in November 2015.
154. Treasury was concerned about the board being fully capacitated to execute its fiduciary duties.
155. When SAA was transferred to Treasury the board's term was due to expire in March 2015. One of the immediate tasks we set out to do was to assist Minister Nene to appoint a full and competent board.
156. This task proved very hard to execute. Our initial view was that SAA needed a totally new board. We were agreeing with the Minister that unless the new board members were respected; with impeccable credentials it was going to be very hard to raise funding for SAA even with government guarantees.
157. We also emphasised that it did not matter what people in government thought of the remaining four and later three non-executive members of the board, the lenders had lost all confidence in them. Personally, I had discerned this from discussion with senior executives of the banks when trying to convince them to lend SAA money that it desperately needed.
158. Most credit facilities of SA were granted in anticipation and almost on condition that a new board would be appointed.
159. However, my understanding from Minister Nene was that the President was determined that Ms Myeni should continue to serve on the board. Initially, we thought it would be possible to persuade the President that Ms Myeni did not have the requisite credentials, so the board's term was extended for a period which was intended to be 6 months, but which later became an indefinite period.

160. In December 2015 a Cabinet Memorandum had been prepared, which was intended to be tabled by the Minister in Cabinet on 8 December 2015. In the Cabinet Memorandum, a new board for SAA was proposed, which did not include Ms Myeni or any of the existing board members. Immediately after the Cabinet meeting where this proposal was to have been discussed Mr Nene was removed.
161. Minister Gordhan had to pick up from where Minister Nene had left the process. He had one or more discussions with the President on the matter of the SAA board. On one of those occasions he returned with what was a very firm indication that President Zuma was not going to agree to remove Ms Myeni from the board of SAA. The Minister then instructed me to liaise with Ms Lakhela Kaunda to compile a list of names from which a board could be constituted.
162. A series of meetings took place involving Mr Mogajane, Ms Kaunda and I where various proposals of names for the SAA Board were made by both National Treasury and the Presidency, which were then to be discussed with our respective principals. Ultimately, a "compromise board" was agreed and a Cabinet Memorandum prepared. In the Cabinet Memorandum we recommend that the new board members be appointed for a three year period, subject to annual review. However, in Ms Myeni's case, she had already served on the SAA board for 7 years at that point, so serving for a further 3 years would have resulted in her exceeding the 9 year threshold stipulated in the King Code of Corporate Governance, where regular assessments were required to establish a Board member's independence. On this basis, we motivated that her appointment be limited to only 2 years as a way of balancing the President's desire to have her continue serving on the board, while minimising the period for which this would continue. The Board was appointed on 2 September 2016, with clear a decision from Cabinet that Ms Myeni would only serve one year on the board.
163. I recall that one or two CEOs of the banks expressed their disappointment at the fact that the government had failed to appoint a wholly new board and signalled that they might find it hard to continue to do business with SAA under such circumstances. This has come to pass.

#### **The Social Security Grant Contract**

164. The social security grant payment contract has been a subject of litigation over many years, which culminated in a number of court judgments, including one by the Constitutional Court in 2014, which declared the contract invalid, but simultaneously suspended the invalidity until 31 March 2017.

165. At about the end of November beginning December 2016, the then Deputy Minister of Finance Mr Jonas and later the Minister of Finance Mr Gordhan alerted me to what he understood to be looming crisis; namely, that there was no firm arrangement made to take over the payment of social security grant when the invalidity of the contract resumed on 1 April 2017.
166. I understand that this might have been brought to their attention by Mr Zane Dangor who was either DG of the Department of Social Development or Advisor to the Minister and Minister Bathabile Dlamini herself.
167. They asked me to take the matter up with Dr Dangor to explore workable alternatives. I set out to do just that by setting up a meeting with Mr Dangor and the Deputy Governor of the Central Bank Mr Francois Groepe. From the Treasury's side I included Mr Dondo Mogajane (DOG: Public Finance) and Mr Momoniat (DDG: Tax and Financial Sector Policy) in the meeting.
168. The presence of the SARB at the meeting was to ensure that they were ready to open the National Payment System to the solution proposed.
169. In exploring the various options, we were focusing on a solution that could be activated by the 1st of April 2017 and lawful. At the same time, we sought to find an option that would be cost-effective. We were also mindful that the existing contract that was due to expire at the end of March had been found to be illegal by the constitutional court. So the option of simply extending it was not plausible.
170. One if the options that had appeal was the option of getting most beneficiaries paid directly through banks rather than via an agent or a service provider. This option had appeal for several reasons:
- 170.1 About 60 per cent or so of the recipients of grants had accounts with one of the banks. It is fair to assume that the choice would have been informed by considerations of convenience, among other things.
- 170.2 It also seemed highly feasible to negotiate a reasonable ("cheap") uniform fee or a special dispensation for SASSA card holders with the banks to enable the payment of grants through the national payment system (and the SARB was open to requests aimed at the enabling this).
171. There was always the very difficult part which related to the cash payments to people who do not have any account with any bank.
172. We were clear that the final decision rested with relevant persons at SASSA, but we indicated willingness to make any legally compliant solution work in the interest of the grant beneficiaries.

173. Not very long after our cordial and fruitful meeting in which we had made tremendous progress towards averting what was a looming crisis, Treasury (the Minister) received a letter from Minister Dlamini which was suggesting interference by Treasury in what was the business of her portfolio. This letter is attached as annexure "LF10"
174. The letter and subsequent correspondence appeared to be calculated to frame a narrative that we (NT and MoF) were interfering in what was a Social Development and SASSA process.
175. Some of the correspondence was very demeaning.
176. The key areas of disagreement between National Treasury and Social Development related to the following:
- 176.1 The appointment of a "committee of experts", separate from SASSA administration in a way that was subsequently found to be irregular.
- 176.2 The recommendations arising from this committee were very expensive and problematic, seemed to involve SASSA taking on the functions of banks, and did not seem feasible to implement by the time the CPS contract ended as legally required.
- 176.3 The reluctance to accept a significant role for the banking industry in the payment model despite the central role of the National Payment system in making payments.
- 176.4 The reluctance to seriously consider 5-6 alternate practical payment options to take over from CPS which had been developed jointly with Treasury. Delays in this added to the need for the Constitutional Court to intervene.
- 176.5 Criticism that the OCPO was finding SASSA procurement processes irregular.
- 176.6 Failure by SASSA to take sufficient practical steps to put a new payment system in place by default led to the existing service provider having to be extended.
- 176.7 The absence of a Board of SASSA and weaknesses in the SASSA Act which made it substantially dependent on the Minister for governance was a key underlying governance problem.
177. At the beginning of 2017, three months before the expiry of the CPS contract's validity there was no alternative in place to take over payment of social security grants. A real crisis was looming.

178. SASSA wrote to Treasury requesting approval to deviate from procurement processes and to extend the "soon to be invalid" contract with CPS. This letter excluding annexures is attached as annexure "LF11".
179. We explained that we did not have the power/authority to override a Constitutional Court decision that rendered the contract invalid and had suspended its invalidity until March 2017. We advised them to approach the Court and make a plea to extend the contract. They were simply not keen to do so.
180. As the 31 March drew closer there was panic in government. I recall that the South African Social Security Agency (SASSA) contract matter was an item of discussion at the Cabinet meeting just a few weeks before the contract was due to expire.
181. Minister Gordhan and I were under immense pressure to grant the exemption to SASSA to extend the contract with CPS for a further year.
182. We made it clear that we would not act illegally and outside the powers and the authority of our positions. On 28 February 2017 SASSA instituted an urgent application with the Constitutional Court for an extension of time. However, SASSA sought to withdraw the application the very next day. The matter went ahead despite this, as civil society organisation Black Sash had also instituted an urgent application with the Court.
183. When asked by a journalist what would happen if grants were not paid after the 31 March 2017, then President Zuma said the journalist should watch what would happen to the persons who were supposed to ensure that grants were paid.
184. Needless to say, the Constitutional Court reluctantly extended the contract on the same terms as old one and grants were paid. It was around the same time that Mr Gordhan and Mr Jonas were removed from their positions.

#### The closure of the Gupta bank accounts

185. In or about April 2016, Oakbay Investments (Pty) Ltd, controlled at that time by the Gupta family, announced that its bank accounts had been closed. In a letter dated 8 April 2016, the CEO of Oakbay Investments, Mr Nazeem Howa, wrote to the Minister Gordhan stating that they would "soon be incurring significant job losses" as a result of "... the unexplained decision of a number of banks, and of our auditors, to cease working with us, and of the continued press coverage of unsubstantiated and false allegations against the Gupta family..." He went on to say that "We have received no justification whatsoever to explain why ABSA,



FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts. KPMG themselves said that there was no audit reason to end their work with us". Following another letter dated 17 April 2016 he apologised and indicated that his only intention was "to hearing from you about any possible assistance you are able to offer". I attach letters of 8 and 17 April 2016 as annexures "LF12 and LF13" respectively.

186. The Minister and I met with Mr Howa and Ms Ronica Ragavan (who he introduced as the CFO) on 24 May 2016 at National Treasury, supported by Mr Momoniat, Mr Roy Havemann and Ms Rebecca Tee. After hearing his account where he indicated that the banks had not provided him with any reasons, I pointed out to him that banks operate in a highly-regulated environment, and a range of factors (including money laundering) could give rise to a bank's decision to close an account. We provided him with detailed information on the regulatory framework, linked to documents that we had provided to the public as Parliament was at that point considering two key Bills. The Financial Intelligence Amendment Bill and the Financial Sector Regulation Bill.
187. We pointed out that there are legal impediments to any registered bank discussing client-related matters with the Minister of Finance or any third-party, and that the Minister of Finance "cannot act in any way that undermines the regulatory authorities". It was also clear that they had not as yet exhausted all their legal remedies, including approaching the court for appropriate relief, which I pointed out. If they had not done anything wrong would "also be in the public interest and help to strengthen the current regulatory regime in order to serve customers better"
188. Towards the end of the meeting, I also pointed out "that the recent attacks on the integrity of the National Treasury are not helpful or in the national interest and should be avoided". This point was reiterated in a follow-up letter. This is because we were aware of the attack, they had launched in a meeting with the ANC leadership and as reported in an online article dated 6 May 2018 by Carol Paton. This related to an anonymous document entitled "Operation Spider Web" which was covered in detail in the statement by Minister Nene to the Commission. This article is attached as annexure "LF".
189. We also became aware of other facts that demonstrated that Mr Howa was very economical with the truth. For example, he appeared on Carte Blanche (an investigative television production) screened by M-net on 19 June 2016, where he divulged that Standard Bank had provided him with the reasons for them closing his account. In paragraph 23 in the affidavit of Mr Gordhan in a case he initiated (Case no 80978/16) in the Gauteng Division of the High Court, the bank stated the reason as being related to their concern that "...a reasonably diligent

(and vigilant) person would suspect that such dealings could directly or indirectly make us party to or accessory to contraventions of that law", in reference to both domestic, UK and USA anti-corruption laws. This affidavit excluding annexures is attached as annexure "LF15".

190. It became clear to me that Oakbay (and the Gupta family) were afraid to go to Court as they did not want to be cross-examined on their suspicious transactions, and instead preferred to lobby the ruling party and the Presidency to force the banks to open their accounts. The subsequent exposure of Bell Pottinger and the use of concepts like "White Monopoly Capital" was intended to hide their nefarious activities.
191. The fact of the matter is that banks are compelled to implement the laws of the country like the FIC Act. Failing to do so will not only strengthen criminal syndicates and money laundering, but to risking or increasing the cost of their correspondent relationships with foreign banks (hence impacting negatively on trade), and worse, exposing our banks to massive fines from overseas regulators, as has been the case with BNP Paribas (fined \$8.9 billion by US authorities). This would bring great financial stability risk to the SA Banking system and to our economy.
192. It was clear to me that after the President set up the inter-ministerial committee, that the process was calculated to produce one outcome: the reinstatement of banking relationships by SA for the Gupta family and their business. This disregarded the fact that the banks were enforcing the law.
193. As we pointed out to Mr Howa, the right place to ventilate his concerns were the courts of law. Indeed, the matter ended up there and the saying goes, the rest is history.

### **The Denel-VR Laser Deal**

194. Another good example which demonstrates the flouting of rules and manipulation of process was in well-publicised case where Denel (the 100 per cent state owned arms manufacturer) entered into an arrangement with VR Laser Asia to form Denel Asia.
195. While I raise this matter in this statement, I am aware that some of my former colleagues have agreed to assist the Commission with all relevant details on this issue. A lot of what I have to say on the Denel matter is also covered extensively in the affidavit I deposed to in May 2017.
196. With this background in mind, I provide a brief summary of the Denel matter in this statement.

197. In October 2015 the National Treasury (through the Minister of Finance) received correspondence from the Denel Board Chairman, Mr Mantsha which was couched as a pre-notification of the intention of forming a partnership between Denel and VR Laser Asia to form Denel Asia.
198. The Relevant provisions of the law applicable to the process that Denel had to follow are section 51(1)(g) and 54 (2) (a)(b) and (e). Section 54(3) deals with instances where there is undue delay in response from approving authorities.
199. In the case of Denel, a further requirement existed as a result of the entity having been granted a sovereign guarantee in 2012 in which further conditions were imposed on the entity had been imposed. In this regard, one of the conditions was that Denel would have to obtain the approval of the Minister of Finance whenever it was to enter in a transaction in terms of section 54.
200. In December 2015, around the time of Minister Nene's dismissal and his replacement with Mr van Rooyen the Chairman of Denel submitted a formal application for the approval of Denel Asia deal. By some coincidence his letter was dated 10 December 2015, which was the first day of Mr van Rooyen's term as Minister of Finance. The formal application followed on from the pre-notification that had been sent to the Minister of Finance from the Denel Board chairman, Mr Mantsha, where Denel's intention of forming a partnership between Denel and VR Laser Asia to establish Denel Asia had been mooted.
201. As it would be appreciated, during December many of the personnel in the Treasury (and in most departments and businesses) take a December break. Quick turnaround times are hard if not impossible at that time. In the case of that particular year in which the Treasury had three Ministers in one month it was particularly hard to keep track of things. Adding to the difficulties was the fact that it is during January and February that the Budget is finalised.
202. Toward the end of January, we were surprised to learn via the media that Denel had already gone ahead and formed Denel Asia without obtaining the requisite approval as indicated in sections 51 and 54 and the conditions of the guarantee and also without even reaching out to communicate with the Treasury.
203. Subsequently:
- 203.1 A series of meetings were held between Denel officials and officials of the National Treasury. I held one myself with the then acting CEO Mr Zwelakhe Ntsepe and the acting CFO Mr Odwa Mhwilana. The meeting did not yield any positive outcome as they appeared determined to prove that they had complied with legal requirements and that we were wrong.

- 203.2 Letters were also exchanged where National Treasury set out in detail the legal advice that it had received by way of explaining its position. This correspondence is attached as annexure "LF16".
- 203.3 There were also some public spats which were also reiterated in some of the correspondence, and which included an unprecedented attack by the Chairperson of Denel on the Minister of Finance, demanding that he retract statements that he made. There was also an instance where the Board issued a blistering statement purportedly responding to media allegations that a letter had been sent to them by the National Treasury demanding that Denel dissolve its partnership with VR Laser Asia or face legal action. The letter never existed. Moreover, if anyone should have been in possession of this letter, it was Denel. Given that they later confirmed that they did not have any such letter, this approach is extraordinary.
204. Ultimately, I filed an affidavit on the matter in May 2017 just a few days before I left government. The affidavit excluding annexures is attached as annexure "LF17".

#### **My resignation as DG**

205. Minister Gordhan has testified before the Commission about his removal from office in March 2017. I shall not repeat everything he said in this regard suffice to make the following points:
- 205.1 I had been part of planning the roadshow which was like any other roadshow we had undertaken previously. We had followed all due processes to obtain approval for the trip. My travel had been approved by Minister Gordhan as per the applicable rules of the civil service.
- 205.2 The trip was intended exclusively for legitimate business, namely, to share with investors and rating agencies the Budget that had been tabled and to seek their support for financing the deficit. There were no secret and unlawful meetings scheduled with anyone.
- 205.3 We received a message from the DG in the Presidency to return back upon arrival and we took the next flight back in the evening of the day we had arrived.
- 205.4 After getting to know everything that Minister Gordhan has referred to in his statement about his imminent sacking, I decided to resign. I tendered my resignation on 29 March 2017 with a notice period running through to May 2017.

206. I served notice period under Mr Malusi Gigaba through 15 May 2017.

### **Conclusion**

207. In this affidavit, I have dealt only with some of the most significant matters with which I was confronted during my term as Director General and which, in my assessment, best illustrate the attempts that were made to pressure the Ministers of Finance and National Treasury to give requisite approvals that would have supported the state capture project, even where this was in conflict with the law, sound fiscal management and interests of South Africans.”

12. At this stage it is necessary to deal with the events of 23 October 2015 when a meeting was held at the Gupta residence in which Mr Mcebisi Jonas was offered the position of Minister of Finance and money if he agreed to work with the Guptas.

### **MR JONAS' MEETING WITH MR TONY GUPTA AND OTHERS AT THE GUPTA RESIDENCE ON 23 OCTOBER 2015**

13. Mr Mcebisi Hubert Jonas testified as follows regarding the circumstances surrounding an alleged bribe offered by a member of the Gupta family to him on 23 October 2015. Mr Jonas was appointed as Deputy Minister of Finance by President Jacob Zuma on 26 May 2014.<sup>4</sup> Mr Nhlanhla Nene was appointed the Minister of Finance at the same time.<sup>5</sup> Mr Jonas occupied the position of Deputy Minister of Finance until 31 March 2017 when he was dismissed together with Mr Pravin Gordhan.<sup>6</sup> Mr Nene's term of office as Minister of Finance under President Zuma ended abruptly on 9 December 2015 under circumstances which caused much economic havoc in the country and reverberated throughout many parts of the world. Mr Nene's dismissal and the circumstances surrounding it are discussed elsewhere in this part of the Report.

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<sup>4</sup> Exhibit C1, p 1, para 2.

<sup>5</sup> Exhibit C1, p 1, para 2.

<sup>6</sup> Exhibit C1, p 1, para 2.

14. As at October 2015 Mr Jonas and Mr Fana Hlongwane had been friends for many years. Mr Fana Hlongwane was also a friend to Mr Duduzane Zuma (Mr D Zuma), one of President Zuma's sons, who regarded him as his "uncle" from the time that Mr Hlongwane and the Zuma family were in exile.
15. Mr Jonas had never met Mr D Zuma before 23 October 2015. Indeed, he only spoke to him for the first time on 17 October 2015. Mr Jonas testified that on or about 27 or 28 August 2015 and while he was in Luanda, Angola, on official business, he received a call from Mr Hlongwane who told him that Mr Duduzane Zuma (Mr D Zuma) wanted to talk to him to invite him to a certain awards ceremony. Mr Hlongwane did not dispute that he made this call to Mr Jonas and said this to him. After Mr Jonas had returned from Luanda, he met with Mr Hlongwane sometime in October 2015. Mr Jonas said that Mr Bongani More – who was a friend of both Mr Jonas and Mr Hlongwane – was present when Mr Jonas met with Mr Hlongwane. Mr Hlongwane confirmed that Mr More was his friend and comrade just like Mr Jonas. Mr Jonas testified that on this occasion Mr Hlongwane told him that Mr D Zuma wanted to meet him. Mr Jonas testified that during that conversation Mr Hlongwane told him that the Guptas were important to him. Mr Jonas testified that he told Mr Hlongwane that he would not like to be associated with the Guptas.<sup>7</sup> Mr Jonas told the Commission that, nevertheless, he asked Mr Hlongwane to give him Mr D Zuma's number which Mr Hlongwane did.<sup>8</sup>
16. Mr Jonas said that he sent Mr D Zuma an SMS on 17 October 2015 to the effect that he had tried to call him and later that evening Mr D Zuma called him back and they had their first conversation.<sup>9</sup> Mr Jonas said that during that conversation on 17 October 2015 Mr D Zuma invited him to a function that Mr Jonas believed was called the South African of the Year Awards hosted by Africa News Network 7 (ANN7) which was to be on 18

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<sup>7</sup> Exhibit C1, p 2, para 4.

<sup>8</sup> Exhibit C1, p 2, para 5.

<sup>9</sup> Exhibit C1, p 2, para 6.

October 2015 in Johannesburg.<sup>10</sup> The ANN7 was a television station that was owned or controlled by the Guptas. Mr D Zuma did not dispute any of this evidence by Mr Jonas. Indeed, he did not dispute it through his Counsel when his Counsel cross-examined Mr Jonas. Mr Jonas testified that ultimately he informed Mr D Zuma that he would not be able to attend the function as his schedule did not permit.<sup>11</sup>

17. According to Mr Jonas, he and Mr D Zuma had further communication with each other on 19 October 2015.<sup>12</sup> Mr Jonas testified that in response to a missed call from Mr D Zuma, he sent Mr D Zuma an SMS at approximately 12h38 suggesting that they talk after he had landed in Cape Town. Mr Jonas was due to fly from Johannesburg to Cape Town.<sup>13</sup> Mr Jonas stated that on the evening of 19 October 2015 at about 19h37 or 19h38 he received two missed calls from Mr Hlongwane.<sup>14</sup> He said that at about 21h43 that evening he sent an SMS to Mr D Zuma which simply stated "called" whereupon Mr Zuma called him "about arranging a meeting". Mr Jonas told the Commission that he told Mr D Zuma that he would be in Johannesburg later that week and that they could meet then.<sup>15</sup>
18. The next communication between Mr Jonas and Mr D Zuma, according to Mr Jonas, was on 22 October 2015. On that day Mr Jonas flew from Cape Town to Johannesburg. He testified that he noticed upon landing in Johannesburg that day that he had received an SMS from Mr D Zuma.<sup>16</sup> That message expressed the trust that Mr Jonas had "made it out of Parliament unscathed" and asked Mr Jonas to return his call.<sup>17</sup> Mr Jonas also noticed a missed call from Mr D Zuma.<sup>18</sup> Mr Jonas did not say that he returned Mr D

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<sup>10</sup> Exhibit C1, p 2, para 7.

<sup>11</sup> Exhibit C1, p 2, para 7.

<sup>12</sup> Exhibit C1, p 3, para 8.

<sup>13</sup> Exhibit C1, p 3, para 8.

<sup>14</sup> Exhibit C1, p 3, para 9.

<sup>15</sup> Exhibit C1, p 3, para 9.

<sup>16</sup> Exhibit C1, p 3, para 10.

<sup>17</sup> Exhibit C1, p 3, para 10.

<sup>18</sup> Exhibit C1, p 3, para 10.

Zuma's call or responded to his SMS. Mr Jonas says that at about 09h58 on Friday 23 October 2015 he received a call from Mr D Zuma and in that conversation he told Mr D Zuma that he was going to be attending a meeting in Rosebank and they could meet briefly later in the afternoon before he flew out to Port Elizabeth. Mr Jonas testified that they then agreed to meet at the Hyatt Hotel in Rosebank before he could leave.<sup>19</sup> Mr Jonas was going to attend a NEDLAC meeting in Rosebank.<sup>20</sup>

19. Mr Jonas left the NEDLAC meeting early and sent Mr D Zuma an SMS suggesting that they meet at 13h30 at "the same place". Mr D Zuma responded and agreed. Mr Jonas says that he arrived at the Hyatt Hotel at about 13h00 and sent Mr D Zuma an SMS asking him to call him. He said that he received a "short call" from Mr Zuma at about 13h03. At 13h13 Mr Jonas sent Mr D Zuma an SMS to the effect that he was already at the Hyatt Hotel. Mr Jonas said that at 13h21 Mr D Zuma sent him an SMS saying that he was on his "way up".<sup>21</sup>
20. Up to this point Mr D Zuma did not challenge Mr Jonas' version. The one difference is that Mr D Zuma said in his evidence that, prior to 23 October 2015, he had told Mr Jonas what he wanted to meet him about and that he had told him that it was about a rumour that he was telling people that Mr Hlongwane was blackmailing him. Mr Jonas' version does not include anything to that effect.
21. Mr Jonas testified that, when Mr D Zuma arrived at the Hyatt Hotel for their meeting, the two had a brief discussion but Mr D Zuma "appeared quite nervous and spoke in very vague terms". Mr Jonas stated that Mr D Zuma said nothing of substance except that his father liked Mr Jonas.<sup>22</sup> In his evidence, Mr D Zuma denied he had said that. Mr Jonas states that after a while he indicated that he was under pressure for time

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<sup>19</sup> Exhibit C1, p 3, para 11.

<sup>20</sup> Exhibit C1, p 3, para 12.

<sup>21</sup> Exhibit C1, p 3, para 13.

<sup>22</sup> Exhibit C1, p 4, para 14.



whereupon Mr D Zuma said that the place was crowded and that he had important matters to discuss but that he wanted other people to join the discussion and that he wanted to drive to a more private place. It is common cause that Mr Hlongwane called while Mr Jonas and Mr D Zuma were at the Hyatt Hotel. Mr Jonas testified that he assumed that the "more private place" that Mr Zuma wanted was an office close by and he agreed that they move to the "more private place".<sup>23</sup>

22. Mr Jonas and Mr D Zuma drove in Mr D Zuma's motor car. Mr Jonas left his protectors at the Hyatt Hotel. When he was asked under cross-examination why he had left his protectors behind, Mr Jonas said that he would leave his protectors behind all the time. He was, therefore, suggesting that there was nothing unusual in him leaving his protectors behind. No motive was put to him as the motive why he left his protectors behind. Mr Jonas testified that he was not told the place where they were going to. Mr D Zuma disputed this and said Mr Jonas did not just jump into his car without knowing where they were going. There was an implied suggestion in Mr D Zuma's evidence as well as in the cross-examination of Mr Jonas by Mr D Zuma's counsel that as a Deputy Minister it was highly unlikely that he would have simply jumped into Mr D Zuma's car without knowing where he was being taken to. I do not accept this criticism. Mr Jonas' understanding was that they were going to a place close by which was more private. I do not think there was anything strange if he did not insist on being told further information about where they were going. It is not as if he thought his safety could be under threat.
23. Mr Jonas stated that it was only when he and Mr D Zuma arrived at their destination – the more private place – that he realised that they had driven to the Gupta residence in Saxonwold.<sup>24</sup> It is common cause that Mr Hlongwane arrived at the same time as Mr

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<sup>23</sup> Exhibit C1, p 3, para 14.

<sup>24</sup> Exhibit C1, p 4, para 15.

Jonas and Mr D Zuma at the Gupta residence.<sup>25</sup> Mr Jonas said that he, Mr D Zuma and Mr Hlongwane went into a lounge where they sat down and started chatting. He said that none of the two men suggested to him that the meeting would be attended by anybody from the Gupta family.<sup>26</sup> Mr Jonas said that the three of them had not spoken for very long when one of the Gupta brothers walked into the room and sat down. Mr Jonas had not met any of the Gupta brothers before that day.<sup>27</sup> In his affidavit which he submitted to the High Court in the application that was brought by Mr Pravin Gordhan as Minister of Finance under case no 80978/16, Mr Jonas said that the Gupta brother that came into that meeting was Mr Ajay Gupta but towards the end of his replying affidavit he said that there was a Gupta brother in the meeting.

24. In his affidavit of August 2018 submitted to this Commission Mr Jonas said that it was Mr Ajay Gupta who was in that meeting but said that he could not exclude the possibility that it was Mr Rajesh Gupta.<sup>28</sup> Indeed, his oral evidence was more or less to the same effect. In his affidavit supporting his application for leave to cross-examine Mr Jonas, Mr Ajay Gupta denied that he was at the Gupta residence at the time. He said that he spent that day at his office in Sandton. Although Mr Ajay Gupta did not testify orally before the Commission, I directed that the investigators of the Commission investigate his alleged alibi. That investigation revealed that he was probably correct that he was at his Sandton office for most of the day including the whole time of the meeting attended by Mr Jonas at the Gupta residence. One of his cellphones was established to have been in Sandton for most of that day and being used. The assumption is that it was used by him.

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<sup>25</sup> Exhibit C1, p 4, para 15.

<sup>26</sup> Exhibit C1, p 4, para 16.

<sup>27</sup> Exhibit C1, p 5, para 17.

<sup>28</sup> Exhibit C1, p 5, para 17.

25. With regards to Mr Atul Gupta, investigators of the Commission investigated where Mr Atul Gupta was and it transpired that he was out of the country at the time. This was established through the Department of Home Affairs. Endorsements or entries in his passport revealed this. I am, therefore, able to find that neither Mr Ajay Gupta nor Mr Atul Gupta attended the meeting with Mr Jonas at the Gupta residence on 23 October 2015. This leaves Mr Rajesh Gupta as the only Gupta brother who would have attended the meeting with Mr Jonas on 23 October 2015 if on that day there was a meeting attended by a Gupta brother, Mr Jonas, Mr D Zuma and Mr Hlongwane.
26. Mr D Zuma testified that Mr Rajesh Gupta was at the Gupta residence when he and Mr Hlongwane had a meeting with Mr Jonas but denied that Mr Rajesh Gupta attended that meeting. Mr D Zuma said that Mr Rajesh Gupta peeped into the room where the three were holding their meeting and beckoned him as he wanted to ask him whether he would be available for a certain meeting the following day and he left. Mr D Zuma said that Mr Rajesh Gupta did not take part in the meeting that was taking place nor did he make any offer to Mr Jonas. Mr Jonas denied that there was any Gupta brother who peeped into the meeting. The result is that, if any Gupta brother attended the meeting as stated by Mr Jonas, it could only have been Mr Rajesh Gupta. Mr Hlongwane corroborated Mr D Zuma's evidence in this regard,
27. Mr Jonas related the discussion thus: Mr Gupta opened the conversation by saying that "we know you" and that he had been informed that Mr Jonas was being blackmailed by Mr Hlongwane. Mr Jonas responded by telling him that that was not true. Mr Gupta then said that that was not why he had called for Mr Jonas anyway. Mr Gupta went on to say that they had been gathering intelligence on Mr Jonas and those closest to him such as Mr Jonas' friend, Mr Rastum Mohamed and Mr Jonas' Chief of Staff, Mr Nkosohlanga Mboniswa both of whom he described as "poor and useless".

28. Mr Jonas testified that Mr Gupta emphasised that they – which Mr Jonas understood to be a reference to the Gupta family – had the capability to gather such information and that they had gathered a lot of information on him which they could use against him. Mr Jonas said that Mr Gupta then said that, as far as he was concerned “this meeting never happened” and, if Mr Jonas were ever one day to suggest that that meeting ever took place, they would destroy his political career. Mr Jonas testified that he understood Mr Gupta to say that, if he were to reveal that that meeting had been held, they had information on him which they could use to destroy his political career.<sup>29</sup>
29. Mr Jonas also pointed out that Mr Gupta went on to say that they were well aware of his activities and that he was working with the then Secretary-General of the ANC, Mr Gwede Mantashe, and Dr Zweli Mkhize, the then Treasurer-General of the ANC both whom he said were not good for Mr Jonas and were “bad guys”. Mr Jonas testified that Mr Gupta said that Mr Jonas was part of what he referred to as a “thing” within the ANC. Mr Jonas said that he understood Mr Gupta to be suggesting that he was part of a faction or process within the ANC which sought to undermine the then President of the ANC, Mr Zuma in the ANC and/or Government. Mr Jonas said that at this stage he interjected and disputed that view or statement and he pointed out that he was nothing more or less than a part of the ANC and that his activities in the ANC and his work in Government had nothing to do with Mr Gupta.
30. Mr Jonas testified that he then asked Mr Gupta directly what the purpose of the meeting was. Mr Gupta, according to Mr Jonas, went on to say that the “old man” seemed to like him (i.e. Mr Jonas) and that they had called Mr Jonas to “check [him] out” and see “whether you can work with us”. Mr Jonas told the Commission that Mr Gupta then told him that President Zuma was going to fire Mr Nene because he (i.e. Mr Nene) would

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<sup>29</sup> Exhibit C1, p 5, para 19.

not work with them (i.e. the Gupta family).<sup>30</sup> Mr Jonas testified that Mr Gupta told him that "you must understand that we are in control of everything", the National Prosecuting Authority, the Hawks and the National Intelligence Agency and that "the old man will do anything we tell him to do". Mr Jonas said that Mr Gupta then told him that "the old man" intended appointing him as the Minister of Finance. Mr Jonas testified that he was "shocked and angered by this statement" and he told Mr Gupta that he was not interested in becoming the Minister of Finance.<sup>31</sup>

31. Mr Jonas testified that Mr Gupta ignored what he said, namely that he was not interested in becoming the Minister of Finance. Mr Jonas told the Commission that instead Mr Gupta emphatically said that Mr Jonas had to become the Minister of Finance because they wanted this. Mr Jonas understood that he was referring to the Gupta family. Mr Gupta told Mr Jonas that, if he worked with them, he would become very rich. Mr Jonas testified that Mr Gupta then told him that he could immediately offer him R600 million. He then pointed at Mr D Zuma in the room and said that they had made him a billionaire and that he had bought a house in Dubai.<sup>32</sup>
32. When Mr D Zuma gave evidence, he was asked whether it was true that the Guptas had already made him a billionaire by 23 October 2015 and that he had bought a house in Dubai. Mr D Zuma did not dispute the correctness of the statement that the Guptas had made him a billionaire by October 2015.
33. Mr Jonas stated that the Gupta brother went on to say that they worked closely with a number of people including Ms Lynn Brown and Mr Brian Molefe and that, as a result of this, those people were protected. Mr Jonas stated that the Gupta brother said that Mr Molefe was very safe and that his career path was very clear. Mr Jonas went on to

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<sup>30</sup> Exhibit C1, p 6, para 21.

<sup>31</sup> Exhibit C1, p 6, para 22.

<sup>32</sup> Exhibit C1, p 7, para 23.

say that the Gupta brother said nobody would touch Mr Brian Molefe and he (i.e. Mr Jonas) would be safe if he agreed to work with them.<sup>33</sup> That is the Guptas. Mr Jonas told the Commission that at that stage he said that he was going to leave and stood up to leave. He said that he was not interested in being the Minister of Finance and if he thought Mr Jonas would work with them, he would have to tell Mr Jonas precisely what they (i.e. the Guptas) did. Mr Jonas says that at that stage both Mr D Zuma and Mr Hlongwane also stood up. Mr Jonas testified that he was angry at this stage and the Gupta brother was also emotional.<sup>34</sup>

34. Mr Jonas told the Commission that at that stage the Gupta brother said something along these lines: "Look, do you know who you are dealing with?" Mr Jonas said that the Gupta brother said "you think it is illegal?" Mr Jonas said that the Gupta brother was agitated at this stage. Mr Jonas stated that the Gupta brother said everything they did was legal and they had created jobs and they contributed to the economy.<sup>35</sup>
35. Mr Jonas testified that the Gupta brother went on to say that they – which Mr Jonas took as a reference to the Gupta family – earned about R6 billion from the fiscus through various entities including Eskom, Transnet and other Government Departments. The Gupta brother said, according to Mr Jonas, that they wanted to increase that amount to R8 billion and they thought that Mr Jonas could be helpful in this regard. Mr Jonas testified that Mr Gupta said that they had determined that the National Treasury was a stumbling block for their growth and that they wanted to "clean up Treasury".<sup>36</sup>
36. Mr Jonas testified that the Gupta brother told him that, when he was the Minister of Finance, he would have to remove the Director-General Mr Lungisa Fuzile, the Head of Tax and Financial Sector Policy, Mr Ismail Momoniat, Deputy Director-General,

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<sup>33</sup> Exhibit C1, p 7, para 23.

<sup>34</sup> Exhibit C1, p 7, para 24.

<sup>35</sup> Exhibit C1, p 7, para 25.

<sup>36</sup> Exhibit C1, p 7, para 26.

Mr Andrew Donaldson and the then Chief Procurement Officer, Mr Kenneth Brown from the National Treasury. Mr Jonas also said that Mr Gupta told him that they (i.e., the Guptas) would provide him with replacements for all the people he wanted to be removed and they would provide Mr Jonas with the necessary support including advisors.<sup>37</sup>

37. Another factor pointing to Mr Rajesh Gupta having been the Gupta brother who had a discussion with Mr Jonas at the Gupta residence on 23 October 2015 is that, according to the evidence of Mr Dukwana or Dukoana before the Commission, Mr Rajesh Gupta wanted him to sign a certain letter appointing one of the Gupta-linked companies to do certain work in Mr Dukwana's department in the Free State at the time. Mr Rajesh Gupta suggested or told Mr Dukwana to get rid of his Head of Department at the time and replace him with Mr Richard Seleke whom he called to the meeting with Mr Dukwana for the latter to see. So, the idea that certain officials in government departments be removed and be replaced by persons chosen by him or the Guptas is something he had done before or might have been one of the features of the way the Guptas worked. In other words, what Mr Jonas says was done by the Gupta brother to him at the meeting of 23 October 2015 is consistent with what Mr Dukoana (also Dukwana) also said was done by Mr Tony Gupta to him in 2012. Indeed, it is consistent with what Mr Vusi Kona testified Mr Tony Gupta did to him when he was the Acting Group CEO of SAA in either 2011 or 2012, namely, offering him a bribe. They were all offered large sums of money as bribes.
38. Mr Jonas testified that he told Mr Gupta that he was under pressure in terms of time and encouraged Mr Gupta to set out "precisely what they did as that would enable him to take an informed decision". Mr Jonas pointed out that he was not asking Mr Gupta this because he intended to consider his offer seriously in any way. He testified that he

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<sup>37</sup> Exhibit C1, p 7, para 26.

did this "as a provocation to seek to draw [Mr Gupta] out in the context of the unfolding state capture phenomenon that we were, at that point in time, trying to make sense of and to determine who was involved".<sup>38</sup>

39. Mr Jonas told the Commission that at this stage he began to walk away and Mr Gupta motioned to both Mr D Zuma and Mr Hlongwane to hang back. He said that, as he was walking to the door of the house, Mr Gupta directed him to a bar area and said that they were serious about offering him the R600 million and it would be deposited into an account of his choice or that they could open an account for Mr Jonas and he could "stash it in Dubai". Mr Jonas said that Mr Gupta then said that, to show that they were serious, he could "give [Mr Jonas] R600 000 now" and he asked Mr Jonas: "Do you have a bag or can I give you something to put it in". Mr Jonas said at this stage Mr Gupta seemed to want to show him the cash. Mr Jonas told Mr Gupta that he did not want money and that he had thought that Mr Gupta was going to tell him what it was that they were doing.
40. Mr Jonas testified that he then told Mr Gupta that he was in a rush to catch his plane but would be returning from the Eastern Cape on Sunday the following week and Mr Gupta could provide him with a list of what the Guptas did. Mr Gupta then told Mr D Zuma to make arrangements for Mr Jonas to come back, it seems implied, to the Gupta residence the following Tuesday and that Mr D Zuma should tell Mr Jonas to bring a bag. Mr Jonas then asked Mr D Zuma to take him back to his car but Mr Gupta said that he still wished to continue this meeting with Mr D Zuma and said that another car would take Mr Jonas to the airport. Mr Jonas testified that at the end of the meeting Mr Gupta repeated his statement that they had information on him and that, if he

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<sup>38</sup> Exhibit C1, p 8, para 27.



suggested that the meeting had occurred, they would "kill" him. Mr Jonas was then driven to the airport.<sup>39</sup>

41. Mr Jonas stated in his statement to the Commission that he was very shaken by what happened at the meeting. Mr Jonas said that, due to the sensitive and threatening nature of what had transpired at the meeting, and because of the uncertainty of the events that were playing themselves out on a national basis, he decided that he would discuss what had occurred with people he could trust. Later that day, Mr Jonas contacted Mr Nene and advised him that he had something serious to talk to him about. Mr Nene was on his way to KwaZulu-Natal and they, therefore agreed to meet with Mr Jonas on his return on Sunday, 25 October 2015.
42. On Sunday 25 October 2015 Mr Nene contacted Mr Jonas and suggested that they meet the following day, Monday 26 October 2015 and Mr Jonas agreed to the suggestion.
43. Mr Jonas returned to Johannesburg on Sunday 25 October 2015 at approximately 4:37pm. He stated that he spoke to Mr Pravin Gordhan and asked if he could see him to seek his advice and guidance.
44. In his statement to the Commission dated 11 October 2018, which he confirmed in oral evidence, Mr Pravin Gordhan said that on 23 October 2015 Mr Jonas contacted him and expressed the wish to see him upon his return from the Eastern Cape on Sunday 25 October 2015. Mr Gordhan said that Mr Jonas appeared upset by something but did not discuss any details regarding why he wished to see him. Mr Jonas testified that on Sunday 25 October he met with Mr Gordhan at the latter's official residence in Pretoria. Mr Jonas' description in his statement of his emotional state after the Saxonwold

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<sup>39</sup> Exhibit C1, p 8, paras 28-9.

meeting is consistent with Mr Gordhan's description of him when, according to Mr Gordhan, they spoke on the phone on 23 October.<sup>40</sup>

45. Mr Gordhan testified that, indeed, on Sunday 25 October 2015 Mr Jonas paid him a visit at his home in Pretoria. Mr Gordhan described his observation of Mr Jonas on that occasion thus:

"117.2 Mr Jonas appeared extremely distraught, upset and emotional. He seemed unable or hesitant, to disclose specific detail about what had caused this (perhaps due to the presence of my wife), and said he found the situation intolerable and that he wanted to resign.

117.3. I tried to calm him down and to prevent him from making any drastic decisions given his state of mind. I dissuaded him from resigning, advising him that it would not be in the best interests of the country for him to leave his position."<sup>41</sup>

46. Mr Gordhan also understood that Mr Jonas was planning to discuss his situation with Mr Nene.<sup>42</sup> In the statement Mr Gordhan did not say that Mr Jonas told him that he had had a meeting at the Gupta residence and a member of the Gupta family had offered him the position of Minister of Finance if he would work with them and had offered him R600 million. Nor did Mr Gordhan say that Mr Jonas told him that a member of the Gupta family had said to him that, if he worked with the Gupta family as Minister of Finance, he would have to get rid of certain officials within National Treasury, including Mr Fuzile, who was the Director-General of National Treasury. Mr Gordhan also did not state that Mr Jonas told him that the Gupta family member at the Saxonwold meeting told him that Mr Nene would be removed from the position of Minister of Finance.
47. Although, with regard to the meeting that Mr Jonas and Mr Gordhan had on Sunday, 25 October 2015, Mr Gordhan did not, as indicated above, say that Mr Jonas told him that at the Saxonwold meeting on 23 October 2015 he had been made an offer of

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<sup>40</sup> Exhibit N1, p 41, para 117.

<sup>41</sup> Exhibit N1, p 41, paras 117.2-3.

<sup>42</sup> Exhibit N1, p 41, para 117.4

appointment as Minister of Finance, that he had been told that Mr Nene would be removed as Minister of Finance, in his statement of August 2018 Mr Jonas said that, given that Mr Gordhan's wife was present, he decided to provide Mr Gordhan with a high level outline of what had happened. However, he did say in the statement that he told Mr Gordhan that he had been invited to a meeting and that individuals present at that meeting had told him that he would be made Minister of Finance and that they had offered him money and that he had rejected the offer. Mr Jonas stated in his statement that at that meeting he was "still deeply shocked, angered and dispirited". He also testified that he told Mr Gordhan that he thought that he should submit his letter of resignation the following day.<sup>43</sup> That is consistent with Mr Gordhan's evidence about that meeting. Mr Jonas also stated in his statement that Mr Gordhan suggested that he should not resign at that stage.<sup>44</sup>

48. Mr Nene also corroborated Mr Jonas' version. In his statement of 1 October 2018 submitted to the Commission and in his oral evidence Mr Nene confirmed that Mr Jonas called him on the afternoon of 23 October 2015 and asked to see him on Sunday.<sup>45</sup> Mr Nene testified that Mr Jonas' call came in after he had just left a NEDLAC meeting at NEDLAC House in Rosebank.<sup>46</sup> Mr Nene said that in that telephone conversation Mr Jonas told him that there was an urgent matter that he wanted to share with him but they agreed to meet on Sunday, 25 October 2015 because he (i.e. Mr Nene) was on his way to OR Tambo International Airport to catch a flight to KwaZulu-Natal.<sup>47</sup> Mr Nene said that he got the impression that Mr Jonas was agitated.<sup>48</sup> Mr Nene also confirmed

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<sup>43</sup> Exhibit C1, p 10, para 34.

<sup>44</sup> Exhibit N1, p 1, para 117.3.

<sup>45</sup> Exhibit K1, p 14, para 37.

<sup>46</sup> Transcript 3 October 2018, p 30, lines 1-3.

<sup>47</sup> Exhibit K1, p 14, para 37.

<sup>48</sup> Transcript 3 October 2018, p 30.

that on Sunday 25 October 2015 he and Mr Jonas agreed to meet on Monday, 26 October 2015 and that they did meet in the morning at National Treasury.<sup>49</sup>

49. Mr Jonas testified that in the meeting that he and Mr Nene had on the morning of Monday, 26 October 2015, he briefed Mr Nene as to what had happened at the Saxonwold meeting of 23 October 2015. He put it this way in his statement of August 2018.

"I told Mr Nene exactly what had happened at the Saxonwold meeting, including that I had been told in clear terms that he was going to be removed from office".<sup>50</sup>

50. Mr Jonas testified that Mr Nene responded to this by saying that, maybe he should resign because he was going to be fired anyway. Mr Jonas said that, given the advice that Mr Gordhan had given him, he suggested to Mr Nene that he should not resign and they could "fight on" if only to hold the line for the finance department.<sup>51</sup> Mr Nene also corroborated Mr Jonas' version that this is what Mr Jonas told him when they met on Monday 26 October 2015.

51. In his affidavit and evidence before the Commission, Mr Nene said that he heard for the first time that he would be removed from office when he met with Mr Jonas on the morning of 26 October 2015.<sup>52</sup> In his affidavit of 1 October 2018 and oral evidence Mr Nene revealed that Mr Jonas told him about the offer made to him at the Saxonwold meeting including the amounts of R600 million and R600 000 – and that he had rejected the offer. Mr Nene testified that Mr Jonas informed him that the Guptas were aware of an imminent Cabinet reshuffle about which there were rumours circulating in the media which included names of certain Ministers including his name as some of the Ministers

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<sup>49</sup> Exhibit K1, p15, paras 38-9.

<sup>50</sup> Exhibit C1, p 15, para 39.

<sup>51</sup> Exhibit C1, p 15, para 39.

<sup>52</sup> Exhibit K1, p 14, para 36.

who were to be dropped from the Cabinet. He stated that he recalled that he even asked in his conversation with Mr Jonas: "Who are they to offer you the job of Minister?"<sup>53</sup>

52. Ms Mosilo Mothepu, former CEO of Trillian Advisory, disclosed information regarding misconduct on the part of the company, as well as its executives. The CEO of Trillian, Mr Eric Wood, and other employees allegedly had prior knowledge of the dismissal of Mr Nene as Minister of Finance and the appointment of Mr Des van Rooyen by President Zuma. Ms Mothepu testified that on 26 October 2015 Mr Wood informed her that Mr Nene would be dismissed as Minister of Finance. He informed her "that the new Minister would be more pliable, and he would approve various transactions that the old Minister was not approving", one being the Nuclear Deal.<sup>54</sup> He, however, did not tell her the identity of the new Minister.<sup>55</sup> It is interesting that the same morning of 26 October 2015 on which Mr Wood was telling Ms Mothepu that Mr Nene was going to be fired is the same morning on which Mr Jonas and Mr Nene had a meeting at National Treasury and Mr Jonas told Mr Nene about his meeting at the Gupta residence on 23 October 2015 including that he had been told at the Gupta residence the previous Friday that Mr Nene was going to be fired as Minister of Finance.
53. At that time, Ms Mothepu did not understand the significance of what Mr Wood was saying. Later that morning, Mr Wood sent an email to Ms Mothepu to which was attached a document which essentially outlined the initiatives that the new Minister of Finance was going to approve. There were about 10 initiatives in the document as well as the potential fees that Regiments at the time was going to earn. Here is that document:

"National Treasury  
Discussion Points- Key Initiatives

<sup>53</sup> Exhibit K1, p 15, paras 39-41.

<sup>54</sup> Transcript 10 December 2020 p 23-24.

<sup>55</sup> Transcript 10 December 2020 p 16.

1. Collateralised Municipal Debt- Assist tier 2 municipal entities to efficiently tap Debt Capital markets through facilitating the collateralisation of debt (with the financial assistance of DBSA and PIC- through support for the Mezzanine portion of this collateralised debt) This will assist in the infrastructure rollout required of the country, and will (with NT oversight and assistance) begin to instil financial discipline currently lacking in the tier 2 municipalities.
2. DBSA Funding Model- move the DBSA to a more efficient funding model (as opposed to simply issuing long dated DCM debt), thereby reducing the margin required by DBSA in their lending model, and supporting more efficient infrastructure rollout in the country (particularly municipal infrastructure)
3. Restructure National Treasury Debt- Analyse the NT debt portfolio with a view to restructure non efficiently priced or structured debt- thereby relieving the fiscus of some of the excessive debt burden
4. Debt Redemption Management- Instil discipline in the SOE's and Municipalities to adequately provide for and invest for the redemption of existing and new debt- thereby preventing the situation whereby new debt is incurred simply to repay existing debt (contravention of both PFMA and MFMA)
5. Collateralised Property Development- Allow for organs of state (national, provincial, municipal and SOE) to facilitate infrastructural and economic development through seeding up property development funds with excess (non-core) properties. These funds to be managed by experienced and accredited portfolio managers. All capital requirements for the property developments with be raised on a ring-fenced basis by the fund managers on behalf of the funds.
6. Hybrid Debt Issuance- Support the issuance of Hybrid debt issuance by SOE's in order to bolster their equity positions- thereby reducing the equity requirements of the SOE's on the State coffers (in particular Eskom ). Ensuring that the hybrid instruments are in fact quasi debt (ie subordinated debt), and that they don't confer real equity rights and benefits.
7. Project and Specialised Finance- ensure that projects that qualify from a commercial perspective, are financed on a project/specialised finance basis (eg some Eskom, Transnet, provincial and National projects). This will reduce the pressure on SOE and National Gov balance sheets
8. SA National Black Bank- facilitate the establishment of a black bank in order to ensure state business supports black industry. State wage accounts, SOE, provincial Governments and municipalities will use the services of this bank as opposed to the services of the current commercial banks.

9. SA National Black Insurer- ensure that the state supports the establishment of a national black insurer for the short term insurance requirements of state (vehicle fleet, aircraft, infrastructure insurance, and other asset insurance). The national insurer will work closely with state to ensure that the right products and partnerships are established for the benefit of all.

10. SA National Black Life Company- Assist in the establishment of a National Black life company, for the life insurance requirements of state and state employees (life cover, funeral cover, credit life, additional investment products)."

54. According to Ms Mothepu, Mr Tebogo Leballo, who was the financial director (more precisely Chief Financial Officer) of Regiments, told her a few weeks later that Mr Mohamed Bobat (then a "principal" at Regiments, reporting to Mr Wood) was going to be the new Minister's special advisor.<sup>56</sup> According to Ms Mothepu, the purpose of placing Mr Bobat at the office of the new Minister of Finance as the Minister's special advisor was that Mr Bobat could provide Trillian with inside information on tenders including price and technical specification.<sup>57</sup>
55. Ms Mothepu stated that six weeks after Mr Wood had informed her that a new Minister would be appointed, Mr Van Rooyen was appointed as the new Minister of Finance. This was on the 9<sup>th</sup> December 2015. Ms Mothepu testified that the next morning - that is on 10 December 2015 - she said to Mr Wood: "Oh you were right" and Mr Wood responded, "yes, I was!"
56. Ms Mothepu testified that, after Mr Bobat had been appointed as Minister Van Rooyen's Special Advisor, he was given a courtesy driver to drive him to Pretoria every morning. She also testified that Mr Wood had appointed a PR company to write the new Minister's speeches. That is Mr Des Van Rooyen's speeches.

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<sup>56</sup> Transcript 10 December 2020 pp 36-37, 53.

<sup>57</sup> See transcript 10 December 2020, p 38-39, p 77.

57. Ms Mothepu further testified that Mr Wood used his prior knowledge of Ministerial appointments for his own commercial benefits. She said that she was told by unconfirmed sources that Mr Wood, being a trader, traded on the information of the replacement of Minister Nene. Mr Wood apparently bought dollars because he knew that the removal of a Finance Minister was going to affect the Rand. The day the announcement of Mr Nene's removal was made, Mr Wood reversed the trade and apparently made hundreds of millions of Rands. Ms Mothepu could not confirm this but she said this is what she was told.
58. Mr Jonas testified that on Sunday 25 October 2015 he received a text message from Mr D Zuma at 20h22 which read: "Good evening, Sir. I tried to call. Please return my call when you can".<sup>58</sup> Mr Jonas does not appear to have responded to that message on the same day. However, he says that on Monday 26 October 2015 at 06h58 he received a text message which read: "Hi broer. Can we postpone today's session to Thursday? Did not realise how hectic my official schedule is".<sup>59</sup> As stated by Mr Jonas, the arrangement at the end of the meeting on 23 October 2015 was that a further meeting would be held on Tuesday, 27 October 2015. So, the question arises: was the session that Mr Jonas spoke about in his message to Mr D Zuma the meeting that had been planned for Tuesday or was it something else? This text message may corroborate Mr Jonas' version that the discussion on 23 October contemplated another meeting on Tuesday. In terms of Mr D Zuma's version and the version of Mr Hlongwane there was an arrangement for another meeting the following week.
59. Mr Jonas also gave evidence that he spoke to Mr Hlongwane on two occasions in the evening of 23 October 2015 after he had arrived in Port Elizabeth. He stated that he expressed his disgust to Mr Hlongwane for his role in him being taken to a meeting with

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<sup>58</sup> Exhibit C1, p 10, para 38.

<sup>59</sup> Exhibit C1, p 10, para 37.



a member of the Gupta family.<sup>60</sup> In his affidavit delivered in support of his application for leave to cross-examine Mr Jonas, Mr Hlongwane did not dispute Mr Jonas' evidence in his affidavit that he had spoken to him during the evening of 23 October 2015 and expressed his disgust at Mr Hlongwane's role in the Saxonwold meeting.

60. Mr Hlongwane testified that some time prior to 23 October 2015 he was told by Mr Duduzane Zuma that he had heard rumours that Mr Jonas was going around telling people that he (i.e. Mr Hlongwane) was blackmailing him. Mr Hlongwane said that Mr D Zuma said this to him two or three times and on the second or third occasion he told Mr D Zuma that he should convene a meeting involving him, Mr D Zuma and Mr Jonas to discuss this matter. When asked whether he asked Mr D Zuma at the time who had told him this alleged rumour about Mr Jonas, his answer was that he did not ask him. When Mr Hlongwane was asked whether he had asked Mr D Zuma what, according to the rumour, Mr Jonas had said Mr Hlongwane was blackmailing him about, his answer was that he did not ask Mr D Zuma.
61. According to Mr Hlongwane, the agreement or arrangement between Mr Hlongwane and Mr D Zuma was that Mr D Zuma was the one who should approach Mr Jonas and convene a meeting of the three of them to discuss the rumour. As Mr Hlongwane's evidence revealed, prior to the meeting of 23 October 2015 Mr Hlongwane and Mr Jonas were interacting very frequently as friends – having meetings and talking on the phone about anything and everything. In other words, on Mr Hlongwane's version, he was party to an agreement with Mr D Zuma that Mr D Zuma should speak to Mr Jonas and convene a meeting in which Mr Hlongwane, Mr Jonas and Mr D Zuma would discuss the alleged rumour.

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<sup>60</sup> Exhibit C1, p 9, para 32.

62. What is strange about this part of Mr Hlongwane's version is this: Mr Hlongwane could have easily called Mr Jonas and either asked him about the rumour or arranged the meeting himself and ensured that Mr D Zuma attended the meeting: it does not make sense for Mr Hlongwane and Mr D Zuma to have decided that Mr D Zuma should contact Mr Hlongwane's long-time friend to convene a meeting to discuss an issue between the two of them i.e. Mr Hlongwane and Mr Jonas. In fact, at the meeting itself, Mr D Zuma appears not to have contributed anything of significance. He did not even tell the meeting who had told him that Mr Jonas was going around telling people that Mr Hlongwane was blackmailing him. Indeed, he did not even tell the meeting what, according to the alleged rumour, Mr Jonas was alleging Mr Hlongwane to be blackmailing him for or about. In this regard Mr Hlongwane was asked whether he asked Mr D Zuma who had given him this information and he said that he did not get an answer.
63. One of the things that Mr Jonas said Mr Gupta told him on 23 October 2015 is that Mr Brian Molefe was one of the people who were working with the Guptas and Mr Molefe's career was safe.<sup>61</sup> It is interesting that, when the Public Protector investigated the relationship between Mr Brian Molefe and the Guptas, she found that Mr Molefe seemed to have been very close to the Guptas. In her report "State of Capture" the Public Protector pointed out that the cellphone records of Mr Brian Molefe's cellphone and Mr Ajay Gupta's cellphone revealed that between 2 August 2015 and 22 March 2016 Mr Brian Molefe had called Mr Ajay Gupta forty-four (44) times and Mr Ajay Gupta had called Mr Brian Molefe 14 times.<sup>62</sup> Therefore, during that period of just under eight months the two men had called each other 58 times.

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<sup>61</sup> Exhibit C1, p 7, para 23.

<sup>62</sup> Public Protector, 'State of Capture Report', p 123, para 5.97.

64. The Public Protector found that the cellphone records revealed that between 23 March 2016 and 30 April 2016, Ms Ragavan, an associate or employee of the Guptas, made 11 calls to Mr Brian Molefe and sent him four (4) text messages.<sup>63</sup> The Public Protector also stated in her report that between 5 August 2015 and 17 November 2015 Mr Brian Molefe could be placed in the Saxonwold areas on 19 occasions.<sup>64</sup> She also found that there had been some calls between Mr Brian Molefe and Mr Nazeem Howa, a Gupta associate, and between Mr Brian Molefe and Mr Rajesh Gupta.<sup>65</sup> The cellphone records found by the Public Protector reveal that Mr Brian Molefe was very close to the Gupta family or at least Mr Ajay Gupta. In his evidence before the Commission Mr Brian Molefe admitted that he was a friend of Mr Ajay Gupta and said that they had been friends over a long period. Neither Mr Hlongwane nor Mr Duduzane Zuma suggested how Mr Jonas could have known that Mr Brian Molefe was close to the Guptas if it was not because Mr Gupta told him so on 23 October 2015.
65. Both Mr Jonas and Mr Hlongwane testified that, prior to the meeting of 23 October 2015, they had been friends for many years and interacted frequently before that meeting but that the friendship ended subsequent to that meeting. On Mr Hlongwane's evidence it is not clear what it is that would have ended their friendship of many years and in this regard Mr D Zuma testified that, when that meeting ended, they were all happy – they were "cool", as he put it. On Mr Jonas' version it is clear that what ended the friendship was that he was "disgusted" at Mr Hlongwane having been part of the plan for him to be taken to the Guptas where the Guptas made him the offer that was made to him. On Mr Jonas' version, when he left the meeting, he was very unhappy and he called both Mr Nene and Mr Gordhan about what had happened to him. This was confirmed by

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<sup>63</sup> Public Protector, 'State of Capture Report', p 123, para 5.98.

<sup>64</sup> Public Protector, 'State of Capture Report', p 100, para 5.100.

<sup>65</sup> Public Protector, 'State of Capture Report', p 124, para 5.101.

both Mr Nene and Mr Gordhan when they gave evidence. On Mr Duduzane Zuma's version there would have been nothing to have upset Mr Jonas.

66. There are at least four things that Mr Jonas told the Commission were said to him by Mr Gupta at the 23<sup>rd</sup> October 2015 meeting that seem to have subsequently been shown to be true. First, he said that the Gupta brother told him that President Zuma was going to fire Mr Nene as Minister of Finance. Mr Nene was fired about six weeks after the meeting. Second, Mr Jonas said that the Gupta family had made Mr D Zuma a billionaire. Mr D Zuma did not deny that as at 23 October 2015 he had been made a billionaire by the Gupta family. Third, Mr Jonas said that the Gupta brother told him that Mr D Zuma had already bought a house in Dubai.<sup>66</sup> Mr D Zuma did not deny this in his oral evidence although he had denied it in an affidavit earlier on when he applied for leave to cross-examine Mr Jonas. Mr Jonas testified that the reason that the Gupta brother gave as the reason why President Zuma was going to fire Mr Nene as Minister of Finance was that he would not work with the Guptas which would have been an illegitimate and illegal reason for President Zuma to fire Mr Nene.
67. The reason advanced by President Zuma for firing Mr Nene did not make sense. He said that Mr Nene had been performing very well as Minister of Finance but he had decided to dismiss him because the ANC Top 6 had held a meeting and decided that he should be deployed to a position in the BRICS Bank that did not exist yet, had not been advertised and which he had no authority to offer to anybody on behalf of the BRICS Bank. Fourth, Mr Jonas testified that at that meeting the Gupta brother told him that "the old man will do anything we tell him to do".<sup>67</sup> I have already found elsewhere in this Report that Mr Themba Maseko was removed from GCIS on the instructions of Mr Zuma because the Guptas wanted him removed as they had told Mr Maseko they

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<sup>66</sup> Exhibit C1, p 7, para 23.

<sup>67</sup> Exhibit C1, p 6, para 22.

would get Mr Zuma to remove him. I find that the statement that Mr Jonas said was made by the Gupta brother who met with him on 23 October 2015, was true. Mr Zuma has not given a rational explanation for dismissing Mr Nene. Mr Nene's dismissal is another example that shows that Mr Zuma would do anything that the Guptas wanted him to do. The statement that Mr Jonas attributed to the Gupta brother, namely, that the Gupta brother said that President Zuma would do anything they wanted him to do is in line with what, according to Mr Themba Maseko, Mr Ajay Gupta said to him at their meeting in October 2010 or at any rate towards the end of 2010.

68. Furthermore, Mr Jonas told the Commission that Mr Gupta had told him that one of the people with whom the Guptas were working was Minister Lynn Brown. This Commission has already found that Ms Lynn Brown was working with the Guptas.
69. Mr Jonas also told the Commission that Mr Gupta told him that Mr Brian Molefe's career was safe and nobody could touch him. Evidence heard by the Commission has revealed that, indeed, extraordinary measures were taken by President Zuma, a friend of the Guptas, Minister Gigaba, another friend of the Guptas, Minister Lynn Brown and Dr Ngubane (as Chair of the Eskom Board) to accommodate Mr Brian Molefe. It seems true that the Guptas were taking care of him. Here are the extraordinary things that these four people did for Mr Brian Molefe.
70. The first is that, when Minister Gigaba had to pick the Group Chief Executive Officer of Transnet from the top three recommended candidates, he picked Mr Brian Molefe even though Dr Mandla Gantsho had scored higher points in the interview. Obviously, President Zuma had given a go ahead to that. Ms Lynn Brown got Mr Brian Molefe seconded to and ultimately appointed as the Group CEO of Eskom without a competitive process which could have attracted a candidate who could have scored higher points than him in the interviews. Dr Ngubane ensured that Mr Brian Molefe was

given an extraordinary pension regime to which he was not entitled when he left Eskom after the release of the Public Protector's Report: State of Capture. That pension was subsequently set aside by the High Court.

71. Despite the fact that when Mr Brian Molefe left Eskom at the end of 2016, he had in effect said he was leaving so that he could clear his name and he had not cleared his name as yet as at February 2017, President Zuma and the African National Congress sent Mr Brian Molefe to Parliament as an ANC MP. Mr Brian Molefe had not been on the ANC list of potential members of Parliament ahead of the 2014 general election. However, somehow the ANC allowed him to jump the queue and be listed as the next person to be made an ANC Member of Parliament in February 2017. This must mean that someone else who was next in line in the list was persuaded not to avail himself or herself to be the next ANC Member of Parliament so that Mr Brian Molefe could take up that position.
  
72. At the time there was a lot of speculation in the media that Mr Molefe was joining Parliament ahead of replacing Minister Gordhan as Minister of Finance. The evidence led in the Commission, as dealt with in the context of the discussion of Minister Gordhan's dismissal as Minister of Finance on 31 March 2017, has revealed that President Zuma wanted to appoint Mr Brian Molefe as Minister of Finance to replace Mr Gordhan and he nearly appointed him. It was only because the five of the Top 6 officials of the ANC objected to that plan when he told them. So, Mr Gupta must have told Mr Jonas indeed that Mr Brian Molefe's career was safe. In fact after five of the ANC Top 6 officials of the ANC (excluding Mr Zuma) had objected to President Zuma appointing Mr Brian Molefe as Mr Gordhan's replacement, a plan was put in place that seems to have been intended to save Mr Molefe from having to sit in Parliament as a backbencher now that he had not been appointed as Minister of Finance. In terms of that plan the Eskom Board, led by another Gupta associate, Dr Ben Ngubane,

rescinded the agreement in terms of which Mr Molefe had left Eskom – namely an early retirement agreement and Mr Molefe resigned from Parliament to go back to Eskom as its GCEO. All this without Mr Molefe having cleared his name that he had said he wanted to clear when he left Eskom. The whole thing was like a circus. Grown up men and women behaving in a bizarre way in order to please the Guptas!

73. One of the things that Mr Maseko testified Mr Ajay Gupta had told him is that, if there was a Minister who was not co-operative, he would call President Zuma and the latter would “sort” them “out”. In his interview with the Public Protector Mr Maseko inter alia said that, after he had told Mr Ajay Gupta that things did not work the way he (i.e. Mr Ajay Gupta) wanted them to be done, Mr Ajay Gupta said: “No that is how the system works now. If there is a Minister who is not cooperative, I tell him, he sorts them out.” The reference to “him” was a reference to President Zuma. Later on, Mr Ajay Gupta said that he had regular meetings with President Zuma. So he would talk to the President and the Ministers would be summoned and they would be instructed to transfer the budget to him. What Mr Maseko told the Commission Mr Ajay Gupta said amounts to saying that the former President would do anything they wanted him to do. Mr Jonas’ evidence was to the effect that the Gupta brother he met at the Gupta residence on 23 October 2015 effectively told him the same thing about their control over Mr Zuma.
74. There are various difficulties with Mr Hlongwane’s and Mr D Zuma’s version that the purpose of the meeting they had with Mr Jonas at the Gupta residence was simply to ask Mr Jonas about the rumour that Mr D Zuma told Mr Hlongwane he had heard that Mr Jonas was going around telling people that Mr Hlongwane was blackmailing him. First, if any person were to tell you that he has heard a rumour that someone is accusing you of blackmailing him, the first two questions you would ask that person – in whatever order- would be:

(a) where did you get that information from or who told you that that person is going around telling *people* that I am blackmailing him?

(b) what is the *person* saying I am blackmailing him about or for? In other words, what am I alleged to want so and so to do?

75. These are the first two most natural questions you would ask. Mr Hlongwane did not ask Mr D Zuma any of these questions before he asked him to convene a meeting for all three of them to discuss the rumour. He decided to ask Mr D Zuma to convene the meeting when he still did not have even the basic information about the alleged rumour.

76. The probabilities favour Mr Jonas' version. It is accepted by all concerned that a meeting did take place at the Gupta residence that was attended by Mr Jonas. There are two disputed issues. The one is whether a Gupta brother attended that meeting. The second is what was discussed in that meeting. On the issue of what was discussed at the meeting, Mr Hlongwane and Mr D Zuma testified that the meeting was to discuss a rumour that Mr D Zuma had become aware that Mr Jonas was going around telling people that Mr Hlongwane was blackmailing Mr Jonas. Mr Hlongwane testified that he had heard about these allegations from Mr D Zuma and he had asked Mr D Zuma to convene a meeting involving the two of them and Mr Jonas to discuss the allegations. Mr Hlongwane said that at the Gupta residence Mr Jonas denied the allegation that he was telling people that Mr Hlongwane was blackmailing him. That is the only thing that Mr Hlongwane testified Mr Jonas said at the meeting. On Mr Hlongwane's and Mr D Zuma's version it appears as if the meeting must have lasted for only a few minutes because neither Mr Hlongwane nor Mr D Zuma was able to give any other details of what was discussed during the meeting. Why would they have taken the trouble to go



and hold the meeting away from the Hyatt Hotel if all it was about was whether Mr Jonas admitted or denied the allegations?

77. What is strange about Mr Hlongwane's version is that he says that he and Mr Jonas had been good friends for many years. The question is: if he and Mr Jonas had been good friends over many years, why would he ask somebody who was a stranger to Mr Jonas to convene the meeting? Why would he not contact his friend himself and then ask Mr Duduzane Zuma to come to the meeting? Why would he not discuss this issue with his friend first? Why would he need someone unknown to Mr Jonas to bring them together?
78. On Mr Hlongwane's version, he seems never to have raised his concern about the allegation with his good friend prior to the meeting at the Gupta residence. That's strange. Do you do that with somebody who is a good friend of many years? Mr Hlongwane's version also does not tell us what the alleged blackmailing was about. Furthermore, the only thing that Mr Jonas is alleged to have done at the meeting was to deny the allegation that he was saying to people that Mr Hlongwane was blackmailing him. So the question arises: how long did the meeting last? If Mr Hlongwane's version is true, that means that for a long time the three sat in the meeting without talking. On Mr Jonas' version the meeting lasted as long as it did which was not a matter of a few minutes – but more than an hour because he and Mr Gupta had a lengthy discussion.
79. Mr Gordhan gave evidence which supported Mr Jonas' version of what happened when he met with a Gupta brother, Duduzane Zuma and Ms Fana Hlongwane. This does not mean that that is because Mr Gordhan testified that Mr Jonas told him everything as he subsequently told the Public Protector and this Commission. However, it does mean that his evidence of what Mr Jonas told him on the afternoon of Friday, 23 October 2015 when Mr Jonas was on his way to the airport and what he told him when they met on

Sunday 25 October 2015 at Mr Gordhan's official residence in Pretoria – and what Mr Gordhan picked up in the conversation is consistent with Mr Jonas' version of what he testified had happened that afternoon at the Gupta residence. Mr Gordhan described his interaction with Mr Jonas in the telephone conversation on the afternoon of Friday 23 October 2015 and in their meeting on Sunday 25 October 2015 as follows:<sup>68</sup>

"117.1. Mr Jonas contacted me on Friday, 23 October 2015, wishing to see me upon his return from the Eastern Cape that weekend. He seemed upset by something but did not discuss any details regarding why he wanted to see me.

117.2. I was visited by Mr Jonas on or about Sunday, 25 October 2015, at my Pretoria home. Mr Jonas appeared extremely distraught, upset and emotional. He seemed unable, or hesitant to disclose specific detail about what had caused this (perhaps due to the presence of my wife), and said he found the situation intolerable and that he wanted to resign.

117.3. I tried to calm him down and to prevent him from making any drastic decisions given his state of mind. I dissuaded him from resigning, advising him that it would not be in the best interests of the country for him to leave his position.

117.4. I understood that he was also planning to discuss his situation with Mr Nene.

117.5. Following my re-appointment as Minister of Finance, I became aware of more details of the offer made to former Dep Min Jonas at the Gupta compound, as were later confirmed by him in his media statement, and elaborated on further in his statement and evidence already provided to the Commission."<sup>69</sup>

80. On the probabilities Mr Jonas' version is the truth. Mr D Zuma and Mr Hlongwane's version falls to be rejected as a fabrication. Here are some of the reasons why Mr Jonas' version must be accepted as true:

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<sup>68</sup> Exhibit N1.

<sup>69</sup> Exhibit N1, p 42-43 para 117.1 – 117.5.

- (a) soon after the meeting and as he was on his way to OR Tambo International Airport (coming from the Gupta residence) Mr Jonas called both Mr Gordhan and Mr Nene and both testified that, when he spoke to them that afternoon, they could tell in effect that there was something wrong. In his conversation with them they agreed to meet him on Sunday 25 October 2015 separately.
- (b) when Mr Jonas had landed in the Eastern Cape the same evening or same afternoon, he called Mr Fana Hlongwane and expressed his disgust at what Mr Hlongwane had done to him by being part of a plan to take him to the Gupta residence and he told Mr Hlongwane never to do that again.
- (c) when Mr Jonas met with Minister Gordhan on Sunday 25 October 2015, he wanted to resign and Mr Gordhan dissuaded him from doing so; the content of that discussion also corroborates Mr Jonas' version.
- (d) Mr Jonas said that he was told by the Gupta brother with whom he had the discussion that Mr Nene would be fired and, indeed, Mr Nene was fired six weeks later.
- (e) according to Mr Jonas, Mr Gupta had told him that, if he agreed to be the Minister of Finance and to work with them, they would provide him with advisors and the person who was appointed to succeed Mr Nene as Minister of Finance after Mr Jonas had rejected the Gupta offer, namely, Mr Des Van Rooyen, came to the National Treasury with Gupta-linked advisors one of whom he only met for the first time a day or two after his appointment.
- (f) according to Mr Jonas, Mr Gupta told him that two of the people with whom the Guptas were working were Mr Brian Molefe and Ms Lynn Brown and, indeed,

the evidence led in this Commission has proved that both Mr Brian Molefe and Ms Lynn Brown were working with the Guptas or were associates of the Guptas.

- (g) on Mr D Zuma's and Mr Hlongwane's version, the meeting ended on a positive note whereas on Mr Jonas' version it ended on a negative note; both Mr Nene and Mr Gordhan both of whom were called by Mr Jonas after the meeting and on his way to the airport suggested that, when Mr Jonas called them that afternoon, they could detect that there was something wrong or that he was concerned about something.
- (h) the reason that President Zuma gave in his media statements of 10 and 11 December 2015 for dismissing Minister Nene made no sense, thus giving credence to the proposition that it was not the true reason and the true reason was one he could not give publicly.
- (i) Mr Des Van Rooyen, who was appointed as Minister of Finance to replace Minister Nene was a Gupta Minister; he had visited the Gupta residence several times from around the end of October 2015 (when Mr Tony Gupta met him for the first time) to the 9<sup>th</sup> December 2015 when he was appointed as Minister of Finance; he appointed as his advisors Gupta associates who must have been given to him by the Guptas; these advisors were Mr Kuban Moodley and Mr Mabaso. As if the Gupta-linked people announced were not enough, his Department took a Ms Kellerman who used to be at Alexkor and whose conduct at Alexkor links her to the Guptas; in this regard it is important to remember that, before President Zuma announced Minister Nene's dismissal, Mr Enoch Godongwana of the ANC had called Mr Fuzile in the late afternoon on 9 December 2015 and told him that he was going to get a Minister of Finance who would come with two advisors that he did not know and that is what actually

- happened. Mr Van Rooyen must have received the approval of the Guptas to be appointed Minister of Finance and he came to National Treasury with advisors he did not know.
- (j) according to the evidence of Ms Mothepu, on Monday 26 October 2015 she, too, heard that Mr Nene was going to be fired as Minister of Finance; she said she heard this from Mr Woods, a Gupta associate.
- (k) both Mr Nene and Mr Gordhan corroborated Mr Jonas' version in certain important respects.
- (l) Mr Jonas testified that on or about 16 January 2016 he met with the then ANC Treasurer-General, Dr Zweli Mkhize, and the latter asked him about the rumours at the time that he had been offered the position of Minister of Finance by the Guptas. Mr Jonas confirmed that he told Dr Zweli Mkhize that he had had a meeting at the Gupta residence on 23 October 2015 and what had transpired in that meeting. Dr Zweli Mkhize was asked to depose to an affidavit or to provide the Commission with an affirmed declaration and comment on Mr Jonas' evidence in this regard. Dr Zweli Mkhize furnished the Commission with an affidavit in which he confirmed that he had met with Mr Jonas on 6 January 2016 and he had asked Mr Jonas about the rumour that the Guptas had made him an offer and he said that Mr Jonas did confirm this to him on the 16<sup>th</sup> January 2016.
- (m) there is no evidence that Mr Nene co-operated with the Guptas or President Zuma in respect of any wrongdoing; in fact, the evidence proves that Mr Nene put up serious resistance to President Zuma's and Ms Dudu Myeni's and Minister Joemat-Pettersson's efforts to get him to approve transactions that were not in the interests of the country.

(n) the Guptas initially issued a media statement denying that there was a meeting attended by Mr Jonas at the Gupta residence on 23 October 2015 when the news of that meeting broke out in March 2016 but had to concede later that such a meeting had taken place.

(o) Mr Hlongwane was not able to explain what caused his friendship with Mr Jonas to end when they had been friends for many years and yet he accepted that, after the meeting on 23 October 2015, their friendship did not continue but Mr Jonas was able to explain that their friendship came to an end because of Mr Hlongwane's role in him being brought to the Gupta residence.

81. Accepting Mr Jonas' version does not mean that his evidence was perfect. It was not. When one has regard to the evidence he gave before the Public Protector, it is clear that there are certain discrepancies between what he told the Public Protector and what he told the Commission but the discrepancies do not affect the main pillars of his version. He had no reason to lie about what was discussed at that meeting whereas Mr Duduzane Zuma and Mr Hlongwane had a reason to lie because, if they admitted Mr Jonas' evidence, they would implicate not just Mr Tony Gupta in criminal conduct but possibly themselves, too.

#### **MINISTER NHLANHLA NENE'S RESISTANCE TO WRONGDOING AND HIS ULTIMATE DISMISSAL BY PRESIDENT ZUMA**

82. Mr Nhlanhla Nene was appointed as Deputy Minister of Finance by President Motlanthe in 2008 and served in that capacity for the rest of President Motlanthe's term as President. After the general elections in May 2009, President Zuma, who was elected by Parliament as the President of the country, appointed Mr Nene as Deputy Minister of Finance. He served in that capacity for five years from May 2009 to May 2014. During this time Mr Pravin Gordhan was the Minister of Finance. After the May 2014 elections

President Zuma appointed Mr Nene as Minister of Finance. President Zuma dismissed Minister Nene as Minister of Finance because he was not co-operating with the Guptas and resisted various attempts by President Zuma, and Ms Dudu Myeni to get the National Treasury to approve wrongdoing or because he resisted the attempts to capture the National Treasury. What follows is a discussion of Mr Nene's resistance and his ultimate dismissal by President Zuma.

### **The Nuclear Deal**

83. During Mr Nene's first term as Minister of Finance, President Zuma wanted the South African government to conclude a nuclear deal with Russia. Mr Nene said that preparations for a nuclear build programme had begun in 2011 when the Cabinet approved and implemented an Integrated Resource Plan (IRP 2010) which provided for nuclear power to contribute an additional 9.6 GW to the energy mix by 2030.<sup>70</sup> The first new plant was to come online in 2013.
84. Mr Nene testified that, after the Department of Energy had provided National Treasury with a draft feasibility study for the new programme and the National Treasury had reviewed the feasibility study, it became apparent to him that, regardless of the underlying policy rationale for developing nuclear energy capacity, the costs associated with the programme were astronomical.<sup>71</sup> Mr Nene said in his statement:

"The envisaged 9.6 GW nuclear new build programme would have constituted the largest public investment programme in South African history and, relative to the size of the South African economy would have been one of the largest public sector investments ever undertaken internationally. The total investment required would have had material consequences for Eskom's and the country's foreign and domestic debt, fiscal and financial position, the balance of payment and sovereign

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<sup>70</sup> Exhibit K1, p 21, para 59.

<sup>71</sup> Exhibit K1, p 22, para 63.

balance sheet for decades to come, as well as investment grading, which would have had implications for all South Africans."<sup>72</sup>

85. Mr Nene testified that he was very concerned that the recovery of the nuclear build cost through the tariff would have profound consequences for the economy and South African users of electricity. He said that this point had become much clearer for him in the face of mounting resistance to electronic tolling in Gauteng. In that connection, Mr Nene said: "The 'user pay principle' was being turned on its head. Construction costs that had originally been meant to be recovered through tariffs were being paid for from general tax revenue with deleterious consequences for public policy and fiscal managements."<sup>73</sup>

86. Mr Nene said that the funding model for the nuclear programme was central to the determination of affordability. He said that key issues were the fiscal affordability of the funding or guarantees to secure borrowing that would be required to finance the project and the impact on the economy of the electricity tariff required to repay the debt used to finance the project.<sup>74</sup> He said:

"In light of the legal obligations of my position, I would ultimately have to approve the funding model based on its viability."<sup>75</sup>

87. On 22 September 2014 the Minister of Energy, Ms Joemat-Petterson announced that Russia and South Africa had signed an intergovernmental framework agreement. Mr Nene said that that agreement laid the foundation for nuclear programme procurement.<sup>76</sup> On 10 June 2015 the Minister of Energy tabled in Parliament five inter-

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<sup>72</sup> Exhibit K1, p 22, para 63.

<sup>73</sup> Exhibit K1, p 22, para 64.

<sup>74</sup> Exhibit K1, p 23, para 66.

<sup>75</sup> Exhibit K1, p 22, para 63.

<sup>76</sup> Exhibit K1, p 23, para 67.



governmental nuclear cooperation agreements that had been concluded with the Russian Federation, France, the People's Republic of China, the USA and South Korea for approval.<sup>77</sup> On the same day the Cabinet took a decision that required the Minister of Energy, in consultation with the Minister of Finance and the NNEEC, as a matter of urgency, to present a memorandum to Cabinet that would deal with the financial implications, proposed funding model, risk mitigation, strategies for the nuclear build programme and the contributions by countries as contained in the inter-governmental agreements.<sup>78</sup>

88. A BRICS Heads of State or government summit took place in Russia from the 8<sup>th</sup> to the 9<sup>th</sup> July 2015. By the time of this summit the Minister of Energy and Mr Nene as Minister of Finance had not produced the memorandum that Cabinet had asked them to produce. Mr Nene testified that President Zuma criticised him for the absence of that memorandum. Mr Nene testified that President Zuma said that he was not happy that Mr Nene had not done what he was supposed to have done a long time earlier so that he could present something to President Putin of Russia at their one-on-one meeting.<sup>79</sup>
89. Ms Joemat-Petterson presented Mr Nene with a draft letter addressed to the Russian authorities for him to consider and sign.<sup>80</sup> Mr Nene refused to sign the letter because he took the view that it would provide Russia with some form of guarantee on the nuclear programme if the Russian government decided or agreed to finance it. Mr Nene told the Commission that, although this was a letter and not an agreement, if he signed it, the consequence would have been a binding financial commitment by the South African government. Ms Joemat-Petterson revised the letter and presented it to Mr Nene again later. Mr Nene rejected the letter again. He did this because the financial

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<sup>77</sup> Exhibit K1, 23-24, para 68.

<sup>78</sup> Exhibit K1, p 24, para 69.

<sup>79</sup> Exhibit K1, p 25, para 72.

<sup>80</sup> Exhibit K1, p 25, para 73.

and fiscal implications that he was concerned about remained.<sup>81</sup> He said that Ms Joemat-Peterson was concerned as to what she was going to say to President Zuma. Mr Nene testified that he told her that he did not know what she should say but he would not sign without seeing and approving the funding model as duly required by the Cabinet and without the necessary processes being followed for such a big project.<sup>82</sup>

90. Mr Nene testified that, as a result of his refusal to sign the letter, he was seen as the person standing in the way of the nuclear deal. He told the Commission that he was accused of insubordination, not only by President Zuma but also by some of his Cabinet Colleagues. He said that he recalled that the attitude of his Cabinet Colleagues, particularly the Minister of International Relations, Minister Maite Nkoana-Mashabane and the Minister of State Security, Minister David Mahlobo, was hostile. Mr Nene testified that they wanted him to sign and he felt that it was not right to sign because the issues on the nuclear deal had not been finalised.<sup>83</sup> Mr Nene said that, as Minister of Finance, he was "responsible for ensuring the secure, accountable, sound, transparent, effective and efficient management of the country's public finances, sovereign debt and the economy." He pointed out that section 66 of the Public Finance Management Act provided that only the Minister of Finance had the power to enter into a transaction that would bind the National Revenue (i.e. the fiscus) to any future financial commitment.<sup>84</sup>

91. Mr Nene testified that, he told President Zuma that he could not sign the letter without first having interrogated the financial and fiscal implications and proposed funding model. He said that this was in line with his statutory mandate as well as Cabinet's decision of ensuring sound management, not only of the government's finances but

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<sup>81</sup> Exhibit K1, p 25-26, paras 73-5.

<sup>82</sup> Exhibit K1, p 26, para 75.

<sup>83</sup> Exhibit K1, p 26, para 76.

<sup>84</sup> Exhibit K1, p 27, para 77.

also those of the institutions governed by the PFMA.<sup>85</sup> Mr Nene said that he knew from how Mr Zuma had treated him in Russia that he was very unhappy with his refusal to sign the letter that Ms Joemat-Petterson had presented to him. He testified that this was later confirmed to him by Mr Mcebisi Jonas after Mr Nene's return from Russia. Mr Nene told the Commission that Mr Jonas told him about two weeks after he had returned from Russia that President Zuma had called him to a meeting in which President Zuma had expressed his dissatisfaction with Mr Nene, particularly the stance that Mr Nene had taken on the nuclear procurement process in Ufa, Russia and his refusal to sign the letter presented to him by Ms Joemat-Petterson.<sup>86</sup>

92. I directed Mr Jonas to depose to an affidavit or an affirmed declaration and comment on this evidence by Mr Nene. That direction was in terms of Regulation 10(6) of the Regulations of the Commission. He did so and confirmed that he had been called by President Zuma to a meeting at which President Zuma had expressed his dissatisfaction with Mr Nene, particularly his refusal to sign the letter that Minister Joemat-Petterson had presented to him for signature. Mr Nene stated that what Mr Jonas told him confirmed what he already knew. The meeting in Russia was from 8-9 July 2015. So, two weeks after that would have been around 20 July 2015. This means that President Zuma expressed his dissatisfaction with Mr Nene about three months before the meeting that Mr Jonas attended at the Gupta residence on 23 October 2015 when he was told by Mr Tony Gupta that Mr Nene was going to be fired.
93. Mr Nene testified that later he asked the Director-General of Treasury together with other senior officials of the National Treasury to form a joint task team with officials from the Department of Energy. The joint task team was going to undertake the required detailed technical work and prepare a technical report for submission to Cabinet on the

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<sup>85</sup> Exhibit K1, p 27, para 78.

<sup>86</sup> Exhibit K1, p 28, para 81.

financial implications, funding model and risk and mitigation strategies relating to the proposed of 9.6 GW nuclear new build programme as had been instructed by the Cabinet.<sup>87</sup>

94. Mr Nene stated that in September 2015 the joint task team provided him with its preliminary report on the fiscal and financial implications, funding model and risk mitigation for the nuclear build programme. The report set out the key considerations in respect of the programme; funding model, and key risks; modelling of the fiscal implications and conclusions and recommendations. He said that in essence the conclusion of the preliminary report was that, even under optimistic assumptions regarding the cost of the programme that did not allow for the significant cost overruns seen in the Medupi and Kusile projects and moderate economic growth assumptions of 2-3 percent, the government debt would grow exponentially. Mr Nene said that this would be "absolutely fiscally unsustainable".<sup>88</sup>
95. Mr Nene told the Commission that, as a way of moderating the risks, the Treasury team recommended spreading the construction over a longer period of time, maintaining flexibility by not entering into any legally-binding commitment beyond two units of nuclear power stations upfront and making stop-go decisions based on an assessment of the progress in implementation, the economic environment, fiscal position and affordability.<sup>89</sup> He said that the Treasury team managed to convince the officials from the Department of Energy that this was the way to go. The Department of Energy officials were, ultimately, persuaded that the phased procurement approval was the way to go.<sup>90</sup> The Treasury team recommended the provision of R200m for a feasibility study

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<sup>87</sup> Exhibit K1, p 29, para 82.

<sup>88</sup> Exhibit K1, p 29, para 83.

<sup>89</sup> Exhibit K1, p 29, para 84.

<sup>90</sup> Exhibit K1, p 30, para 85.

for preparatory work that would allow for a more thorough consideration of the costs, risks and benefits.<sup>91</sup>

## SAA

96. Another matter that may have been a factor in President Zuma's decision to remove Mr Nene is how Mr Nene had handled SAA's requests for guarantees and how he handled the Airbus contract. With regard to the SAA Mr Nene stated as a matter of background that:

(a) in December 2014 SAA was removed from the administration of the Department of Public Enterprises to that of National Treasury.<sup>92</sup>

(b) at the time of the transfer of the SAA from the Department of Public Enterprise to National Treasury, SAA's financial position was "extremely weak". In this regard Mr Nene pointed out that:

- (i) in the 2012/2013 financial year SAA had suffered a loss of R1,2 billion.
- (ii) in the 2013/2014 financial year the loss more than doubled – it increased to R2.6 billion.
- (iii) when SAA was transferred to Treasury for the 2014|2015 financial year it was on track to realise an even greater loss which eventually almost tripled amounting to R5.6 billion.
- (iv) SAA was technically insolvent because its assets were worth about R3.5 billion as at March 2014 and its liability exceeded that amount.
- (v) SAA was only able to raise funding with the support of government guarantees.

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<sup>91</sup> Exhibit K1, p 30, para 87.

<sup>92</sup> Exhibit K1, p 35, para 102.

(vi) by December 2014 a total of R7,906 billion in guarantees had already been issued to SAA to enable it to continue operating as a going concern.<sup>93</sup>

97. Mr Nene testified that, given the above financial situation of SAA, it was incumbent upon him, as Minister of Finance, to ensure that decisions taken by SAA were responsible,<sup>94</sup> particularly because with effect from some time in December 2014 SAA fell under the administration of the National Treasury.

98. Mr Nene testified that on 21 November 2014 the Minister of Public Enterprises at the time wrote to him requesting Mr Nene's concurrence for the issuance of a R6,488 billion perpetual going concern guarantee in favour of SAA. Mr Nene testified that the guarantee was intended to enable SAA to finalise its financial statements on a going concern basis and secure the liquidity necessary to meet its commitments.<sup>95</sup> Mr Nene testified that at that time SAA's cash flow forecast showed that it would run out of cash by mid-January 2015 unless additional guarantees were provided. He said that this would have triggered a default by SAA on its guaranteed debt, requiring government to meet the obligations on SAA's behalf as well as negative economic impact and loss of jobs.<sup>96</sup>

99. Mr Nene testified that on the 22nd December 2014 he issued the guarantee in favour of SAA in his new capacity as the Executive Authority for SAA. He said he did so after taking into account the recommendations of the Fiscal and Liability Committee of National Treasury. He said that in August 2015 – that is about nine months after Mr Nene had issued the other guarantee – SAA once again applied for an additional

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<sup>93</sup> Exhibit K1, p 35, para 102.

<sup>94</sup> Exhibit K1, p 36, para 103.

<sup>95</sup> Exhibit K1, p 36, para 104.

<sup>96</sup> Exhibit K1, p 36, para 105.

guarantee of R5 billion. He said that, like the other one, this guarantee was also sought in order for the airline to be able to finalise its financial statements.<sup>97</sup>

100. Mr Nene stated that the Fiscal and Liability Committee recommended that he should not approve the issuance of that guarantee because of concerns that there was no financial case to support the issuance of the guarantee and that the governance challenges at SAA did not provide a basis for confidence that the airline would turn around within the projected timeframes.<sup>98</sup> The Fiscal and Liability Committee evaluates all applications for guarantees and makes recommendations to the Minister of Finance. In evaluating applications for guarantees, this Committee determines what the probabilities are that the guarantee might be called. The calling of a guarantee means that the national revenue fund has to make good some or all the amount guaranteed.<sup>99</sup> Mr Nene said that if a guarantee is issued to an entity whose balance sheet and cash flows are weak, it can be a huge inconvenience to the country.<sup>100</sup>
101. Mr Nene testified that against the above background he wrote to Ms Dudu Myeni, the chairperson of the SAA Board, requiring that certain outstanding matters be finalised by the 18<sup>th</sup> September. Concluding, those matters would have assisted in improving the financial performance of SAA. One of the matters was the conclusion of the Airbus contract.<sup>101</sup> Mr Nene did not receive any response from Ms Myeni by the 18<sup>th</sup> September 2015. Accordingly, on the 28<sup>th</sup> September 2015 Mr Nene wrote again to Ms Dudu Myeni requiring that the outstanding matters be finalised the following day, namely, 29 September 2015. Mr Nene was to table SAA's financial statements in Parliament by 30 September as prescribed by the PFMA. On the 29<sup>th</sup> of September 2015 Ms Myeni responded to Mr Nene's letter. Mr Nene says in her response Ms Myeni

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<sup>97</sup> Exhibit K1, p 36-37, para 106-7.

<sup>98</sup> Exhibit K1, p 37, para 108.

<sup>99</sup> Exhibit K1, p 38, para 109.

<sup>100</sup> Exhibit K1, p 38, para 111.

<sup>101</sup> Exhibit K1, p 38, para 112.

provided a "high level review and update on the outstanding matters that he had raised."<sup>102</sup>

102. Mr Nene stated that in his letter to Ms Myeni dated 30 September 2015 he stressed to Ms Myeni that the decision on A320/A330 swap transaction would have a material impact on the amount of support required and that delays in reaching finality on the airbus contract could delay a decision on the going concern request.<sup>103</sup>
103. It is apposite to deal with the Airbus contract at this stage. In 2002 SAA and Airbus had concluded a contract in terms of which SAA would purchase fifteen A320 aircrafts (A320s) from Airbus which was later (in 2008) amended so as to increase the number of A320s to 20. Ten had already been delivered between 2013 and 2015. The other ten were to be delivered between 2015 and 2017.<sup>104</sup> However, SAA had subsequently concluded a new contract with Airbus with regard to the remaining ten in terms of which the agreement to purchase the remaining ten was cancelled and SAA would enter into operating leases of five long haul A330-300 carriers from Airbus. Airbus was going to refund SAA an amount of R1,3 billion which was made up of pre-delivery payments that SAA had already made in respect of the ten A320s. This refund would reduce the financial pressure on SAA's tight liquidity position. On 30 July 2015 Mr Nene had approved this agreement between Airbus and SAA. He confirmed his approval in September 2015.<sup>105</sup>
104. Mr Nene testified that, after he had approved the operating lease in respect of the remaining 10 A320s, Ms Myeni changed her position. She now proposed in effect that the operating lease transaction should not be proceeded with but that, instead, SAA should purchase the A330s from Airbus and then enter into a sale and lease back

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<sup>102</sup> Exhibit K1, p 38-39, para 113-4.

<sup>103</sup> Exhibit K1, p 38-39, para 114.

<sup>104</sup> Exhibit K1, p 39, para 115.

<sup>105</sup> Exhibit K1, p 39, para 116.



agreement of the aircrafts with a local leasing company. Mr Nene responded to Ms Myeni's letter by way of letter of 30 September 2015. Mr Nene testified that in that letter he told Ms Myeni that he would need an assurance that any such amendment would leave SAA in a better financial position than would otherwise have been the case if the swap transaction that he had approved had been proceeded with. He also testified that he told Ms Myeni in the letter that steps would have to be taken to mitigate any risks that could arise from the original swap transaction not being proceeded with.

105. Mr Nene also testified that he told Ms Myeni that, if there was a material amendment to the swap transaction he had approved, SAA would need to resubmit an application for approval in terms of section 54(2) of the PFMA. Mr Nene said he told Ms Myeni that he required that the rationale for reconsidering the application as well as a comprehensive business case and the financial implication of the alternatives that were being considered be provided for his consideration. He said that these requirements were reiterated several times in his subsequent correspondence with Ms Myeni.
106. Mr Nene testified that in October 2015 he became aware that Airbus was threatening to walk away from the swap transaction because of delays in its finalisation. He testified that, if Airbus walked away from that transaction, it would have reverted to the original purchase agreement because that agreement was still in place. Mr Nene said that the consequence would have been that SAA would have had to pay the pre-delivery payments for which funds had not been secured. He said that SAA would also have had to recognise impediments that would negatively impact the financial performance of the airline – something that would not happen if SAA continued with the swap transaction.
107. Mr Nene testified that it also came to his attention that, in the absence of the conclusion of the swap transaction Airbus intended to, or, sought to, enforce the original purchase

agreement and was demanding payment of the pre-delivery payments. Mr Nene said he was informed that the most immediate payments, which were done at the end of November 2015, amounted to \$44 million. Mr Nene testified that, if SAA had to pay that amount, that would result in a cash shortfall and there would be a significant risk of a default by SAA. Given this situation, Mr Nene believed that immediate and decisive action was required to conclude the swap transaction.

108. Mr Nene testified that, following repeated entreaties, SAA submitted a "business case" on the 9th November 2015. He said the "business case" revealed a number of gaps and flaws. He said that, after reviewing the "business case", he wrote to Ms Myeni on the 12th November 2015 indicating that the business case provided little in the way of concrete information that would be required to make an informed decision and requested additional details.
109. Mr Nene stated that during November 2015 it became evident, in the light of the National Treasury's review of the sale and lease back proposal of SAA, that SAA had not demonstrated that there was certainty that the proposed amendments to the transaction structure would leave SAA in a better financial position than would have been the case under the swap transaction structure. Mr Nene testified that in fact there was even a significant risk that it would leave SAA in a materially worse off financial position where it would be unable to meet its commitments as they fell due. This meant that there was a high probability of SAA defaulting on its government guaranteed debt which would have had severe consequences for the fiscus and the economy.
110. On the 2nd December 2015 Mr Nene decided not to approve the sale and lease back proposal sought by SAA. Mr Nene publicly announced his decision in a statement on 3 December 2015. The statement basically contained the three or so points dealt with above as reasons for the refusal to approve the transaction. It added that, although

possible benefits could be realised through allowing SAA to pursue the sale and lease back proposal, those were outweighed by the probability of a default on the government guarantees and the severe consequences thereof. Mr Nene testified that he and National Treasury were concerned about the severe negative consequences for SAA and country if SAA were to default. He said that "as with the nuclear built proposal, we were concerned about the impact of the deal on government capacity to deliver on its social and development objectives".

### **The Khartoum route**

111. Mr Nene testified that by way of a letter dated 17 June 2015 Ms Myeni asked him to consider the outcome of a business case for SAA to open a new route from Johannesburg to Khartoum via Entebbe, Uganda. He testified that the business case was said to provide a basis on which he could present the results to President Zuma. He said Ms Myeni's letter made it clear that President Zuma knew about the idea. Mr Nene says that the letter came three days after the Sudanese President, President Omar al-Bashir had left South Africa after attending a summit of the Heads of State and Heads of Government of the African Union. He stated that the proposal was made in circumstances where the executive management of SAA did not agree with the proposal. Mr Nene decided that he did not support the proposal because a review of the letter from Ms Myeni and the Business Case showed that, if the proposal was accepted, SAA would incur losses in the first two years of operating such a route which was money that SAA simply did not have.
112. Mr Nene stated that his decision not to approve the Khartoum route and "other similar decisions frustrated Ms Myeni and President Zuma. He told the Commission that he suspected that this and other decisions he made contributed to President Zuma's decision to fire him. The other decisions he must have been referring to must include

the position he adopted on the procurement of nuclear and on the Airbus deal relating to SAA.

#### **MR NENE'S MEETING WITH PRESIDENT ZUMA AND MS MYENI**

113. Mr Nene testified that he was extremely concerned by the leadership instability at SAA. He said that his concern increased from August 2015 when several senior executives were either replaced or resigned citing a breakdown of trust with the board. Mr Nene thought that a stable executive management team was crucial to the implementation of the turnaround strategy so that the airline could return to financial sustainability. He stated that he asked the Board to brief him on those developments and their impact on the operations of the airline.

114. Mr Nene testified that on the 3rd of November 2015 he attended an ANC Study Group meeting. He testified that in that meeting he said:

"Either Ms Myeni leaves or I leave".

115. Mr Nene testified that Ms Myeni was not at that meeting but this was reported to her. It is interesting that as at the beginning of November 2015 – about five or so weeks before his dismissal, Mr Nene felt that his relationship with Ms Myeni had reached a point where he thought the President should make his choice either to fire Ms Myeni or him.

116. Mr Nene testified that some time in November 2015 he was called to a meeting with former President Zuma and Ms Myeni. Mr Nene stated that at that meeting President Zuma said that he was trying to get him and Ms Myeni to "find each other". Mr Nene testified that he found this strange as Ms Myeni reported to him and the President was treating them like two errant school children. He told the Commission that it was an awkward meeting. He said that he realised that there was little that could be achieved at that meeting because it appeared to him that it was intended to allow Ms Myeni to

complain. He testified that he stated the issues as he saw them and said that he felt that Ms Myeni was obstructive and that she played the media.<sup>106</sup>

117. Mr Nene told the Commission that he had told President Zuma and Ms Myeni that he was of the view that Ms Myeni should be removed from the Board. In this regard Mr Nene testified that he pointed out that under Ms Myeni's leadership the airline had persistently been in crisis throughout the year and reckless action by the Board had repeatedly exacerbated rather than averted the crisis. Mr Nene testified that he told President Zuma and Ms Myeni that on a number of occasions this had meant that there was a material threat that the airline would default on its government guaranteed obligations which would have had negative consequences for the fiscus and the economy. He said that after expressing his views, he requested to be released from the meeting and he was released.<sup>107</sup>

#### **PRESIDENT ZUMA'S MEETING WITH SELECTED CABINET MINISTERS ON THE NUCLEAR DEAL ON 8 DECEMBER 2015**

118. A meeting of all the Cabinet members whose portfolios were relevant to the nuclear deal was called by President Zuma for 15h00 on the 8<sup>th</sup> December 2015. Mr Nene said that he and the Treasury officials were later advised that the meeting would take place at 16h00. He testified that, when he and Treasury officials arrived for the meeting just before 16h00, they found that a consultation had already taken place between President Zuma and Mr Nene's Cabinet colleagues including State Security Minister David Mahlobo, International Relations Minister Maite Nkoana-Mashabane, Public

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<sup>106</sup> Exhibit K1, p 43, para 128.

<sup>107</sup> Exhibit K1, p43, para 128.

Enterprises Minister Lyn Brown and Energy Minister Tina Joemat-Petterson from which Mr Nene and his officials had been excluded.<sup>108</sup>

119. The meeting that Mr Nene attended was then held. Mr Nene testified that at the meeting that he attended nothing was said about the earlier consultation between President Zuma and the other Cabinet Ministers. At the meeting officials from the Department of Energy presented the proposed nuclear programme to the President and other Ministers. Mr Nene stated that the presentation did not reflect the input from Treasury regarding the concerns with the feasibility of the programme and the possible escalated approach. Mr Nene said that, instead, the officials presented a procurement plan that was based on the production of 9.6GW of nuclear energy.<sup>109</sup>
120. Mr Nene said that the Energy Department's assumptions were extremely optimistic with respect to the assumed construction cost and exchange rate implications resulting in a much lower cost for the programme than was realistic. Mr Nene said that additionally there was no consideration of fiscal implications under different economic scenarios. He said that the presentation assumed an exchange rate of R10/USD whereas the exchange rate assumed by Treasury was between R12 and R14 to the dollar. Mr Nene stated that in fact on the 8<sup>th</sup> December 2015 the exchange rate was R14,57 to the dollar.
121. Mr Nene testified that the failure of the officials from the Department of Energy to show the President and the Ministers a scenario depicting that day's exchange rate meant that the Committee was presented with a 40% understatement of the cost of nuclear. He said that this was a gross material understatement of the project. Mr Nene testified that, after the presentation, President Zuma asked him whether he had anything to say in response. Mr Nene testified that he pointed out that the concerns of the National Treasury were not included in the presentation. In particular, he said that he noted that

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<sup>108</sup> Exhibit K1, p 30-31, para 88.

<sup>109</sup> Exhibit K1, p 31, para 88-9.

the assumptions in relation to the exchange rate were optimistic and that there was still no funding model accompanying the presentation. However, Mr Nene told the Commission that he did not really think that there was any point in saying more and resisting any further. He testified that he suggested that the officials from the Department of Energy and from Treasury should finalise the presentation for the Cabinet meeting the next day.

122. Mr Nene said he asked the Director-General of the National Treasury, Mr Fuzile, to make an input Mr Nene testified that Mr Fuzile expressed serious concerns, at length, regarding the cost implications of the proposal and the failure by the Department of Energy to phase the construction over a longer period of time. Mr Nene testified that that meeting of the 8<sup>th</sup> December 2015 ended with a decision to proceed with the nuclear programme proposal by the Department of Energy despite the contrary views of the National Treasury. Mr Nene told the Commission that President Zuma made an off the cuff remark that the National Treasury would not "do to us what you did with PetroSA". President Zuma was referring to a failed transaction relating to PetroSA that he seems to have wanted to succeed which was dealt with during Mr Gordhan's first term as Minister of Finance. That transaction is dealt with in the part of the Report that relates to Mr Pravin Gordhan.
123. On the evening of 8 December 2015, after the meeting at the Presidential residence regarding the Nuclear Deal, Mr Nene and his team went to the Sheraton Hotel in Pretoria to have coffee. While at the Sheraton Hotel, they saw a Business Day online report which said that Minister Nene would be removed as Minister of Finance and Mr Des Van Rooyen would replace him. Mr Nene testified that he did not pay much attention to the report, because he had reached the point of "indifference."<sup>110</sup>

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<sup>110</sup> Transcript 3 October 2018 p 91. See annexure NN5.

## THE CABINET MEETING OF THE 9<sup>TH</sup> DECEMBER 2015

124. At the meeting with the President the following morning, 9 December 2015, Mr Nene informed him of the documents that would be tabled at the Cabinet meeting. Of particular importance was to apprise the President of the budget allocations for the next year. As this was the last Cabinet meeting of the year, Cabinet needed to adopt the Budget recommendations so that preparations could be undertaken over the vacation period. The President did not at this stage raise his intention to remove Mr Nene from office.
125. The Cabinet meeting began at 8:30am. The Cabinet minutes revealed that in short, and subject to some alterations, the Cabinet approved a proposal from the Department of Energy regarding the nuclear deal. Nothing was mentioned about a phased approach, or any compliance with the PFMA or a feasibility study. The outcome of the meeting, on the nuclear issue, was that Cabinet decided that the Department of Energy should issue a Request for Proposals for the nuclear build programme, with the final funding model to be informed by the responses received to the request.
126. The situation immediately prior to Mr Nene's removal from office was that the proposal was largely in the hands of the Department of Energy, and that to an extent and consistent with a pattern, that the concerns of Treasury had been ignored. In addition, the events at the BRICS Summit in Russia similarly seemed to show that notwithstanding Treasury's concerns, it was proposed to Mr Nene that he should enter into a binding agreement involving Russian supplies for the nuclear deal. There were also attacks on Mr Nene and the integrity and viability of Treasury, which were largely unexplained and have been largely uninvestigated.
127. In these circumstances, Mr Nene confirmed that there was pressure on the National Treasury from the former President and other members of the Cabinet to approve the



nuclear deal. That pressure was immense. Mr Nene agreed with Mr Jonas's contention that this was ultimately the trigger for Mr Nene's dismissal on 9 December 2015 - after he again refused to support the deal at a Cabinet meeting that same day.

128. Mr Nene said that the Cabinet meeting ended around 17h30. He testified that on his way home he received a call from the President's office informing him that the President wanted to see him. He went back to the Union Buildings. He testified that in their brief meeting, President Zuma said to him:

"You would remember that when we were discussing the establishment of the Africa Regional Centre, I had said that we would have to deploy a senior, high-ranking individual to that position?"

129. Mr Nene said he told the President that he remembered that discussion. Mr Nene said that the reference to the Africa Regional Centre was a reference to the Africa Regional Centre of the BRICS New Development Bank (Brics Bank). Mr Nene stated that the BRICS countries had signed an agreement establishing the BRICS Bank. They had done this at the Sixth BRICS Summit in July 2014 in Brazil. The BRICS Bank was to have regional offices the first of which was to be the Africa Regional Centre in Johannesburg.

130. Mr Nene testified that President Zuma continued and said in isiZulu (translation into English provided by Mr Nene in his statement):

"We discussed this matter with the Top 6 and we agreed that we should put you there."

131. Mr Nene said that his response was to ask President Zuma as from when that decision would be effective and President Zuma said that he was going to be making the announcement shortly. Mr Nene said that he then thanked the President for having

given him the opportunity to serve the country as Minister of Finance. He said that they then shook hands and Mr Nene left. Mr Nene said that the entire meeting lasted two or three minutes. On his way home Mr Nene sent Mr Fuzile a message which said: the axe has fallen. That meant that he had been fired.

### **The Impact of Mr Nene's Dismissal on the Financial Markets**

132. Mr Gordhan testified that the announcement of Mr Nene's dismissal resulted in a widespread public outcry. Civil society, organised labour and organised business groups criticised the decision, and demanded urgent corrective action by President Zuma. Over this period, Mr Gordhan stated that he engaged with Ms Lakela Kaunda, the Chief Operations Officer in the Presidency at the time, regarding his concerns, in the national interest, about the economic turmoil and its adverse impact on the country and citizens that followed the removal of Mr Nene. Mr Gordhan stated that he suggested that a team consisting of the Presidency, the South African Reserve bank, Treasury and the private sector meet with investors to reassure them before the markets opened for trading on Monday, 14 December 2015. His primary concern was the need for urgent measures to address the economic and financial harm caused since the announcement of Mr Nene's removal while at the same time remaining conscious that such matters related to the National Treasury and were not within the brief of COGTA.
  
133. According to Mr Gordhan, the devastating impact of the unexpected announcement on the South African economy is estimated to be approximately R500 billion. As commentators and market analysts had described, over two days the market value of the country's biggest financial and property shares fell by R290 billion. This figure excluded the remainder of the equities market that also was hard hit by the decision. South African bonds lost 12% of their capital value (R216 billion). The Rand depreciated sharply from R13.40 to R15.40/USD overnight.

134. Mr Gordhan testified that Mr Nene's dismissal by President Zuma was one of those decisions that really shocked the whole country and many parts of the world which trade with South Africa.
135. According to Mr Gordhan, "the announcement of Mr Nene's removal caused economic and financial market turmoil and a sharp depreciation in the value of the Rand. Once markets closed for the weekend, there were ongoing fears that the situation would worsen when they re-opened on Monday, 14 December 2015."
136. Mr Mogajane testified that "the National Treasury had calculated, recognising all variables and noting pre-conditions that the so-called 'Nene Gate' cost 1.1 per cent of GDP by the end of 2017, 148 000 jobs lost, and a reduction of R378bn JSE market capitalisation."

#### **The true reasons for Mr Nene's dismissal**

137. What were the true reasons for President Zuma's decision to fire Minister Nene? President Zuma had already shown himself as someone who was prepared to remove a person from a position if that person was not prepared to cooperate with the Guptas. This was shown by the removal of Mr Themba Maseko by President Zuma from his position as Chief Executive Officer of GCIS despite the fact that Mr Maseko had not asked to be removed or transferred and despite the fact that his performance of his work had just been assessed as more than 100%. As explained in Part 1 of the Report, President Zuma had removed Mr Themba Maseko unlawfully at the behest of the Guptas because he had refused to co-operate with the Guptas. He did so in order to advance the business interests of the Guptas and his son, Duduzane Zuma.
138. Mr Nene was dismissed in the early evening of Wednesday the 9<sup>th</sup> December 2015 after a cabinet meeting that had run from about 08h30 to 17h30. President Zuma told him

that he was relieving him of his position as Minister of Finance because the previous day (i.e. 8 December 2015) he and the ANC Top 5 had agreed that Mr Nene should be deployed to the position of Head of the Regional Centre of the BRICS Bank in Johannesburg. In a media statement issued by President Zuma on 9 December 2015 when he announced changes to the Cabinet, President Zuma said that he had "decided to remove Mr Nhlanhla Nene as Minister of Finance ahead of his deployment to another strategic position." In that media statement Mr Zuma also said about Mr Nene:

"Mr Nene has done well since his appointment as Minister of Finance during a difficult economic climate.

Mr Nene enjoys a lot of respect in the sector locally and abroad, having also served as a Deputy Minister of Finance previously."

139. Two days after Mr Nene's dismissal and the issuing by President Zuma of the media statement of the 9<sup>th</sup> December 2015 – on the 11<sup>th</sup> December 2015 - President Zuma issued another media statement in which he described Mr Nene's performance as Minister of Finance as "a sterling contribution..." He put it thus in the statement:

"I would like to thank the former Minister of Finance, Mr Nhlanhla Nene for his sterling contribution to the National Executive and to taking forward the goals of building a better life for all our people."

140. In the next two sentences President Zuma went on to say:

"The urgency of the changes in the leadership of National Treasury was occasioned by the need to send nominations to Shanghai, of the head of the African Regional Centre of the New Development Bank/BRICS BANK, to be based in Johannesburg. Mr Nene is our candidate for this position.

We are fully backing his candidature, knowing full well that he will excel and make the nation proud in his next assignment."

141. Based on the above quotations it can be said that, according to President Zuma; the position was as follows:
- (a) Mr Nene was removed as Minister of Finance because he was to be deployed to the position of the Head of Africa Regional Centre of the New Development Bank/BRICS Bank which was to be based in Johannesburg.
  - (b) Nominations for the position referred to above had to be sent urgently to Shanghai and that is why Mr Nene had to be removed urgently from the position of Minister of Finance.
  - (c) Mr Nene had performed excellently as Minister of Finance.
  - (d) Mr Nene was the South African Government's candidate for the position of Head: Africa Regional Centre of the BRICS Bank.
  - (e) President Zuma and his National Executive fully supported Mr Nene's candidature for the position and they knew full well that he would excel and make the nation proud in that position.
142. Mr Nene testified that, when he met with President Zuma and the latter dropped him from his Cabinet, he did not ask President Zuma any question except when his removal would take effect. He said that President Zuma told him that he would be making a public announcement that same evening. Mr Nene said that he thanked President Zuma for the opportunity he had given him to serve the country as Minister of Finance.
143. Mr Nene stated in his affidavit dated 10 October 2018 and in his oral evidence that President Zuma's reasons for removing him were a "fabrication". He put it thus in his statement:

"it is obvious that the "deployment" to the BRICS bank was a fabrication. I say so because the President had no authority to offer me a position or to deploy me to a position in BRICS Bank, nor could such an appointment be considered at that stage at least without due process, which also involves other member countries."

144. Mr Nene also said that at the BRICS Bank there was a formal process for appointments. He pointed out that within the BRICS Bank it is the Vice-Presidents who were responsible for various functions within the Bank and for the responsibility to lead the process of appointment to the Africa Regional Centre of the Bank. He said that the President had no authority to make any appointments at the Bank and, as a Head of State, his role was limited to participation at summit meetings. Mr Nene also stated that in any event he already held the position of Governor at BRICS which was a more senior position than that of the Head of the Africa Regional Centre.
145. Mr Nene implied that the position in question could not be filled without due process and a deployment of any candidate to the position before the exhaustion of due process was not possible. In other words, the point that Mr Nene was making when he said that such an appointment could not be considered without at least due process was that President Zuma could not speak of deploying him to the position in question when there had been no due process as yet. Of course, President Zuma would have known this.
146. Mr Nene testified that the only time Mr Zuma spoke to him about his intended deployment to the position of Head of the Centre was on the day he removed him from the position of Minister of Finance. That means that for over two years after removing Mr Nene as Minister of Finance, President Zuma never followed up with him to tell him what was happening with the BRICS Bank position or to check whether anybody had contacted him with regard to the position. That is not consistent with the conduct of someone who, at the time of Mr Nene's removal, reasonably believed that Mr Nene was about to be appointed to the position.

147. Mr Nene went on to testify that, having left the Ministry of Finance in December 2015, no offer was ever made to him concerning the position of Head: Africa Regional Centre. Not in 2016. Not in 2017. Indeed, no offer or approach had been made to Mr Nene with regard to that position by February 2018 when President Ramaphosa appointed him as Minister of Finance after Mr Zuma had resigned as President of the country and Mr Ramaphosa was elected as President.
148. Mr Riaz "Mo" Shaik, who was Group Chief Executive of the BRICS Bank based in Johannesburg at the time of giving evidence before the Commission, gave evidence that corroborated Mr Nene's evidence that there were due processes that had to be followed before appointments were made at the BRICS Bank. Mr Shaik's evidence also reflected that President Zuma could not have had any power to deploy Mr Nene to the position in question.
149. Mr Shaik testified that he was appointed to the BRICS Bank in 2012. He said that as at the time of Mr Nene's dismissal – on 9 December 2015 - he had been in the bank's employ for about three or four years. He said that the position was advertised and people had to apply for the position. Mr Shaik said that "there was no way a shareholder could impose on the management of the bank a nominee for regional offices without violating the corporate governance of the bank itself. Mr Shaik said it would have made no sense at all for Mr Nene to accept the appointment or deployment to such a position.
150. Mr Shaik pointed out that Mr Nene as Minister of Finance had nominated Mr Leslie Maansdorp to be appointed as the Chief Financial Officer of the BRICS Bank when it was formed which position was at Vice-President level at the Bank. He said that, if Mr Nene had been appointed to the position of Head of Africa Regional Centre, he would have reported to Mr Maansdorp. He said that it would have been odd for Mr Nene to be

appointed to a position that would have reported to a person that he got appointed to the Bank. Mr Shaik said:

“So it would have been incredibly odd for Minister Nene, who in his capacity appointed through regular process and appropriate process an individual to the Chief Financial Officer [and] then only to eventually report to much lower down the line to that office, it just did not make any sense at all.”

151. I requested Mr Gwede Mantashe, Dr Zweli Mkhize and Ms Jessie Duarte to depose to affidavits or affirmed declarations and to comment on Mr Nene’s evidence that President Zuma told him on the 9<sup>th</sup> December 2015 that the Top 6 had agreed the previous day that Mr Nene should be removed as Minister of Finance and be deployed to the position of Head: Africa Regional Centre. In December 2015 Mr Gwede Mantashe was the Secretary-General of the ANC, Dr Zweli Mkhize the Treasurer-General of the ANC and Ms Jessie Duarte, the Deputy Secretary-General of the ANC. They were all part of the so-called Top 6 of the ANC from December 2012 to December 2017. All three of them deposed to affidavits and said that at no stage did President Zuma ever discuss with them nor did the Top 6 ever agree that Mr Nene be removed as Minister of Finance and be deployed to the position of Head: Africa Regional Centre. President Ramaphosa testified that he was never consulted nor involved in any discussion regarding the dismissal of Minister Nene. He said he was informed simply as a matter of courtesy as an official of the ANC. President Ramaphosa also stated in his affidavit he furnished to the Commission<sup>111</sup> that the Top 6 officials of the ANC never held a discussion to the effect that Minister Nhlanhla Nene should be removed from the position of Minister of Finance and be redeployed to the BRICS Bank. He said that he heard this for the first time when President Zuma made the announcement concerning Minister Nene’s dismissal.

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<sup>111</sup> Exhibit BBB3.



152. Mr Mantashe, Dr Mkhize and Ms Duarte all said that in August 2015 President Zuma had suggested at a meeting of the Top 6 that the Top 6 would have to try and get some South Africans appointed to the Africa Regional Centre and the rest of the Top 6 had expressed agreement with President Zuma's suggestion. However, Mr Mantashe, Dr Zweli Mkhize and Ms Duarte made it clear that there was no stage prior to Mr Nene's removal that the Top 6 ever discussed names of candidates for nomination to the position in the BRICS Bank. Mr Mantashe pointed out in his affidavit that the 52<sup>nd</sup> elective conference of the ANC had resolved in 2007 that any appointments of ANC cadres to the Cabinet or removal of ANC cadres from the Cabinet should be effected after consultation with the leadership of the ANC.
153. Upon a proper reading of Mr Zuma's media statements of 9 December 2015 and 11 December 2015 concerning Mr Nene's removal as Minister of Finance it is clear that Mr Zuma removed a Minister whose performance was, in Mr Zuma's own words, "sterling". In other words, a Minister whose performance was excellent. The reason he gave was that Mr Nene was a candidate for the position of Head of the Africa Regional Centre. Minister Nene had been Minister of Finance for only about 18 months when he was removed. His predecessor, Mr Pravin Gordhan, had served a full term of five years as Minister of Finance. Mr Gordhan's predecessor, Mr Trevor Manuel had served for about 13 years under three Presidents. Mr Nene was the first Minister of Finance in more than 15 years to serve for less than a full term.
154. It is undisputed that the position of Head: Africa Regional Centre had not been advertised when Mr Zuma removed Mr Nene. It is undisputed that the formal recruitment process had not even been initiated. On Mr Zuma's own version, Mr Nene was only going to be a candidate. There is no suggestion that there were not going to be other candidates for the position. Both Mr Nene and Mr Mo Shaik testified that President Zuma was one of the shareholders in the Bank and he had no authority to

appoint the Head: Africa Regional Centre. Indeed, Mr Nene said that in the structures of the BRICS Bank he was already occupying a more senior position than the position of Head: Africa Regional Centre. That was the position of Governor of the BRICS Bank. If Mr Nene had taken that position, he would have been taking a lower position than the one he was already occupying in the Bank.

155. Why did President Zuma remove Mr Nene even before Mr Nene was appointed to the BRICS position? Logic dictates that a President would ordinarily not remove a high performing Minister before he had to. Logic dictates that, if the reason why President Zuma was removing Mr Nene from the position of Minister of Finance was to enable him to take up another appointment at the BRICS Bank, he would have only released him when Mr Nene had actually been appointed to the position and not before. In this case President Zuma removed Mr Nene as Minister of Finance when there was no certainty that Mr Nene would get the position. In fact, he removed him when the position had not even been advertised - before the recruitment process could start. He removed him as Minister of Finance knowing that he was to be unemployed for some time? Why? It does not make sense. To make things worse, President Zuma replaced this high performing Minister with someone with no good track record as a performer. That is Mr Des van Rooyen.
156. After Mr Nene had been removed, the world markets reacted very negatively. There was a big outcry in and outside the country about Mr Nene's removal and the appointment of Mr Des van Rooyen as Minister of Finance. Pressure was put on President Zuma to reverse his decision to remove Mr Nene and to appoint Mr Des Van Rooyen as his replacement as that decision had a devastating impact on the South African economy. President Zuma apparently refused to reverse his decision and reinstate Mr Nene but agreed to appoint Mr Gordhan as Minister of Finance and to shift Mr Des van Rooyen to the position of Minister of Co-operative Governance and

Traditional Affairs. He refused to reinstate a Minister that he himself said had done a sterling job as Minister of Finance. When President Ramaphosa gave evidence, he said that he and others spoke to President Zuma urging him to reverse his decision. In the light of this, I asked President Ramaphosa why President Zuma did not reinstate Mr Nene, particularly in the light of the fact that in his own media statement of 11 December 2015 President Zuma had described Mr Nene's performance as "sterling". President Ramaphosa's response to my question was that what President Zuma said in the media statement was "political speak".

157. If President Zuma was prepared, as he was, to move Mr Des van Rooyen to another position, the question that arises is: why did he not want to simply reverse his decision to remove Mr Nene and re-appoint him as Minister of Finance? Mr Nene was available and, I am sure, he would have agreed to return and serve his country. If, as a President, you had such a well performing Minister and you had released him under the circumstances under which President Zuma said he was releasing Mr Nene, why would you not bring such a Minister back when you are put under pressure to reverse your decision? One would have thought that when, as in this case, the President was being asked to reinstate as Minister someone who, on his own version, had excelled in the position, there would have been no difficulty at all in the President reversing his decision. Mr Nene had not misconducted himself. Mr Zuma's refusal to reinstate Mr Nene suggested that the reason why Mr Nene was removed was not because he needed to take up the position of Head: Africa Regional Centre but the reason was a different one. The question is: what was that reason?
158. To establish President Zuma's reason, Mr Jonas' evidence about his meeting at the Gupta residence on Friday, 23 October 2015 is relevant. Mr Jonas testified that one of the things that the Gupta brother he met at the Gupta residence said to him on that occasion was that Mr Nene was going to be fired from his position as Minister of Finance

because he was not working with the Guptas. That is in line with what Mr Maseko said Mr Ajay Gupta said to him in the meeting that the two of them had at the Gupta residence in or about October 2010. That evidence is dealt with in Part 1 Vol 2 of this Commission's Report. However, what is clear from Mr Maseko's evidence is that Mr Ajay Gupta in effect suggested that anyone not co-operating with them, including Ministers, would be "sorted out". Of course, Mr Ajay Gupta told Mr Maseko that, since Mr Maseko was not cooperating with them, he would report him to his seniors and they would sort him out and replace him with someone who would co-operate with them. Indeed, early in February 2011 President Zuma instructed Minister Chabane to remove Mr Maseko from his position of CEO of GCIS and he was replaced with Mr Mzwanele Manyi, who co-operated with the Guptas.

159. What the above means is that two people who gave evidence before this Commission – who might not even have known each other – namely Mr Themba Maseko and Mr Mcebisi Jonas each told the Commission encounters that they each had had with one of two Gupta brothers in separate incidents which happened about five years apart in which incidents each one of these two Gupta brothers had spoken of adverse consequences for anyone who did not co-operate with them or who did not want to work with them. That this is what the two Gupta brothers said in those separate incidents must be true because Mr Themba Maseko and Mr Jonas could not have conspired to fabricate this about these two Gupta brothers.
160. Mr Jonas' evidence was disputed by Mr Duduzane Zuma and Mr Fana Hlongwana who, according to Mr Jonas, were in the same meeting in which Mr Tony Gupta told him that Mr Nene was going to be fired. They said that no one from the Gupta family had a meeting with Mr Jonas on that occasion. However, I have accepted Mr Jonas' evidence as the version that is probably true. Indeed, the fact that Mr Nene was fired only about six weeks thereafter corroborates Mr Jonas' evidence. Indeed, the fact that the reason

that was given by President Zuma as the reason for Mr Nene's removal does not make sense gives even more credence to Mr Jonas' evidence in this regard. Furthermore, Mr Jonas said that Mr Gupta told him that some of the people that they (i.e. the Guptas) were working with were Minister Lynn Brown and Mr Brian Molefe. There is evidence that reveals that the two were working with and co-operating with the Guptas. That evidence is dealt with elsewhere in this Report.

161. President Zuma was capable of dismissing someone who did his or her job excellently if that person was not prepared to co-operate with the Guptas. That is what he did with Mr Themba Maseko. He removed him from his position as the CEO of GCIS after he had refused to co-operate with the Guptas. A few weeks before his removal, Mr Maseko's performance had been assessed to be more than 100%. That means that he was an excellent performer. Mr Ajay Gupta had told Mr Maseko that, if any Minister did not co-operate with them, they reported him or her to President Zuma.
162. Apart from what emerged from Mr Maseko's evidence as to what the nature of the relationship between President Zuma and the Guptas was, Mr Rajesh Sundaram also gave evidence of his experience of that relationship. Mr Sundaram's evidence revealed that the relationship between President Zuma and the Guptas was very "deep". According to Mr Sundaram, for all intents and purposes President Zuma seemed to conduct himself as if he was in business with the Guptas. Mr Sundaram even said that the interest President Zuma showed in the Gupta's business ventures (i.e. The New Age newspaper and the ANN7 TV station) could be compared to that of a shareholder. Mr Sundaram made it clear that, although it was said that Mr Duduzane Zuma had a 30% shareholding in the TV station, his father, President Zuma, was the one who was very active in matters relating to the TV station. That was in 2013. Mr Nene's removal was in December 2015.

163. When in his media statement of 11 December 2015 President Zuma said that "the urgency of the changes in the leadership of the National Treasury was occasioned by the need to send nominations to Shanghai, of the head of the African Regional Centre of the New Development Bank | BRICS Bank, to be based in Johannesburg", he was misleading the nation and he knew that he was misleading the nation. He knew it because, as both Mr Nene and Mr Mo Shaik testified, there was no vacancy that had been advertised nor had there been any invitation for nomination. Obviously, President Zuma and his government also never sent any nominations to Shanghai after Mr Nene had been dismissed. If President Zuma or his government had communicated with Shanghai nominating Mr Nene for the position in question, they would have told Mr Nene and he probably would have been required to consent to the nomination or to sign some documents and he testified three or so years after his dismissal that President Zuma never contacted him after his dismissal in connection with the position for which President Zuma had said he was going to be nominated.
164. President Zuma's statement to Mr Nene on the 9<sup>th</sup> December 2015 that the Top 6 had had a discussion on 8 December 2015 and had agreed that Mr Nene should be removed as Minister of Finance and be deployed in the Brics Bank was exposed to be untrue in the affidavits submitted to the Commission by Mr Gwede Mantashe, Ms Jessie Duarte and Dr Zweli Mkhize. These officials of the ANC all said that it was not true that the Top 6 of the ANC had met and made such a decision. These affidavits were furnished to the Commission when I requested these officials to depose to affidavits or affirmed declarations and comment on the evidence given by Mr Nhlanhla Nene that, when he met with President Zuma on the 9th December 2015, he told him that the Top 6 had met the previous day and decided that Ms Nene should be removed as Minister and be deployed to the BRICS Bank position in question. This means that President Zuma was prepared to not only mislead the nation about why he was removing Minister Nene from the position of Minister of Finance, he was even prepared to falsely implicate his

comrades in the Top 6 of the ANC in the dismissal of Minister Nene – which was a decision aimed at advancing state capture.

165. The reason given by President Zuma for Mr Nene's dismissal must be rejected. The reasons why President Zuma dismissed Minister Nene is that he was not co-operating or working with the Guptas and he was resisting President Zuma's and Ms Dudu Myeni's attempts to get National Treasury to approve transactions or projects or measures that were not in the interests of the country.

#### **APPOINTMENT OF MR DES VAN ROOYEN**

166. As previously stated, on 9 December 2015, President Zuma announced the removal of Mr Nene and the appointment of Mr van Rooyen as Minister of Finance. On that evening, Mr Fuzile received a call from Mr Enoch Godongwana who said: "You are now going to get a Gupta Minister who will arrive with advisors".<sup>112</sup> Mr Fuzile said that Mr Godongwana did not tell him who the advisors would be that would be accompanying the new Minister. He said something to the effect that they would most likely be of Indian descent and that they were likely to control the new Minister.<sup>113</sup>
167. Prior to his appointment as Minister of Finance, in his affidavit furnished to the Commission, Mr Van Rooyen had this to say about meetings he had with President Zuma:

"28. When the President exercises his or her constitutional powers in section 91(2) of the Constitution. Section 91(3)(b) provides that the President may select any number of Ministers from among the members of the National Assembly. These provisions empower the President to appoint any member of the National Assembly, the so-called "backbenchers" included. I was a member in the National Assembly,

<sup>112</sup> Exhibit P at p 7-8, para 17 – 18.

<sup>113</sup> Transcript 21 November 2018, p 119 – 120.

when I was appointed Minister of Finance and technically falling within the group of persons that were appointable.

29. As indicated in my affidavit and below, my recollection of events leading up to my appointment as Minister of Finance make me believe that the former President relied on his constitutionally protected power and discretion to appoint me to the position of Minister of Finance in December 2015.

30. On 21 October 2015 I was contacted by former President Zuma's Parliamentary counsellor, Mr Ebrahim Ebrahim to meet with him at the Presidential Tuynhuys Office. I attended the meeting in Cape Town which focused mainly on retirement reforms, which, at the time were a contentious subject in parliamentary discussions and between the Alliance partners. At that time, I was representing ANC caucus in all meetings meant to resolve this impasse.

31. On the 19 November 2015 I received a note in Parliament from the former President's Parliamentary Counsellor requesting me to go to Tuynhuys after the adjournment of the National Assembly for a meeting with the former President. The meeting focused mainly on my profile, more especially my academic qualifications and experience.

32. On 30 November 2015 I received a call from the Presidency, in which I was invited to submit my Curriculum Vitae (CV). On the phone, it was a lady that I spoke to. I do not remember her name. I immediately went to the Presidency and delivered my CV.

33. On 6 December 2015 and while I was on holiday, I received a call from Former President Zuma informing me that he wanted to see me between 7 and 10 December 2015 in Gauteng. I immediately abandoned my family holiday and flew back to Gauteng on 7 December 2015. I attach a copy of my itinerary as "DVR3". On 9 December 2015 I was called by a gentleman from the Presidency, requesting me to come to Mahlamba Ndlopfu Presidential Offices in Pretoria for a meeting with former President Zuma.

34. I arrived at the meeting as scheduled. The former President in his typical warm manner, welcomed and thanked me for accepting his invitation to meet with him. He informed me that he had carefully examined my qualifications and experience and knew of my passion for economic development and finance. Based on that he expressed an intention to appoint me to the position of Minister of Finance. I thanked the President and indicated to him that I was available to be of service in whatever capacity the President deemed relevant for our national goals. He thanked me for my response and indicated that he would be making the announcement soon.

35. On 9 December 2015 the former President Zuma announced the removal of Minister Nene from the position of Minister of Finance and my appointment to that



position. Prior to meeting the President, I had met no other individual who conveyed to me any information involving the decision to appoint me to the position of Minister of Finance. To be clear, I met no one from the Gupta family in which my potential or actual appointment to the position of the Minister of Finance was discussed. The allegation that I was appointed by the Guptas, or at their instance, is simply false. Just to be clear, I would not have accepted any appointment by any other person other than President Zuma to the position of Minister of Finance. I would not have accepted the offer if it had come from any other person, private or public, if it was not President Zuma. Our Constitution makes it clear that only the President may constitutionally and lawfully appoint a person to the position of Minister."

168. In her "State of Capture" report the Public Protector wrote that her investigation revealed that Mr Des van Rooyen could be placed in the Saxonwold area on at least seven occasions including on the day before he was appointed as the Minister of Finance. In his evidence before the Commission, Mr van Rooyen admitted that he visited the Gupta residence in Saxonwold on several occasions before his appointment, including on 8 December 2015. He said that he had met Mr Tony Gupta for the first time towards the end of October 2015 at Luthuli House. He said that Mr Tony Gupta had a meeting at Luthuli House and he was at Luthuli House in connection with his role as Treasurer-General of the MK Military Veterans Association and Mr Tony Gupta came to greet him. Mr van Rooyen said that, since then he had visited the Gupta Residence several times before the 9th December 2015 when President Zuma appointed him as the Minister of Finance. In fact, Mr van Rooyen testified that there were other meetings there that "went beyond just what is recorded in the Public Protector report."<sup>114</sup>

169. Mr Van Rooyen maintained that he and Mr Tony Gupta had never discussed his appointment as Minister<sup>115</sup> and yet he admitted that Mr Tony (also known as Rajesh) Gupta was the one Gupta brother that he often met with when he visited the Gupta residence. What is interesting is that in terms of the finding made earlier Mr Tony

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<sup>114</sup> Exhibit P(c) para 12.2; Transcript 11 August 2020, p 232.

<sup>115</sup> Exhibit P(c), p 400, para 15.

Gupta was the Gupta brother with whom Mr Jonas had had a meeting (together with Mr Duduzane Zuma and Mr Fana Hlongwane) at the Gupta residence on Friday 23 October 2015. He is the Gupta brother who had offered Mr Jonas the position of Minister of Finance and a bribe if he agreed to work with the Guptas.

170. Quite clearly, the discussion between Mr Jonas and Mr Tony Gupta on 23 October 2015 reveals that Mr Tony Gupta was looking for a person who would replace Mr Nene as Minister of Finance and, since Mr Jonas rejected his offer, it is logical to think that he would move on and look for someone else. The objective facts are that:

170.1. on 23 October 2015 Mr Tony Gupta met with Mr Jonas, Mr Duduzane Zuma and Mr Fana Hlongwane and told Mr Jonas that Mr Nhlanhla Nene was going to be fired as Minister of Finance and asked him to agree to be Minister of Finance and to work with the Guptas which Mr Jonas rejected.

170.2. at the meeting of 23 October 2015 Mr Tony Gupta told Mr Jonas that they would provide him with advisors as Minister of Finance if he agreed and if he wanted advisors.

170.3. Mr Nhlanhla Nene was fired by President Zuma as Minister of Finance six weeks later, namely, on 9 December 2015 and Mr Van Rooyen was appointed as Mr Nene's replacement. Mr Van Rooyen and Mr Tony Gupta met for the first time around the end of October 2015 – this was at Luthuli House, the Headquarters of the ANC

170.4. between that first encounter between Mr Tony Gupta and Mr Van Rooyen to the 9<sup>th</sup> December 2015 Mr Van Rooyen visited the Gupta residence several times including on 8 December 2015 which was one day before Mr Nene's dismissal and Mr Van Rooyen's appointment as Minister of Finance.

170.5. Given the above facts there is no way that it can be said that Mr Tony Gupta would not have discussed Mr Van Rooyen's appointment as Minister of Finance with him. It would make no sense. The probabilities are overwhelming that Mr Tony Gupta spoke to Mr Van Rooyen about his possible appointment as Minister of Finance. President Zuma may have met with Mr Van Rooyen and looked at his CV but there can be no doubt that Mr Van Rooyen was either suggested to President Zuma by the Guptas or that his appointment as Minister of Finance had the blessing or approval of the Guptas. Mr Van Rooyen's evidence that he and Mr Tony Gupta did not discuss his appointment as Minister of Finance is not true and falls to be rejected.

171. Mr Van Rooyen testified that prior to meeting President Zuma, he had met no other individual who conveyed to him any information involving the decision to appoint him to the position of Minister of Finance.<sup>116</sup>

#### **Appointment of Mr Van Rooyen's "Advisor" and "Chief Of Staff"**

172. By the 11<sup>th</sup> December 2015 Mr Van Rooyen had decided that he would have Mr Mohamed Bobat as his advisor and Mr Whitley as his Chief of Staff. The Commission's terms of reference require the Commission to look into whether these two "advisors" were properly appointed. It is, therefore, necessary to deal with their appointment. Mr Van Rooyen testified that his first encounter with Mr Bobat was in 2009 in the Bojanala District when he (i.e. Mr Van Rooyen) was still a member of the ANC Provincial Executive Committee and the Provincial Chairperson of the South African Local Government Association (SALGA) in the North West Province. He said that he met Mr Bobat in a restaurant and they exchanged business cards. Mr Van Rooyen testified that at that time he was still studying for his Master's degree. He said that he kept Mr Bobat's

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<sup>116</sup> Exhibit P(c), p 123, para 35.

card. Mr Van Rooyen said that, after he had realized that Mr Bobat was in the financial sector, he mentioned to Mr Bobat that he was studying finance. He said that Mr Bobat offered to assist if Mr Van Rooyen needed any assistance with his studies from 2009 and 2015.<sup>117</sup> Mr Van Rooyen testified that he called Mr Bobat once or twice, for assistance with his studies. Mr van Rooyen testified that, when he was appointed as Minister of Finance, he thought about Mr Bobat being his special advisor. He said that he, therefore, called Mr Bobat to his swearing-in ceremony which was to take place on 10 December. Mr Van Rooyen testified that on 10 December 2015, he met with Mr Bobat at the Union Buildings and requested him to be his Special Advisor and Mr Bobat agreed.<sup>118</sup> Mr van Rooyen further testified that, when he introduced Mr Bobat to Mr Fuzile at his swearing in ceremony, Mr Fuzile failed to indicate that he had already met Mr Bobat and he had made comments that made him professionally uncomfortable.<sup>119</sup> Mr Van Rooyen testified that Mr Fuzile agreed without any reservations to facilitate his appointment process and did not convey his concern about budget availability or any other issue in relation to the process.<sup>120</sup> According to Mr Van Rooyen, the offer to appoint Mr Bobat was discussed before he met both Mr Fuzile and Ms Macanda.<sup>121</sup>

173. According to Mr Fuzile, the appointment of Ministerial advisors is governed by the Ministerial handbook and the Public Service Act of 1994 (PSA). In summary, the Ministers are appointed by the President who makes an announcement and then the Ministers get sworn in. Often these two steps: the announcement and the taking of the oath do not happen at the same time. Until a Minister is sworn in s/he is a Minister-designate and cannot legally exercise the powers associated with the job. It goes

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<sup>122</sup> Exhibit P(c), p 133, para 60.

<sup>122</sup> Exhibit P(c), p 133, para 60.

<sup>122</sup> Exhibit P(c), p 133, para 60.

<sup>122</sup> Exhibit P(c), p 133, para 60.

<sup>122</sup> Exhibit P(c), p 133, para 60.

without saying that no one can be an advisor to a Minister who is yet to take up his role formally.

174. Further, Cabinet determined in terms of section 12A(2) of the PSA that Ministers are entitled to two Special Advisors and in terms of section 12A(1) the Cabinet may determine and appoint one or more persons under a contract to advise the executive authority on the exercise or performance of his or her powers and duties.
175. Mr Fuzile also referred to the Dispensation for the Appointment and Remuneration of Special Advisors which directs that the Executive Authority must ensure that Special Advisors obtain the necessary security clearance before appointment. Any deviation from this must be submitted to the President. He further stated that Ministers first have to consult with the department whether there are funds to appoint an advisor. According to Mr Fuzile, failure to go through this step risks creating unauthorised expenditure.
176. It is clear that none of the above steps were taken into account when Mr Bobat was "appointed" as the advisor to Mr van Rooyen. The cross-examination of Mr Fuzile by Mr Van Rooyen's Counsel revealed that:

- (a) Mr Van Rooyen allowed Mr Bobat and Mr Ian Whitley to start work as his advisors at the National Treasury before they had signed contracts of employment with the National Treasury Mr Fuzile said that that was improper because without them having been properly appointed or without them having concluded contracts with the National Treasury, there would be nothing against which to hold them accountable, Mr Fuzile said that the point was never that Mr van Rooyen as Minister had no power to appoint advisors; he said Mr van Rooyen, like any other Minister had such power.

- (b) Mr Fuzile disputed the suggestion made by Mr Van Rooyen's Counsel that he did not advise Mr Van Rooyen that Mr Bobat and Mr Whitley could not start working before contracts were concluded with them.
- (c) Counsel for Mr Van Rooyen did not challenge Mr Fuzile's evidence that it was improper for Mr Van Rooyen's advisors to start working before they signed contracts with the National Treasury.
- (d) It was common cause that Mr Bobat and Mr Whitley had not signed contracts of employment when Mr Van Rooyen came to the National Treasury with them and they started working and they had still not signed any contracts by the time Mr Van Rooyen was transferred to the Ministry of COGTA and Mr Bobat and Mr Whitley followed him.

177. As alluded to above, at the time of his appointment as advisor to Mr van Rooyen, Mr Bobat held a senior position at Regiments, which was headed by Mr Eric Wood. In his evidence, Mr van Rooyen said that he was unaware that Mr Bobat worked for Regiments until he met him at the Union Buildings and Mr Bobat brought this fact to his attention. If this is true (which is unlikely), then not only did Mr van Rooyen have no CV of Mr Bobat at the time of his decision to appoint him, but he had not even bothered to establish beforehand where Mr Bobat worked. Mr van Rooyen may or may not have known that Mr Bobat was employed at Regiments but it is Mr Tony Gupta or one of the Gupta brothers who must have arranged for him to appoint Mr Bobat. So, Mr van Rooyen knew that he got the appointment as Minister of Finance through the Guptas and that he got Mr Bobat and Mr Whitley through the Guptas. They were all Gupta people.

178. It is now necessary to deal with the appointment of Mr Whitley as Chief of Staff.

179. Mr van Rooyen testified that Mr Whitley was first introduced to him by Mr Malcom Mabaso, who at the time was support staff to Minister Mosebenzi Zwane in a breakfast meeting that was held at Melrose Arch on the 11th December 2015. Mr. Mabaso informed Mr Van Rooyen that Mr Whitley was looking for work and could be an asset in government if there were opportunities. Mr Van Rooyen said that he then arranged to meet Mr Whitley. Mr Van Rooyen testified that, after having a brief interview with Mr Whitley and on the strength of his qualifications and experience as set out in his CV in administration, banking, and the broader corporate sector, he was content to offer Mr Whitley the position of Chief of Staff. He testified that Mr Whitley accepted the position and joined Mr Van Rooyen's Ministerial team as Chief of Staff. Mr Van Rooyen stated that in support of his appointment of Mr Whitley, the circumstances of his appointment as Minister of Finance required that he make decisions firmly and quickly to ensure that he had proper advisory infrastructure needed to assist him with his new work.<sup>122</sup>
180. In his evidence before the Commission, Mr van Rooyen stated that he made the appointments of Mr Bobat and Mr Whitley because he was entitled to do so as the executive authority of a national Department (i.e., Minister) in terms of section 12A of the Public Service Act 103 of 1994.<sup>123</sup> Mr van Rooyen further testified that the legal and policy position governing the appointment of special advisors and Chief of Staff did not require the Minister to personally or intimately know the people that they were appointing. Nonetheless, Mr van Rooyen testified that he knew both Mr Bobat and Mr Whitley.<sup>124</sup> He said that he knew that they had a wealth of experience in the financial sector and understood the functioning of the markets.<sup>125</sup> He asserted that what he knew about them was sufficient for him to make the decision to appoint them.<sup>126</sup>

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<sup>122</sup> Exhibit P(c), p 133, para 60.

<sup>123</sup> Exhibit P(c), p 125, para 38.

<sup>124</sup> Exhibit P(c), p 127, para 41.

<sup>125</sup> Exhibit P(c), p 0127, para 41.

<sup>126</sup> Exhibit P(c), p 0127, para 41.

181. To provide more detail, below is an excerpt from Mr Van Rooyen's affidavit<sup>127</sup>:

"36. Much has also been made about the Ministerial staff that I required and appointed to assist me in my new role as Minister of Finance. Upon having the meeting in which the President indicated his intention to appoint me as Minister of Finance, I understood and appreciated the enormity of the tasks involved in the position. I expected that my appointment could trigger a firestorm of criticisms from some sectors of society. This was not unusual to me and I was not overly concerned. I knew that I needed to work diligently and with integrity in order to win my critics. I appreciated that I would be severely scrutinized by the public and mostly those involved in the financial sector. I was keen to win them over. There was a public custom of intensely public scrutiny over any appointment involving such a sensitive and strategic institution. I remembered that when Trevor Manuel, with no qualifications in the finance sector was appointed, there had been a firestorm of criticism over that decision. The markets were not happy because the first black Minister of Finance had been appointed. It took a collective cabinet effort to win over the markets and critics and Trevor Manuel finished his terms without any rancor. Similarly, when Trevor Manuel was replaced by Minister Pravin Gordhan, there were scenes of negative market reactions. Those working in the financial markets predicted doom and gloom but that did not happen and the sky did not fall. I felt that criticism to my appointment would soon die down and my focus was ensuring that the stringent protocols of financial management of the National Treasury were stable, dependable and improved.

37. I however accept that I underestimated the enormity and ferocity of the opposition to my appointment. I was initially not overly concerned about the negative comments coming from opposition political parties, which are critical of any appointment made by former Presidents of persons to strategic national institutions.

38. Despite the hostility from some sectors of the media community to my appointment I nonetheless began to make critical appointments necessary to enable me to settle down to this position. I needed special advisors and a Chief of staff that I could trust to drill down to what we were expected to do at the National Treasury. I spoke to friendly cabinet colleagues about possible candidates for appointment. I was not necessarily and specifically looking for people that I personally knew. I was looking for experts in the financial sector who were prepared to perform under the extremely hostile conditions which we found ourselves in. I needed patriots who would give attention to the complex issues at the National Treasury with professionalism and expertise. I wanted to win the confidence of my cabinet

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<sup>128</sup> Transcript 11 August 2020, p 229.



colleagues, the financial sector, business, labour and the markets. I wanted the National Treasury to be at the centre of our development goals. I therefore needed exceptional professionals with a sound experience and grasp of the financial sector and the markets. Mr. Fuzile, derides, with cynical contempt, my decision to appoint a special advisor and the Chief of staff to my office, even suggesting that I had acted illegally in making these appointments because according to him, I was not entitled to do so, without his signature. His understanding of the powers of Ministers to appoint their special advisors and Chief of Staff is unimpressive for someone who has paraded himself as a paragon of virtue and professionalism. Simply put, I made the appointments as I was entitled to do so. His job, as the accounting officer, was to ensure that my decision to appoint them as implemented. I refer specifically to s 12A of the Public Service Act (PSA), 1994, which makes it clear that the power to appoint special advisors lies with the relevant executive authority. In case a national Department, the executive authority is the Minister responsible for that Department.

39. The statements and oral evidence of Mr. Fuzile about my appointment of special advisor and the Chief of staff demonstrate that he had assumed the position of hostile foe. His claim that he wished for my success is simply false and belied by his own evidence. Having allegedly been told by his trusted comrade Mr. Godongwana that I was a Gupta Minister, he must have decided that I did not deserve his support or respect from the beginning. He claims to have taken steps to ensure that I was warmly welcomed, creating the unfortunate impression that I did not appreciate the elementary fundamentals of my role as Minister. He never intended to assist or support me in any manner because to do so would have been to assist what he regarded as the nefarious agenda of the Gupta Minister. He would not have positioned himself to welcome me and to ensure that I was properly and fully briefed on the critical issues at the time requiring immediate ministerial intervention. He regarded me as a Gupta Minister and therefore an enemy of the state. He saw himself as the custodian of the National Treasury with a national duty to resist a Gupta Minister. It is therefore not true that when he communicated with me he had an open mind which was influenced by nothing else other than the work of National Treasury. His mind was made up that I was appointed to capture the National Treasury for unspecified nefarious purposes. His view was that I had been appointed to advance corruption and to ensure that the National Treasury was used to advance corrupt interests. Without any shred of evidence, he asserts that I was a tool in the hands of corrupt people. Mr. Fuzile's entire attitude appears to have been poisoned by this malicious piece of useless information. I find these statements defamatory in the extreme as they do not bear out the objective facts.

40. While I knew Mr. Fuzile well (so I believed) and had worked with him well (so I believed) I was horrified to hear of how much he despised me, to even without any shred of evidence, allege that I was a corrupt person, appointed to the National

Treasury for nefarious purposes. I was horrified to understand from his testimony how much he belittled me and my role in government. The truth is different to that painted by Mr. Fuzile.

41. The legal and policy position governing the appointment of special advisors and Chief of staff do not require the Minister to personally or intimately know the people that he or she is appointing. It is not the position in the law that I should have personally known the people that I was appointing. Mr. Fuzile claims that there is evidence that I did not know the people that I was appointing as special advisor and Chief of Staff to bolster his imagination of the Gupta influence of my appointment. The accusations are without any merit. I knew Mr. Bobat Mohamed – who I had offered the position of special advisor and Mr. Whitley who I was offering the position of Chief of Staff. I knew that they had a wealth of experience in the financial sector and understood the functioning of the markets. That is what I wanted, not bosom buddies whom I knew at a personal level. What I needed to know about them was sufficient for me to make the decision to appoint them. They had unquestionable superior qualifications and experience that I needed in the finance portfolio. What I knew about the special advisor and Chief of Staff was sufficient for how I intended to engage with them.

...

**Mr. Mohamed Bobat**

55. My first encounter with Mr. Bobat was in 2009 (I do not recall the exact date) in the Bojanala District whilst I was still member of the ANC Provincial Executive Committee (PEC) and the Provincial Chairperson of SALGA in the North West Province, when he provided me with his business card. I looked at his business card and realised that he was in the financial sector. I indicated to him that I was doing my studies in finance which he offered to assist if I needed any assistance.

56. Mr. Bobat and I did not make regular contact but I can recall once or twice when I called him for some assistance with my academic studies in finance. When President Zuma indicated his intention to appoint me to the position of Minister of Finance, I thought about Mr. Bobat being my special advisor. After the announcement of my appointment, I included him on the list of people to be invited by the Presidency to my swearing in ceremony. On 10 December 2015, I met with him at the Union Building and requested him to join my team as a Special Advisor. After his acceptance of my offer, I further informed him of the process of appointment assuring him that the decision to appoint was mine but the administrative process formalising the appointment would be processed by the Director-General who would do so at my instance.

57. When I met Mr. Fuzile at my swearing in ceremony, I informed him and introduced him to Mr. Bobat. At no point did Mr. Fuzile indicate that he had already met with him or that Mr. Bobat had made comments that made him professionally uncomfortable. The reason that I requested Mr. Bobat to my swearing in ceremony was to ensure that I introduced him to the Director-General, Mr. Fuzile, and to ensure that I had some advisory services from the first date of my appointment.

58. I can confirm that the offer to appoint Mr Bobat was discussed before I met both Mr. Fuzile and Ms. Macanda. I was not meeting Mr Bobat for the first time in that meeting and I knew and had his contact, hence I gave the Presidency his details for my swearing in ceremony.

59. In terms of the dispensation for the appointment and remuneration of persons (Special Advisors appointed to Executive Authorities on ground of Policy consideration in terms of Section 12A of the Public Services Act of 1994 which took effect on the 1 April 2015 enjoins Executive Authorities to appoint Special Advisors who are South Africans but also fit and proper. In my view, Mr. Bobat met all these requirements. I reject Mr. Fuzile's assertion that I appointed Mr. Bobat wrongly without proper background check. It's a misplaced and baseless submission.

Mr. Ian Whitley

60. Mr. Whitley was first introduced to me by Mr Malcolm Mabaso (Mr. Mabaso) who was at the time a support staff to Minister Mosebenzi Zwane (Mr. Zwane). In a breakfast meeting held at Melrose Arch on the 11/12/2015. Mr. Mabaso Informed me that Whitley was looking for work and could be an asset in government if there were opportunities. I arranged to meet Mr Whitley. After having a brief interview with Mr Whitley and on the strength of his qualifications and experience as set out in his CV in Administration, banking, and the broader corporate sector I was content to offer him the position of Chief of Staff. He accepted the position and joined my ministerial team as chief of staff. The circumstances of my appointment required that I make decisions firmly and quickly to ensure that I had proper advisory infrastructure needed to assist me with my new work.

61. Before I left the meeting, Mr. Whitley Requested that Mr Mabaso join him on his first day in office to assist him with anything that may be required of him. I agreed to his request because Mr. Mabaso was also a ministerial Staff at the Department of Mineral Resources.

62. Mr Whitley and Mr. Bobat met the PSA requirements, and this was confirmed when the Department of Public Service and administration approved the appointment while serving as my ministerial support stuff at CoGTA. I can also

confirm that at CoGTA, they excelled in all duties assigned to them by me. Any contrary assessment would simply be dishonest and uninformed.

63. Allegations that these well qualified and experienced advisors served a nefarious agenda or a Gupta gender is simply false and unfair. They worked hard and competently when serving me in CoGTA- and no evidence Has been given to support these vicious allegations that their appointments were part and parcel of the capture of state institutions to serve private interests.”

182. Mr Whitley was informally appointed as Mr van Rooyen's Chief of Staff on 10 December 2015.<sup>128</sup> The formal appointment did not occur before Minister Van Rooyen was moved to COGTA and Mr Whitley went with him. It is important to note that all the advisors that National Treasury had had during Mr Fuzile's tenure<sup>129</sup> had signed contracts with Mr Fuzile. Mr Fuzile, as the accounting officer, had not signed any papers appointing Mr Bobat to the position of advisor.<sup>130</sup>
183. Although that part of the terms of reference that relates to the appointment of advisors by Mr Van Rooyen requires a decision whether or not Mr Van Rooyen's advisors were properly appointed or whether proper procedures were followed in their appointment, it emerged during Mr Fuzile's evidence that the real issue was not whether they had been properly appointed but whether it was proper or lawful for them to start performing duties before they were properly appointed. The answer is, of course simple. It was not lawful or proper that Mr Van Rooyen's advisors start performing duties or start working before they were properly appointed. Mr Fuzile did testify about why it was important that they be properly appointed before they could start working. He made the example that they needed to be bound by prescripts that relate for example to keeping certain information confidential. Before they were appointed, there would be difficulty with how to ensure that they complied with confidentiality obligations within Treasury. In fact, as it happened, the evidence heard by the Commission revealed that they unlawfully sent

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<sup>128</sup> Transcript 11 August 2020, p 229.

<sup>129</sup> Transcript 22 November 2018, p 22 – 23.

<sup>130</sup> Transcript 20 November 2018, p 67 – 68.

out of National Treasury some documents that were confidential. In the circumstances Mr Van Rooyen's "advisors" were not supposed to start working until they were properly appointed.

### **Engagement by Mr van Rooyen with National Treasury after his appointment**

184. Mr Fuzile testified that on the morning of 10 December 2015, he observed that the Rand was taking a serious pounding and the stock market was shedding value at a pace he had not seen in a long time. This was the morning after the evening of the announcement by President Zuma of Mr Nene's dismissal and Mr Des Van Rooyen's appointment as Mr Nene's replacement. Mr Fuzile said he called Mr van Rooyen and indicated to him that he was going to put him on speakerphone so that the Head of Communications, Ms Phumza Macanda, could be part of the conversation. Mr Fuzile said that he encouraged Mr van Rooyen to consider doing two things. The first was to come to the department early so that he could meet Mr Nene and they could address staff together so that the out-going Minister could say his goodbyes to the staff at National Treasury and the Minister-designate could introduce himself and essentially calm the staff down. The second was for Mr van Rooyen to seriously consider issuing a media statement as soon as he could because it was evident that the markets were reacting adversely to the untimely removal of Mr Nene.
185. Mr Fuzile testified that Mr van Rooyen turned down the suggestions and he sternly warned Mr Fuzile that the Treasury officials' tendency to issue statements had to come to an end. Mr Fuzile stated that he was surprised by what really seemed to be Mr Van Rooyen's prejudiced view of them as members of staff of the department, especially the fact that, while Mr Fuzile and Mr Van Rooyen were not friends, they had known each other for some time. This was because Mr Van Rooyen was a long-standing member of the Standing Committee on Finance (SCOF) in the National Assembly from 2009

right up to his appointment as Minister in 2015. Mr Fuzile stated that he was disappointed that Mr Van Rooyen was going to miss an opportunity to be seen by the staff with his predecessor which Mr Fuzile thought would make for a good start in Mr Van Rooyen's new role. Further, Mr Fuzile was perturbed that the new Minister seemed oblivious to the near catastrophic consequences that had been triggered by the developments of the previous day and appeared not to appreciate that he, among others, had to do something to stave this off.

186. Mr Fuzile told the Commission that Mr van Rooyen stated that Mr Fuzile was misinformed in his allegation that he failed to avail himself for a meeting with Mr Nene. He received the handover report from Mr Nene's Chief of Staff. Accordingly, the meeting with Mr Nene did not take place because Mr Nene became unavailable to meet after 11 December 2015 to discuss the handover report.<sup>131</sup>

187. Mr Fuzile testified that later in the day he went to the Union Buildings to attend the swearing-in ceremony of the new Minister. Mr Fuzile testified that on his arrival at the Union Buildings, the first person he found standing at the door was a person who introduced himself as Mr Bobat, the "advisor to Mr van Rooyen". Mr Fuzile was surprised by Mr Bobat's attitude and approach: first, Mr Fuzile as the DG of the Treasury, had not signed any papers appointing Mr Bobat to the position he claimed to hold and the new Minister had not even informed him of the appointment. Mr Fuzile was shocked that this man was introducing himself to him as "advisor to Mr Van Rooyen". At this point Mr Fuzile recalled what Mr Godongwana had told him in a telephone conversation during the late afternoon of 9 December 2015. Mr Godongwana had told Mr Fuzile in that conversation that he (i.e. Mr Fuzile) was going to get "a Gupta Minister who would arrive with advisors". Mr Fuzile was also shocked that a person designated

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<sup>131</sup> Exhibit P(c), p 135, para 64.

to be appointed as Minister had already had an "advisor. This was even before Mr Van Rooyen could be sworn in.

188. According to Mr Fuzile, Mr Bobat wasted no time in issuing instructions to him. Mr Bobat told Mr Fuzile to draft a statement that Mr van Rooyen would release after being sworn in. Mr Fuzile testified that this is how Mr Bobat issued the instruction: "I'd require a statement from you to be issued by the Minister". Mr Fuzile said that he told Mr Bobat to check with Mr van Rooyen whether he would want such a statement from him. Mr Fuzile proceeded to state that he found it very strange that the "advisor" was demanding a statement from him while the Minister-designate had previously bluntly told Mr Fuzile that he did not want a statement from him. It was at this point that Mr Fuzile realised that Mr Bobat did not care about protocol and civilities and he appeared determined to assert some "authority" over him.
189. Mr Bobat also told the Communications Head, Ms Macanda, that from then onwards all communication would go through him. Mr Bobat had not bothered to check the communication policy in government and in Treasury. Mr Fuzile stated in his evidence that the communication policy of the Department did not provide for an advisor issuing instructions to officials on matters of communication.
190. Mr Fuzile said that Mr Bobat felt such a sense of authority and empowerment that he could issue instructions to anyone without first checking with the person (the Minister-designate) on whose behalf he purported to act. Mr Fuzile said that Mr Bobat gave him an impression of being a law unto himself.
191. Mr Fuzile also testified that, when Mr van Rooyen arrived at the Union Buildings, Mr Bobat approached him and they greeted. Mr Fuzile told the Commission that at some point he could hear Mr Bobat complaining that Mr van Rooyen had not answered his calls and Mr van Rooyen saying something to the effect that he did not recognize Mr

Bobat's number and that is why he did not take his call. Mr Fuzile testified that this conversation between Mr Van Rooyen and Mr Bobat, suggested to him that Mr van Rooyen and Mr Bobat either did not know each other or they had not known each other for long enough to have exchanged telephone numbers.

192. Ms Macanda also confirmed that she witnessed this bizarre interaction between Mr van Rooyen and Mr Bobat. According to Ms Macanda, she overheard Mr Bobat saying to Mr van Rooyen: "I called you, why did you not return my call?" Ms Macanda testified that Mr Bobat's tone was authoritative and almost aggressive in a way. She testified that she was quite taken aback by this. Ms Macanda said that Mr van Rooyen responded: "Oh! I've been getting a lot of phone calls from people congratulating me and the thing is I don't have your number, so I could not return your call".
193. Ms Macanda said two things struck her from the above conversation between Mr Van Rooyen and Mr Bobat: first that Mr Bobat seemed to have a contemptuous and dismissive attitude towards the Minister and, second, that the Minister also did not know him and did not even have his number. This evidence by Ms Macanda is consistent with Mr Fuzile's evidence about what he had observed and heard when Mr Bobat and Mr Van Rooyen met that day.
194. On 11 December 2015 Mr van Rooyen had an introductory meeting with the staff at National Treasury. According to Mr Fuzile, at this meeting, Mr van Rooyen stated that the officials had to work through his advisors. Thus, for the first time, to Mr Fuzile's knowledge, National Treasury officials would not have direct access to the Minister. Mr Mogajane, the DDG for Public Finance who was present at the introductory meeting,



testified that the officials of National Treasury were "stunned" to hear the Minister say this and that he himself did not have words to explain what they were witnessing.<sup>132</sup>

195. Both Mr Fuzile and Mr Mogajane recalled that, when introducing Mr Bobat to National Treasury officials on 11 December 2015, Mr van Rooyen could not recall Mr Bobat's name and had to be reminded by the latter, and he also mistakenly stated that Mr Bobat was his Chief of Staff and had to be told by Mr Bobat that the Chief of Staff was Mr Whitley and that he (i.e. Mr Bobat) was Mr Van Rooyen's special advisor.<sup>133</sup> This is how Mr Mogajane recalled Mr Bobat's reaction to have been in that meeting when Mr Van Rooyen said that he was going to be Mr Van Rooyen's Chief of Staff:

"That is when [missing audio] and then he is going to be my Chief of Staff and Mohamed said no, no, no. You did this. No, no, no I am advisor. Then he looked at ja of course this is Mr Ian Whitley. He is going to be my Chief of Staff."<sup>134</sup>

196. Mr Fuzile's account of the event before the Commission is as follows:

MR LUNGISA FUZILE: He walked in, we sat. Could you appoint these two gentlemen. And then pointing towards Mr Bbobat, he said this one is Chief of Staff and then the reaction was no, no, no I will be advisor, this one will...[intervenes]<sup>135</sup>

197. This made it clear that Mr van Rooyen was not familiar with these two people. The mistakes that Mr Van Rooyen was making about their roles, as well as the fact that the two only appeared to exchange phone numbers at Mr van Rooyen's swearing-in ceremony as Minister raised the question: how did he appoint them as his advisor and Chief of Staff? After all these mistakes by Mr Van Rooyen, Mr Fuzile became convinced that what had happened was exactly what Mr Godongwana had told him would happen, namely, the new Minister would arrive with two advisors with whom he was not familiar

<sup>132</sup> Transcript 23 November 2018, p 53.

<sup>133</sup> Exhibit P(b) pp 48-49, para 10 (Mr Mogajane); Exhibit P(b) pp 69-71, paras 59-65 (Mr Fuzile); Transcript 22 November 2018, pp 61-67, 86-87.

<sup>134</sup> Transcript 23 November 2018, p.42.

<sup>135</sup> Transcript 22 November 2018, p.61.

or whom he would not know. Mr Godongwana had told Mr Fuzile that he would get a Gupta Minister of Finance who would come with advisors that he did not know.<sup>136</sup>

198. As already stated, Mr Bobat was employed by Regiments Capital and Trillian. In the brief time that Mr Bobat was at National Treasury, he shared classified information with people outside Government such as Mr Eric Wood.<sup>137</sup> He emailed to people outside of government a National Treasury presentation which was intended for Cabinet. Mr Wood and Mr Mabaso on 12 December 2015, prior to Mr van Rooyen's removal.<sup>138</sup> This adds credence to Ms Mothepu's evidence with regard to what the purpose was of Mr Bobat's appointment as advisor to Mr Van Rooyen.
199. Mr van Rooyen testified that no one, including Mr Fuzile, told him of Mr Bobat's alleged interference with the administration of National Treasury.<sup>139</sup>
200. Mr van Rooyen, further had to say the following about his brief time at National Treasury and the above allegations by Ms Macanda and Mr Fuzile<sup>140</sup>:

"69. Immediately after the meeting with Mr Fuzile, we proceeded to our meeting with the Senior Management Team of the National Treasury. As initially agreed with Mr Fuzile, the focus of this meeting was for me to assure the Senior Management Team of my Commitment to work with them, and also to serve as an introductory session and to reiterate to them about the planned Executive Management Meeting which was to take place on Tuesday, 15 December 2015. My approach to this meeting with the Senior Management Team and the planned Tuesday meeting were thoroughly discussed with Mr Fuzile as the then Director-General of the National Treasury. It is therefore disingenuous of Mr Fuzile to claim that he had hoped for a long and detailed meeting.

70. As much as I do not remember every detail of what happened in my meeting with the Senior Management Team, I wish to state that that Mr Fuzile lied to the Commission when he said I wrongly introduced the names and roles of Bobat and

<sup>136</sup> Transcript 22 November 2018, p 88.

<sup>137</sup> Exhibit P(c), para 69.

<sup>138</sup> Exhibit N1, Annexure 25.

<sup>139</sup> Exhibit P(c), p 122, paras 49-50.

<sup>141</sup> Exhibit N1, para 82.

Whitley. As already stated in this statement, I met Bobat and Whitley before this meeting. There is therefore no basis on which I could have confused them. On 10 December 2015 and 11 December 2015, I respectfully told Mr Fuzile about Bobat and Whitley's position.

71. The statements and evidence by Mr Mogajane and Ms Macanda are contradictory. According to the latter's statement (para 37) I correctly introduced Whitley as the Chief of Staff and Mr Bobat as my special advisor. This is contrary to the statement of Mr Fuzile (para 65) and Mogajane (para 10) who indicated that I confused both the names and roles Bobat and Whitley. It is as if the three people were not in the same meeting. I know that I did not confuse the names and roles of Mr Bobat and Whitley. Therefore, Ms Macanda spoke the truth in relation to this aspect, and Mr Mogajane and Mr Fuzile did not. Quiet interestingly Mr Mogajane seems to be notorious with not telling the truth, it is public knowledge that the Public Protector (Report No. 28 of 2018/29) has found that the current National Treasury Director-General Mr Mogajane failed to disclose a criminal record on Z83 application form for the position of Director-General, which he currently holds.

72. Apart from the appointment provisions and considerations provided for in the Public Service Act and Ministerial Handbook, in his statement (para15) Mogajane interestingly claims that Ministers should appoint Chief of Staff with whom they have a long-standing relationship. I must submit that in all the years I served as Executive Authority, I have used merit and competency as the guiding principles in appointing support staff, and I can safely confirm that out of this approach, I have seen excellence and loyalty prevailing.

My concluding remarks about the statements of Mr Fuzile, Mr Mogajane and Ms Macanda

73. As I have stated in this statement, I followed what I understood to be the normal process in the appointment of my Ministerial Support Staff. Mr Fuzile's allegations that the appointment of my support staff was done before any proper process or background checks was done is misleading to this Commission. As a former senior government official, having served in government for at least 16 years, six whereof he was a Director-General, he should be knowing it better that due to State Security Agency capacity problems, government departments, State-Owned-Companies and all government linked institutions allow appointments whilst awaiting security clearance application to be concluded.

74. I reiterate that according to my knowledge all departments go through the same process, which means that the National Treasury under my short stint as Minister of

Finance was not an exception. Based on this known practice, I submit that Mr Fuzile deliberately misled the Commission in order to cast aspersions on me.

75. South African legislation enjoins Directors-Generals to give sound and prompt advice to their politician principals. It should therefore be serious cause for concern that Mr Fuzile did not bring what he regarded as violation of legislation to my attention but instead brought it to the Commission. I would have expected that a seasoned Government official who claimed to have had concerns about the performance of the National Treasury would have brought these serious concerns to me at the Minister of Finance then. If I had refused to take his advice, he ought to put his advice in writing as required by legislation. It left me perturbed that Mr Fuzile as the Director-General of the Department did not bring such serious concerns to my attention. If he did not trust me, he would have reported the matter to the Presidency or at the very least the Public Service Commission, which he did not.

76. All the three officials, namely Mr Fuzile, Mr Mogajane and Ms Macanda complained about Mr Bobat before the Commission but none of them used existing procedures to lodge their complaints. It is also important to note that the three officials contradict one another regarding how I introduced my support staff at the Senior Management meeting. I cannot help it but see this as a group of people who agreed to act in concert to try and implicate me as a "Gupta captured deployee."

#### THE ALLEGATION RELATING TO THE MEDIA STATEMENT

77. Mr Fuzile insinuates that I did not prepare the speech that I made after my swearing in ceremony. He, without any shred of evidence insinuates that someone else other than myself prepared that statement and is bold enough to suggest that he and his team would have provided a better statement.

78. A public statement by any news Minister ought to be carefully made because if made recklessly, it could undermine confidence in the institution. I was cautious in engaging the Public robustly before meeting the National Treasury teams and assembling a proper briefing on the priorities of the department. I did not have one chance of making a public statement. I decided that I would make the statement that I made. It was not to set out a new agenda for the National Treasury but it was an attempt to register my new presence. I was not going to, as Mr. Fuzile believes I should have, make a big speech on matters that I had not fully engaged on or being briefed properly on.

79. What is untrue, however, is the insinuation that I was not the author of that Public statement. The temerity of Mr. Fuzile's statement that I read a statement written by someone is fanciful and a false imagination.

80. As a matter of fact, in a telephone conversation that I had with Mr. Fuzile and Ms Macanda before the swearing in ceremony, I shared my statement with them. They agreed with the content of the statement. They further agreed with my directive of issuing a detailed statement after the Executive Management Meeting scheduled for 15 December 2015. The Presidency issued a detailed statement to address the markets concerns. I was aware of the statement and its contents. I attach a copy thereof as "DVR5". I therefore find Mr Fuzile's oral testimony disingenuous in suggesting that my statement showed a lack of undertaking the issues at play. He agreed with it. If he felt strongly about this statement, he was obliged to register his discomfort at the Director General which he did not do."

201. At this stage two or three matters need to be highlighted from Mr Van Rooyen's version and affidavit. The first is that I believe Mr Fuzile's and Mr Macanda's evidence that Mr Van Rooyen confused both the names of his advisors and their roles at the meeting he had with the senior management of the National Treasury. Even in his affidavit before the Commission he got mixed up with the name and surname of Mr Bobat. Mr Bobat is Mr Mohamed Bobat. His name is Mohamed and his surname is Bobat – but in paragraph 41 of his affidavit Mr Van Rooyen referred to him as "Mr Bobat Mohamed" instead of Mr Mohamed Bobat. Furthermore, it is legitimate to say that Mr Van Rooyen appointed as his advisors people that he really did not know. With regard to Mr Whitley, he met him for the first time on 11 December 2015 and yet he appointed him on the same day on which he met him. He had not done any background check on this person, he did not know his background and he did not know if he was the person his CV said he was and yet, on his own version, he offered him a job as his Chief of Staff and took him on the same day to the National Treasury as his first day at work. In his affidavit Mr Van Rooyen stated that on the same day on which he had met Mr Whitley, Mr Mabaso said to him that Mr Whitley was asking whether Mr Mabaso could go with him to the National Treasury on his first day at work and he (i.e. Mr Van Rooyen) agreed. No Minister in his sound mind would appoint someone as his or her Chief of Staff on the first day he met him and without having checked his background. The reason Mr Van

Rooyen was doing this is because he had no choice in the matter. These were the people that the Guptas wanted him to appoint. That is the only explanation that makes sense.

202. With regard to Mr Bobat, the position is also that for all intents and purposes Mr Van Rooyen did not know him. On his version which I seriously doubt is true but do not have to decide, he had met him once and briefly at a restaurant about six years previously and they had exchanged business cards. In the six years Mr Van Rooyen had spoken to Mr Bobat two or three times. He invited him to his swearing-in ceremony on the 10<sup>th</sup> December 2015 and Mr Bobat came and he met him for the second time on that occasion and offered him the position of advisor and Mr Bobat accepted the position there and then without having to think about it despite the fact that he was in Regiments' employment at the time. Mr Van Rooyen also did not do any background checks on Mr Bobat but offered him the position of advisor immediately.
203. No Minister would behave like this. The position is simply that Mr Bobat knew the whole story and it was the Guptas who wanted Mr Van Rooyen to appoint Mr Bobat as his advisor. Mr Van Rooyen – himself having got the position of Minister through the Guptas or with their blessing – had to appoint them. In this regard reference can be made to Ms Mosilo Mothepu's evidence that in October or November 2015 already Mr Wood told her that Mr Bobat would be appointed as advisor to the new Minister who would be appointed after Mr Nene had been fired and that the new Minister would be pliable – unlike Mr Nene. Mr Wood and other Gupta associates had even prepared topics or matters that the new Minister would have to deal with. Lastly, Ms Mothepu also testified that Mr Wood even talked about who would be writing speeches for the new Minister. When one has regard to the fact that Ms Mothepu was told these things towards the end of October or even in November 2015, that was the time when Mr Van Rooyen had

started interacting with Mr Tony Gupta. There is simply no doubt that Mr Van Rooyen was a Gupta Minister.

**TRANSFER OF MR DES VAN ROOYEN TO MINISTRY OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND THE REAPPOINTMENT OF MR GORDHAN AS MINISTER OF FINANCE**

204. In the late afternoon of Sunday, 13 December 2015, Mr Gordhan received a message from Ms Kaunda requesting his attendance at a meeting with President Zuma to be held at Mahlamba Ndlopfu later that evening.
205. At around the same time, Ms Jessie Duarte, the Deputy Secretary-General of the ANC at the time, contacted Mr Gordhan and informed him that he was going to be asked to do something by President Zuma, and he should not refuse the request. Mr Gordhan also received a similar message from the then Deputy President of the ANC and the country, Mr Cyril Ramaphosa.<sup>141</sup>
206. At the meeting between Mr Gordhan and President Zuma, the latter said that he believed that Mr van Rooyen was suitable for the Finance Minister position, but others held a different view and believed that, when markets re-opened on Monday, 14 December 2015, if Mr van Rooyen was still the Minister of Finance, the destruction already experienced on the previous Thursday and Friday would continue or could possibly even worsen. He indicated that he wanted Mr Gordhan to take up the position of Minister of Finance in order to calm the markets.<sup>142</sup>
207. Mr Gordhan responded that there were other qualified individuals that President Zuma could consider for the post, such as Messrs Mcebisi Jonas and Jabu Moleketi but,

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<sup>141</sup> Exhibit N1, para 82.

<sup>142</sup> Exhibit N1, para 85.

President Zuma indicated that neither of these suggestions was acceptable to him and he thought that Mr Gordhan should accept the position.

208. Mr Gordhan accepted his re-appointment as Minister of Finance, although he was enjoying his role at COGTA. In agreeing to serve again as Minister of Finance, Mr Gordhan indicated to President Zuma that there were three matters at that time which concerned him. Mr Gordhan indicated that these needed to be discussed by him and President Zuma and resolved as soon as possible. The three matters were:

208.1. the ongoing dire financial predicament of SAA and, specifically, the role of the Chair of the Board, Ms Dudu Myeni ("Ms Myeni");

208.2. the proposed nuclear procurement deal, and

208.3. Mr Tom Moyane's role at SARS as its Commissioner.

209. Mr Gordhan then assisted with the drafting of a media statement that was issued by the Presidency later that evening, which announced his re-appointment to the position of Minister of Finance, and the appointment of Mr van Rooyen to the vacated post of Minister of COGTA. The statement also sought to provide reassurances regarding the fiscal discipline and prudence, financial sector stability and the ongoing prioritisation of strategies for economic growth and employment creation.

### **MR GORDHAN'S CONTINUED RESISTANCE AND HIS HARRASMENT**

210. In his statement of 11 October 2018 the contents of which he confirmed under oath to be true when he gave his oral evidence before the Commission Mr Gordhan dealt with a number of incidents or events which he said appeared aimed at forcing him to resign as Minister of Finance so that another Minister of Finance would be appointed who



would allow the National Treasury to be captured. This is how Mr Gordhan put this in his statement:

"This set of events, combined with what is set out below, was the beginning of what appeared to be a campaign to force me to resign as Minister of Finance and continue the efforts to capture the National Treasury thereafter. I believe that my re-appointment had thwarted these efforts and I believe Mr Nene was removed from the national executive for the same reason – to obtain full control of the Treasury."

211. Most of the evidence that was given by Mr Gordhan in regard to what he called the campaign aimed at forcing him to resign so that another Minister of Finance would be appointed who would allow the capture of the National Treasury was not disputed except, may be, to a limited extent, by Mr Tom Moyane in so far as it may have related to him which has already been dealt with in Part 1 Vol 3 of this Report. For that reason, it seems appropriate to allow Mr Gordhan to tell this part of the story of the attempted capture of the National Treasury in his own words as they appear in his statement of 11 October 2018. In that statement Mr Gordhan had this to say on the attempted capture of the National Treasury:

"2016

98. During January and February 2016, I was part of South Africa's delegation to the annual World Economic Forum meetings held in Davos, Switzerland ("WEF Davos") and worked on the finalisation of the Budget, which was presented to Parliament on 24 February 2016.

99. I was approached by South African business leaders at the WEF Davos for urgent discussion on how to avoid a sovereign credit downgrade and how to inspire confidence in the South African economy and government, after the drastic and damaging changes at the Treasury. This resulted in an urgent meeting convened with business leaders upon my return to South Africa from the WEF Davos. The CEO initiative was formed out of these engagements.

100. This was followed by an investment roadshow by labour, government and business representatives, to overseas investors who are invested in our economy and in particular in South Africa's debt, during March 2016.

101. In addition, the CEO initiative launched a fund of R1,5 billion for supporting small business, particularly black-owned small businesses, as well as the Youth Employment Service (as proposed and championed by then Deputy President Ramaphosa), which will ensure that big business provide work and entrepreneurial opportunities to a million young people over a three-year period. Further possibilities for additional investment in the South African economy were explored during these various initiatives.

#### 27 Questions

102. Shortly before my budget speech in Parliament, Major General Mthandazo Berning Ntlemeza ("Gen Ntlemeza"), head of Directorate for Priority Crime Investigation, known as the "Hawks", requested and attended a brief meeting at the Treasury. Gen Ntlemeza advised me then that two investigations were ongoing: into SAfA and SARS. No details as to the substance, scope or progress of either investigation was shared with me by Gen Ntlemeza in this short conversation.

103. I believe that the capture of the Hawks under Gen Ntlemeza was central to the state capture project. This capture enabled the Hawks to be abused for political objectives through malicious law enforcement action and without regard for the impact that abuse of power would have on the integrity of the country, the economy or personally in the individuals, such as myself, who were targeted in this orchestrated campaign.

104. On or about 19 February 2016, in the week before my Budget speech, an envelope was hand-delivered to the Treasury at Gen Ntlemeza's insistence. This envelope contained 27 questions addressed to me from the Hawks, and demanding that they be answered by 2 March 2016. The questions related to the High Risk Investigation Unit within SARS, formed years earlier. Charges against me relating to that unit had been filed by Moyane on 15 May 2015 (SAPS Brooklyn Case No. 427/04/15).

105. I arranged to visit the then President late that day to present the correspondence and questions from the Hawks to him and to ask him whether he was aware of, and agreed with, this law enforcement action against me.

106. During that meeting, I objected strongly about this persecution and asked former President Zuma whether political activists like myself must now prepare to be eliminated during the democratic era even though we had survived the oppression of the Security Police in the apartheid era.

107. In response to my objection, he merely flipped through the pages of the letter. He said he would discuss the matter with the then Minister of Police, Mr Nkosinathi Nhleko (Mr Nhleko).

108. I received no information from the former President in this regard subsequent to this meeting.

109. However, on Monday 22 February 2016, I was requested to attend a meeting with the Secretary General (Mr Gwede Mantashe) ("Mr Mantashe"), Deputy Secretary General (Ms Jessie Duarte) ("Ms Duarte") and Treasury General (Mr Zweli Mkhize) of the ANC. I interrupted preparation for the Budget and flew to Johannesburg from Cape Town to meet them that afternoon. The 27 questions and this abuse of law enforcement for political objectives was discussed with them. I was assured that a political solution will be found to this political problem.

110. The 27 questions were leaked to the media the day after the Budget.

111. State Security Minister, Mr David Mahlobo, and Min Nhleko held a joint press conference on 2 March 2016, defending the investigation and the timing of the questions posed to me by the Hawks.

112. Following an extension on the deadline, I answered all 27 questions on legal advice and provided my responses to the Hawks.

113. This set of events, combined with what is set out below, was the beginning of what appeared to be a campaign to force me to resign as Minister of Finance and continue the effort to capture the National Treasury thereafter. I believe that my re-appointment had thwarted these efforts and I believe Mr Nene was removed from the national executive for the same reason – to obtain full control of the Treasury.

114. In this regard,

114.1. I refer the Commission to the contents of subsequent media reports that revealed that shareholders in Gupta-linked consultancy group Trillian, allegedly were warned in advance that Mr Nene would be fired as Finance Minister, and that Trillian planned to exploit access to the Treasury under Mr Nene's replacement, Mr Van Rooyen. Mr Eric Wood, Trillian's Chief Executive Officer at the time ("Wood"), denied the allegations, and suggestions that he, Trillian and other Gupta-connected individuals had profited from the market turmoil that followed Mr Nene's removal. Evidence provided by a Trillian whistleblower to the parliamentary inquiry into Eskom, established that Wood may have profited thanks to his prior knowledge of the removal of Mr Nene.

114.2. Upon returning to the Treasury, I learnt of a related controversy regarding the appointment of two individuals who accompanied Mr Van Rooyen to the Finance Ministry following his appointment, namely Messrs Ian Whitley ("Whitley") (appointed as chief of staff) and Mohamad Bobat ("Bobat") (appointed as a special advisor).

114.3. Messrs Whitley and Bobat also were reported to have been present with Mr Van Rooyen at the Gupta family compound located in Saxonwold, in the days immediately preceding his appointment as Minister of Finance. A third individual, Malcolm Mabaso ("Mabaso") (said to be associated with the Guptas through former Minister of Mineral Resources, Mr Zwane) was also present with Mr Van Rooyen at Treasury, though his precise role was unclear.

114.4 Media report also revealed that Whitley and Bobat shared a confidential Treasury document containing a Nine-Point Plan for South Africa's economic recovery growth and development, with Gupta associates and executives, including Messrs Essa, Wood and Mabaso, on or about 12 December 2015, prior to Mr Van Rooyen's removal. The email forwarding the Treasury document stated "Gents, finally..." (see annexure 25)

#### **New Age Budget Breakfast Cancellation**

115. Another decision which I believe may have contributed to my eventual removal as Minister of Finance in March 2017, was revealed on 21 February 2016, three days before the Budget was presented to Parliament, when the Sunday Times newspaper reported that the National Treasury had cancelled the Gupta-owned The New Age newspaper's sponsorship of, and participation in, the post-Budget breakfast briefing. This event was set to take place the morning following delivery of the Budget speech in Parliament (i.e. 25 February 2016). Ultimately, the broadcast rights for the breakfast briefing were allocated to two other media institutions, namely the SABC and ENCA, in an effort to rotate the opportunity to carry the broadcast.

#### **Offer to Jonas**

116. At around this time, on 16 March 2016, former Dep Min Jonas issued a statement confirming media reports that, in October 2015, he had been offered the position of Minister of Finance to replace Mr Nene, prior to Mr Nene's removal December 2015. Former Dep Min Jonas stated that the offer was made at a meeting at the Gupta family's Saxonwold compound by a member of the Gupta family, accompanied by Mr Duduzane Zuma, former President Zuma's son, and Mr Fana Hlongwane.

117. In this regard,

117.1. Mr Jonas contacted me on Friday, 23 October 2015, wishing to see me upon his return from the Eastern Cape that weekend. He seemed upset by something but did not discuss any details regarding why he wanted to see me.

117.2. I was visited by Mr Jonas on or about Sunday, 25 October 2015, at my Pretoria home. Mr Jonas appeared extremely distraught, upset and emotional. He seemed unable, hesitant, to disclose specific detail about what had caused this (perhaps due to the presence of my wife) and said he found the situation intolerable and that he wanted to resign.

117.3. I tried to calm him down and to prevent him from making any drastic decisions given his state of mind. I dissuaded him from resigning, advising him that it would not be in the best interests of the country for him to leave his position.

117.4. I understood that he also was planning to discuss his situation with Mr Nene. Following my re-appointment as Minister of Finance, I became aware of more details of the offer made to former Dep Min Jonas at the Gupta compound, as were later confirmed by him in his media statement, and elaborated on further in his statement and evidence already provided to the Commission.

#### **My interactions with Gupta family members**

118. For the record, I have been asked by the Commission's legal team whether I ever met members of the Gupta family.

119. I have never been to the Gupta family compound located in Saxonwold.

120. I was invited to the infamous Gupta family wedding at Sun City, but declined the invitation.

121. I can recall the following further instances where I was in the same place as them.

121.1 I attended a cricket test match also in the 2009 to 2014 period (I cannot recall which year) and one of the Gupta brothers (I cannot recall which one) was present in the Presidential box. We greeted but did not speak to each other.

121.2 Ministers accompanied the former President to various functions, including breakfast briefings following the State of the Nation Address. I recall that one or more of the Gupta brothers would be present at such events. I would see them, but not interact with them.

122. I can recall one meeting where the former President introduced me to Mr Ajay Gupta.

122.1 Early in my first term as Minister of Finance, though I cannot recall precisely when, I went to the Presidential guest-house in Pretoria, Mahlamba Ndlopfu, for a meeting with former President Zuma. When I was called into the meeting room, former President Zuma introduced me to a man who I believe is Mr Ajay Gupta. Mr Zuma introduced him as "my friend" and told me that the man had expertise in regard

to small business and finance. I recall us exchanging generalities for a couple of minutes, but I do not recall the details of what was very cursory exchange. Mr Gupta then excused himself and left me and the President to continue our meeting.

123. I had forgotten of another instance where one of the Gupta brothers may have been present at a meeting I had with billionaire Indian businessman Anil Ambani of the Reliance group companies in or about June 2010. I stress that I do not recall the details set out below since it proved to be a meeting of little significance at the time, but have been assisted in this regard by my former Chief of staff, Mr Dondo Mogajane.

123.1. I am told that the Presidency put Mr Rajesh "Tony" Gupta in touch with Mr Mogajane. Mr Gupta called Mr Mogajane repeatedly, asking for a meeting with me. However, he never advised Mr Mogajane who would at such meeting or what the agenda for the meeting was to be. We were even asked to attend the meeting at the Gupta family compound at Saxonwold. I refused to schedule a meeting with the Gupta family, whether at their residence or anywhere else.

123.2. Eventually, Mr Gupta told Mr Magajana that one of the Ambani brothers, from the Reliance group of companies in India, wished to meet me and that it was concerning a possible MTN transaction. Bharti Airtel had called off merger talks with MTN in 2008 and again in 2009, and Reliance Communications was reported also to have been interested in pursuing the acquisition of MTN during 2009. We were advised that Mr Ambani was in South Africa for the 2010 Soccer World Cup and he would like to meet me regarding the possible MTN transaction.

123.3. I agreed to a meeting with Mr Ambani, who had a potential to be a significant investor in South Africa.

123.4. The meeting was held at a hotel in Pretoria, Villa Sterne, on a Sunday morning.

123.5. I attended the meeting together with Mr Mogajane, who advises me that:

123.5.1. The meeting lasted less than an hour;

123.5.2. Discussions in the meeting were between Mr Ambani and I;

123.5.3. It commenced with general conversation about the World Cup, the Ambani family's visits to the Kruger National Park, and Indian and global politics;

123.5.4. Eventually, Mr Ambani asked about the legal and regulatory process that would be required to obtain approval for a transaction such as the purchase of MTN and we spoke in general terms of what processes would need to be followed, and the role of National Treasury; and

123.5.5. The meeting ended inclusively and we parted ways and left.

123.5.6. Mr Mogajane has advised me that he recollects that Mr Ajay Gupta was present at the meeting. I do not recall him being present.

123.6. I wish to refer the Commission to Annexure 27, which is my response to a parliamentary question from the Democratic Alliance. It is apparent in my written response that I do not make mention of the 2010 meeting with Mr Ambani of the Reliance Group, which a Gupta brother may or may not have attended. This is simply because, at the time of submitting the written response, I had no recollection of the 2010 meeting with Mr Ambani.

### **Public attacks and Presidential inaction**

124. Returning to the event of 2016, it was a year marked by ongoing harassment and attempted distraction of me by law enforcement agencies, some media houses and a persistent social media campaign of fake news and personal attacks that appeared antagonistic towards me and the work being done by Treasury. I was the target of an orchestrated campaign that appeared aimed at forcing me to resign as Minister of Finance. The role of the public relations agency Bell Pottinger was central to this orchestrated campaign and I am sure it is well known to the Commission.

125. This orchestrated campaign against me and the National Treasury caused immense stress for myself, former Deputy Minister Jonas, senior officials and our families. In response, we were repeatedly advised by our comrades that we should not resign but that we should continue to serve the national interest and to "hang in there." Comrades would tell us that, ultimately, all one had was one's integrity and that it was worth fighting for. The sentiment seemed to be that we should not "make it easy for them" to get rid of those of us who were seen as obstacles to the state capture project and the looting of our public resources.

126. It was difficult and a challenging period. Throughout, I tried to focus on the national interest and what was best for our country, and to do my work and fulfil my constitutional obligations with that as a guiding principle.

127. First to occur was the blatant refusal by Mr Moyane to account to me as Minister of Finance on material issues (such as the operating model of SARS). He even refused to acknowledge my authority on what may appear to be pretty much such as his applications for personal leave would not be submitted to the Ministry (although during Mr Nene's time as Minister they were). He would claim that he obtained permission for leave from the Presidency, which officials there would deny.

127.1 Mr Moyane made serious allegations against me and continued to refuse to accept that as Minister of Finance, he is accountable and answerable to me

for the performance of SARS. However, the former President did nothing to intervene in this deteriorating relationship, to facilitate adjudication of the dispute, or to resolve it in any other less formal way. It festered for many months, with Mr Moyane writing further letters about me to the President.

127.2 I faced further ongoing personal and institutional attacks, antagonism and an evident lack of accountability from Mr Moyane, the Commissioner of SARS. Indeed, the Commission is respectfully referred to the affidavit filed in the ongoing disciplinary proceedings against Mr Moyane for further detail regarding the deterioration of my relationship with him.

127.3 Declaration of an inter-governmental dispute in terms of section 41 of the Inter-Governmental Relations Framework Act, 13 of 2005, by Mr Moyane at SARS against me as a Minister of Finance on or about 14 April 2016.

127.4 Michael Hulley attempted to mediate the dispute on behalf of former President Zuma. However, he (Mr Zuma) appeared reluctant to personally intervene and end the hostility and lack of accountability from Mr Moyane evident in our relationship.

128. Second, in or about 12 June 2016, the Minister of Social Development, Bathabile Dlamini ("Min Dlamini"), wrote a lengthy letter to Mr Zuma seeking his intervention with regard to National Treasury's scrutiny of, and objections raised regarding the various systems for the payments of social grants and the implementation of policy by the Social Development.

129. In addition, the important work that National Treasury was doing to amend the Financial Intelligence Centre Act caused acrimonious and personally insulting attacks on me and the officials of the Department from those opposed to the amendments.

129.1 These amendments related to the improvement and strengthening of various aspects of South Africa's financial intelligence capabilities. The Financial Intelligence Centre ("FIC") receives information from the banking sector, which it analyses and shares with domestic and international law enforcement agencies to identify the proceeds of crime, combat money laundering, terrorism funding and tax evasion, among other crimes. South Africa is a member of the Financial Action Task Force, which is an intergovernmental organisation that develops standards for all countries to combat these illegal activities and facilitates international cooperation in these efforts. In order to enhance the integrity of the financial system and to comply with developing international standards its best practices, South Africa needed to amend its legislation regarding the FIC Act and the powers and functions of the FIC.



129.2 Most controversially, the amendments introduced additional scrutiny of the personal finances and transactions of so-called Politically Exposed Persons (“PEPSs”) (which in the Act are termed Prominent Influential Persons (“PIPs”) (and their families and associates), as well as a requirement to record the Beneficial Owners (the natural persons) of bank accounts.

129.3 This amendment process saw a concerted effort by other member of the executive in the Security Cluster to undermine National Treasury’s oversight of the FIC. There appeared to be an effort to move the FIC, and presumably access to its highly sensitive personal information, to the Security Cluster. This was concerning since the FIC plays such an important role in the fiscal and banking regulatory environment overseen by National Treasury.

129.4 Former President Zuma also delayed signing the amendments into law until litigation was commenced to force him to do so. No meaningful engagement occurred between the Presidency and National Treasury regarding any reservations that the former President may have had regarding the Bill. Media reports noted that he was lobbied to not sign it into law by critics and those that seemed opposed to National Treasury at the time...Eventually it was referred back to Parliament by the President in November 2016.

129.5. Media outlets owned by the Gupta family (ANN7 in particular) launched several determined attacks on the amendments. Commentators such as Mr Mzwanele Manyi and Mr Tshepo Kgadima of the Progressive Professionals Forum and Ms Danisa Baloyi of the Black Business Council were vocal critics of the amendments, and the provisions relating to PEPs in particular.

129.6. At the Parliamentary hearings held in January 2017, these same critics objected to the Bill. My Cabinet colleagues in the Security Cluster also met with officials from National Treasury to raise their objections to the amendments as well.

129.7. The Amendment Bill was eventually passed in May 2017 under my successor.

130. In sum, the orchestrated campaign against me and other leaders of National Treasury raged within the Cabinet, the institutions of state and on certain media and social media platforms. It shifted to yet another front later in the year, when I became the target of malicious and seemingly politically-motivated criminal charges.

## **Charges**

131. On 11 October 2016, the former National Director of Public Prosecutions, Adv Shaun Abrahams ("Adv Abrahams"), announced that charges were to be brought against me, as well as former SARS Commissioner, Mr. Oupa Magashula and former deputy SARS Commissioner, Mr. Ivan Pillay. The charges alleged fraud, relating to Pillay's early retirement, which had been approved by myself and Magashula in 2010.

132. Subsequent media reports revealed that Adv Abrahams had met President Jacob Zuma, Mr Mahlobo, Justice Minister Michael Masutha and Social Development Minister Bathabile Dlamini at Luthuli House the day before his announcement, 10 October 2016, Adv Abrahams explained the meeting as being held to discuss student protests with ANC leaders, but it is unusual that the ministers of higher education, finance and police were not present if that was the subject of discussion.

133. Markets reacted to the announcement of Adv Abrahams as follows:

133.1. The Rand weakened by 3.9% against the US Dollar;

133.2. Yields on South African government bonds due rose to their highest level since 2 September 2016;

133.3. The cost of insuring against non-payment of debt for five years using credit-default swaps, rose to the highest since July 2016; and

133.4. Banks stocks fell, wiping off almost R34 billion in value on the FTSE/JSE Africa Banks index.

134. On 26 October 2016, in the midst of facing these charges, I delivered the Medium Term Budget Policy Statement (MTBPS) in Parliament.

135. In an about-turn days later, Adv. Abrahams announced the withdrawal of all of the charges on 31 October 2016, stating that he was then satisfied that the three accused did not have the intention to act unlawfully. This was a few days before my first scheduled court appearance. Various civil society organisations had mobilised in protest against the charges and in support of me and fellow accused.

136. Both announcements were made amid allegations in the public domain the political motives were at play in the decisions to question and charge me and my fellow accused, in what appeared to be yet another attempt to force me to resign, to create uncertainty and instability and ultimately, to enable the capture of the Treasury.

137. Following the withdrawal of the criminal charges, I then turned to preparation of the 2017 Budget, which I delivered to Parliament on 22 February 2017.

### **The closure of the Gupta bank accounts**

138. In or about April 2016, Oakbay Investments (Pty) Ltd ("Oakbay"), controlled at that time by the Gupta family, announced that its bank accounts had been closed.

138.1. At around the same time, Mr Nazeem Howa, the Chief Executive Officer of Oakbay, began to correspond with me seeking my intervention to reverse these account closures. I obtained legal advice that confirmed that it would be unlawful and improper for me to intervene in the private contractual relationship between a bank and its client. I conveyed this advice to Mr Howa, but he appeared undeterred and continued to request a meeting with me.

138.2. Together with officials from National Treasury, I held a meeting with representatives of Oakbay (including Mr Howa and Ms Ronica Ragavan) on or about 24 May 2016 in which we explained the highly-regulated environment in which banks operate and the requirements that they closely monitor and report on suspicious transactions in order to combat money laundering. We also explained the legal impediments to me, or anyone else, intervening in the private contractual relationship between a bank and its clients. I urged him to approach the courts for relief. I knew his father as a highly principled person and asked him directly if he believed his father would be proud of his behaviour.

139. Following a Cabinet meeting on 13 April 2016, at which I was not present, a Ministerial task team (which should not be confused with an Inter-Ministerial Committee ("IMC")), was established to look into the issue of the closure of the Gupta bank account. Mr Zwane, Labour Minister Mildred Oliphant and myself were nominated for this task.

140. Following correspondence received from Mr Zwane purporting to schedule a meeting of the task team (seemingly expanded to include the then Minister of Communications, Faith Muthambi) with the banking institutions, I questioned the purpose and seeming aim of the task team with my colleagues who were nominated to it. I explained the extensive global and domestic legal regulatory framework that governs the financial sector, and cautioned that this framework needed to be understood and considered prior to any engagements with the banking institutions. My concerns were not addressed by the members of the task team.

141. I chose not to attend the meetings of the task team nor to participate in its actions, because I was of the view, confirmed in legal advice that members of the executive cannot interfere in the contractual relationships between banks and their customers.

142. I do recall further events in Cabinet that I cannot publicly disclose but which I have indicated to the Commission should be investigated, that indicated to me that

Mr Zwane had the full backing and support of former President Zuma in pursuing the task team's objective of undermining and maligning the stance adopted by myself and National Treasury to the closure of the bank accounts, this included three reports from the task team, two of which were distributed in Cabinet.

143. On or about 1 September 2016, Mr Zwane issued a media statement, purportedly on behalf of the task team and, I believe, based on its first report, announcing that it, through Cabinet, would recommend to former President Zuma that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa. This statement was effectively abandoned in the days that followed, with a statement issued by the Presidency, to clarify that no such decision had been endorsed as a decision by Cabinet.

144. On or around 14 October 2016, I launched a court application to seek declaratory relief regarding the limitations of my available powers to intervene in various decisions taken by several commercial banks to close the accounts held by Gupta-related firms.

144.1. This application attracted further hostility towards me from supporters of the former President and the Guptas.

144.2. Attached to the application as an annexure was a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports from the various banks relating to suspicious account activity and transactions conducted using the bank accounts that had been closed. This was the first public acknowledgement of suspicions regarding the business affairs of the Gupta entities since the Public Protector's State of Capture report was only released to the public on 2 November 2016 (following litigation aimed at interdicting its release launched by former President Zuma, Mr Zwane and Mr Van Rooyen).

145. I submit to the Commission that it should "follow the money" and request a full account of all transactions by any Gupta-related company and related individuals that has gone through bank accounts. By doing so it will be better placed to determine which activities were related to criminality and malfeasance. This will assist State Owned Enterprises and taxpayers to recover funds lost in this process.

#### **"The Nuclear deal" (Part II)**

146. Following Cabinet's decision on 9 December 2015 that the Department of Energy ("DoE") issue the Request for Proposal ("RFP") for the nuclear programme, the engagements between National Treasury and the DoE during 2016 largely centred on the procurement process to be followed.

147. The Office of the Chief Procurement Officer ("OCPO") sought two legal opinions. Initially the DoE intended to undertake a closed government-to-government procurement, but this would have violated the Constitution, which requires that state institutions procure goods or services using a system that is fair, equitable, transparent, competitive, and cost-effective. Having reached agreement that a competitive process must be followed, the DoE continued to insist that the "pre-engagement" activities they had already undertaken (relating to the signing of the cooperation agreements) served to prequalify those bidders. There were several other unresolved issues, including aspects that would have required exemption from the Preferential Procurement Policy Framework Act. Moreover, the RFP documentation that had been prepared had many flaws and gaps, identified not only by the National Treasury officials, but also in reports produced by the advisors working on behalf of the DoE.

148. In June 2014, Eskom had written to the DoE indicating that the Board had decided not to provide funding for any new build projects beyond Medupi, Kusile and Ingula power stations due to the funding constraints Eskom was facing. As a consequence, the DoE had sought Cabinet approval for the South African Nuclear Energy Corporation SOC ("NECSA") to replace Eskom as the implementing agent, i.e. the institution that would own and operate the nuclear power plants, with the DoE serving as the procuring agency.

149. Despite the fact that Eskom was experiencing severe financing challenges, warranting that government decide to appropriate R23 billion of funding to the company during the 2015/16 financial year, in September 2016, Eskom, through its then chief executive officer, Mr Brian Molefe, indicated its willingness and commitment to participate in the nuclear build programme. The Commission will be familiar with the centrality of Eskom's capture to the state capture project. In November 2016, Cabinet approved that Eskom assume responsibility for procuring, owning and operating the nuclear power stations. In December 2016, Eskom issued a watered-down and non-binding general request for information ("RFI") instead of the originally intended RFP.

150. Around the same time, the non-governmental organisations Earthlife Africa and the Southern Africa Faith Communities' Environment institute launched legal proceedings against the Minister of Energy, the President and Eskom (among others) challenging the determinations in terms of Section 34 of the Electricity Regulation Act that had been made by the Minister of Energy in 2013 and 2016, and the constitutionality of the tabling by the Minister before Parliament of three intergovernmental agreements during 2015. This stalled progress on the nuclear programme.

151. Shortly after my replacement as Minister of Finance, the Cape High Court ruled that the nuclear cooperation agreements with the USA, Russia and South Korea were unconstitutional and unlawful, and that the ministerial determination for a 9.6 GW nuclear new-build in South Africa was invalid.

#### **Maseko and DGs response**

152. I have been asked by the Commission's legal team to respond to the evidence of Mr Themba Maseko regarding a memorandum calling for a commission of inquiry into state capture that a group of former Directors-General addressed to the President, Deputy President, other Cabinet members and myself. One of the signatories to that memorandum, Mr Dipak Patel, provided me with a copy of the document. We had a brief conversation about it, during which I encouraged the group "do their bit" to resist state capture and ensure accountability for those implicated in it. At this time, civil society also was active regarding state capture and corruption. The former Directors-General's concerns regarding the circumventing and undermining of procurement processes, professionalism and integrity within the public service were all concerns that I shared. I understand that the group demobilized following the failure of the ANC's own initiative to deal with state capture that came about at around the same time. I understand that only Mr Maseko lodged a submission with the ANC following its call for information. Nothing further came of the initiative, as far as I am aware.

#### **V MY REMOVAL AS MINISTER OF FINANCE**

153. As is customary, I planned and led an investor roadshow to London and the USA in late March 2017, following the Budget. As also is the usual practice, the Presidency approved the roadshow and participation of myself, former Dep Min Jonas and the Director-General of the Treasury, Mr Fuzile. This approval involves the preparation of a memorandum setting out our proposed itinerary, details of the meetings to be held on the roadshow and details of the South African business people accompanying us on the roadshow.

154. According to that itinerary, Mr Fuzile and I travelled to London overnight on Sunday, 26 March 2017. Former Dep Min Jonas was due to fly to New York overnight on Tuesday, 28 March 2017 and Mr Fuzile was to travel from London to New York to join him. I would then return to South Africa overnight on that Tuesday.

155. Once the airplane touched down at Heathrow Airport on the morning of Monday, 27 March 2017, I turned on my mobile phone and received an SMS from Dr Cassius Lubisi, the Director-General in the Presidency. The message requested

that I, former Dep Min Jonas (who had not left South Africa yet) and Mr Fuzile return to South Africa immediately.

156. Mr Fuzile and I discussed the message, and decided to proceed with the meetings scheduled for that day, including with two of the global ratings agencies and to schedule a teleconference call for Monday afternoon with the ratings agency with which we were scheduled to meet on Tuesday. We made this decision so as to provide these important players with the same information on the same day. This was the most cost-effective option to return to South Africa. My office investigated purchasing a one-way ticket to fly home during the day on Monday, 27 March 2017, but I considered it too costly.

157. Also on Monday 27 March 2017, former President Zuma reportedly informed senior leaders of the South African Communist Party ("SACP") that he intended to remove me and former Dep Min Jonas, and referenced a purported "intelligence report" accusing me and others of conspiring with foreign forces against him as President. Of course, I reject and deny these allegations. I never saw this "intelligence report".

158. Following a day of meetings that formed part of the planned investor roadshow, I flew back to South Africa that evening, arriving back on Tuesday morning, 28 March 2017.

159. Tuesday, 28 March 2017 was the day that the court application regarding the closure of the Gupta businesses' bank accounts in South Africa by several of the major banking institutions was set to commence argument in the Pretoria High Court. It is of course possible that I had been removed as Minister of Finance by that time my successor would have withdrawn the application.

160. It was also the day that revered anti-apartheid activist, Mr Ahmed Kathrada, passed away.

161. Immediately after landing at OR Tambo, on Tuesday 28 March 2017, Mr Fuzile and I met with former Secretary-General of the ANC, Mr Mantashe, at Luthuli House to obtain clarity about our positions. None was forthcoming. Mr Mantashe had contacted me while I was still in London and we had agreed to meet upon my return to South Africa,

161.1. During that meeting with Mr Mantashe, he informed me that former President Zuma had met with the ANC's Top 6 officials on the previous day, Monday, 27 March 2017. The same fake "intelligence report" had been presented to them, but it had been rejected by those in the meeting.

161.2. Mr Mantashe then told me that Mr Zuma told them that, regardless of the "intelligence report", his relationship with me had irretrievably broken down. Since this was not my impression of my relationship with former President Zuma,

I asked Mr Mantashe if he had indicated why he felt that our relationship had irretrievably broken down. Mr Mantashe indicated that he did not.

161.3. Mr Mantashe recounted that Mr Zuma had indicated that it was unusual that the Minister, Deputy Minister and Director-General were all out of the country at the same time. I corrected him, saying that Former Dep Min Jonas had not yet left South Africa. Mr Mantashe seemed shocked by this fact.

161.4. I believe that Mr Zuma had mentioned Brian Molefe as a possible replacement as Minister of Finance, but that this suggestion was rejected by the members of the Top 6 in the meeting.

161.5. As an aside, I note that, on 23 February 2017, Mr Brian Molefe, who had resigned as the Eskom CEO in November 2016, following the Public Protector's State of Capture report, was sworn in as a Member of Parliament for the ANC. Speculation at the time was that this was a precursor to his appointment as my replacement as Minister of Finance. Almost a year earlier, in April 2016, Mr Sifiso Buthelezi also, was sworn in as a Member of Parliament for the ANC. Speculation suggested that he was earmarked to be Mr Molefe's Deputy Minister.

161.6. Mr Mantashe indicated to me that Mr Zuma would prefer it if I would resign, rather than him having to fire me. He spoke to me about leaving with my integrity or honour intact. As explained above, I had no plans to resign but would continue to serve the national interest. My position was that the former President could fire me if he wanted to get rid of me.

161.7. I understood from Mr Mantashe that I was likely to be removed, but that the issue of my replacement was to be discussed again by Mr Zuma at the next Top 6 meeting the following week (Monday, 3 April 2017). Mr Fuzile was distraught at the turn of events and was himself considering resigning.

161.8. I returned to my office at National Treasury that afternoon.

162. The next day, Wednesday, 29 March 2017, a funeral was held for Ahmed Kathrada at West Park Cemetery in Johannesburg.

163. On Thursday, 30 March 2017, the SACP issued a media statement recording that it had been informed on Monday, 27 March 2017, by Mr Zuma that I was to be replaced as Minister of Finance. The statement recorded that the SACP objected to this intended reshuffle. It also noted that it had laid a complaint with the Inspector General of Intelligence and the Minister of State Security regarding a "rogue intelligence unit that in our view gathers data illegally, produces false reports and



feeds them into the political and public domain to smear comrades". I do not know the status of that complaint.

164. That evening, former President Zuma announced that both myself and former Dep Min Jonas, and several others including Ministers Hanekom and Ramatlhodi, were removed from our positions. We were replaced by Messrs Malusi Gigaba and Buthelezi, respectively. I became aware of my removal when the President made his announcement of the reshuffle, which was broadcast on television while I watched.

165. I had no contact with the former President regarding his decision to remove me as Minister of Finance.

166. The global ratings agencies expressed their immediate concern at these developments. For example,

166.1. On Monday, 3 April 2017, Moody's Investors Services announced that it had placed the Baa2 long-term insurer and senior unsecured bond ratings of the government of South Africa on review for downgrade, that review was said to be prompted by the "abrupt change in leadership of key government institutions" and would "allow Moody's to assess these risks and if the changes in leadership signal a weakening in the country's institutional, economic and fiscal strength".

166.2. The same day, Standard & Poor's downgraded South Africa's ratings to 'BB+' from 'BB-' and the long-term local currency rating to 'BBB-' from 'BBB' in a reflection of their "view that the divisions in the ANC-led government that have led to the changes in the executive leadership, including the finance minister, have put policy continuity at risk. This has increased the likelihood that economic growth and fiscal outcomes could suffer".

166.3. On 7 April 2017, Fitch Ratings also downgraded South Africa's Long-Term Foreign- and Local-Currency Issuer Default Ratings to 'BB+' from 'BBB'. These downgrades were made in light of its view that "the cabinet reshuffle, which involved the replacement of the finance minister, Pravin Gordhan, and the deputy finance minister, Mcebisi Jonas, is likely to result in a change in the direction of economic policy. The reshuffle partly reflected efforts by the out-going finance minister to improve the governance of state-owned enterprises (SOEs). The reshuffle is likely to undermine, if not reverse, progress in SOE governance, raising the risk that SOE debt could migrate onto government's balance sheet. Differences over the country's expensive nuclear programme preceded the dismissal of a previous finance minister, Nhlanhla Nene, in December 2015 and in Fitch's view may have also contributed to the decision for the recent reshuffle."

## **VI RETURN TO PARLIAMENT**

167. Following my removal as Minister of Finance, I remained an ANC Member of Parliament. I was a member of the Portfolio Committee on Public Enterprises that held an inquiry into state capture at various SOCs, including Eskom, Transnet, PRASA and Denel. The disclosures and submissions made to the Committee will doubtlessly be relevant to this Commission's other terms of reference. I do not provide that detail in this statement.

168. My experience in the Portfolio Committee's inquiry into Eskom, in particular, revealed the extent of the manipulation of the Boards of the SOCs, their management, and the abuse of the contracts and procurement processes for corrupt and unlawful ends. This pillage was replicated and became prevalent in other SOCs as well. I believe that this hollowing out of the governance structures of SOCs was a direct consequence of the state capture project and was aimed at facilitating their plunder. One can observe how the methodology was perfected at one SOC and then replicated at others as the state capture project was rolled out.

## **VII RETURN TO CABINET**

169. Following Mr Zuma's resignation on 14 February 2018, President Ramaphosa announced a cabinet reshuffle on 26 February 2018. I was appointed Minister of Public Enterprises.

170. In my current position, the investigation of the damage done in the past decade to South Africa's SOCs is ongoing. So too are efforts to restore good corporate governance, procurement framework compliance and accountability for implicated members of the Boards and management of SOCs. The details of the state of our SOCs and these "re-capturing" efforts also are relevant to this Commission's other terms of reference. The Department of Public Enterprises will be providing the Commission with information in this regard.

## **CONCLUSION**

171. The Commission's legal team has requested that I reflect on possible lessons and recommendations arising from my evidence relating to its Terms of Reference 1.1 to 1.3.

172. I believe that South Africa required what I call a "whole society transformation." By this I mean we need deep reflection on our chosen and shared values and priorities. On issues of integrity and corruption, South African business, and professionals or advisors in particular, need to reflect on their role in state capture. The Commission's investigation of these issues should lead to a genuine and deep transformation of business ethics and culture in our country.

173. I believe that meaningful reflection and transformation also is required in respect of the need for greater transparency and effective oversight with regard to major public procurement processes. New checks and balances on executive power – at all levels and in all spheres of government, not just national executive or the Presidency – are required.

174. I believe that these lessons will promote unity and the national interest, and enhance development and inclusive growth.

175. The work currently being done with SOEs shows that they are and were seriously compromised in terms of the scale of financial losses, the undermining of good corporate governance, their operational capability, and the dearth of competent and courageous leadership in the face of serious fiscal risk.

176. The Commission should consider releasing interim reports or measures that could expose and help put a stop to ongoing malfeasance.

177. "Consequence management" is required: criminal charges should be pursued by our restored law enforcement agencies, individuals should have their services terminated, demoted, declared to be delinquent directors or ordered to pay back the money pillaged and looted from our state.

178. It must be recognised that those constituencies who would have liked the status quo to remain are engaged in a determined and vigorous fight back taking place across our state.

179. The real cost of state capture is the damage it has done to the institutional fabric of our state. Good people lost their jobs, families were put through trauma and vilification for standing up, and the lasting impact of the past decade weakened and hollowed out our state. A culture of malfeasance was legitimised and tolerated with increasing impunity and a lack of accountability. SOCs were distracted from their intended purpose of providing services, supporting economic development and creating inclusive growth in service of transformation.

180. People, including myself, who are appearing before the Commission continue to be subjected to harassment and racist abuse in frivolous and vexatious litigation, in the media and on social media. Decisions taken to clean up are stalled when they are challenged, whether internally or through litigation.

181. The misuse and abuse of public powers for suspicious objectives, including intimidation and harassment, also continues.

181.1. For example, recently on 1 October 2018, I was subpoenaed to appear before the Public Protector in regard to an investigation she is undertaking into the approval of an early retirement package offered to Mr Ivan Pillay. This was the same issue regarding which I was charged criminally in 2016. The complaint

was lodged on 18 November 2016 by Mr Lebogang Hoveka, who was then a speechwriter in the Presidency.

182. I believe that the fight back is aimed at countering the work done this year by public servants and political office bearers to “re-capture” the state and deliver on its constitutional mandate.

183. As I hope is clear from my statement, there were many who have resisted state capture at every opportunity, including activists, civil society, political leaders, journalist, business people, labour, and lawyers. Our insistence on following the constitutional mandate given to the executive, and to follow the legal and regulatory frameworks over which we were responsible ensured that we could resist and oppose improper and unlawful schemes. Following the law and our consciences has been, and will continue to be, our chosen path. The cost of being honest is high for me personally, as well as for my family and my colleagues. It is a price paid to ensure that South Africa transforms from its apartheid past and its recently captured state into the nation for all South Africans promised in the Constitution.”

212. What has been done above is to provide Mr Gordhan’s evidence as he set it out in his statement or affidavit without analysis. What follows hereunder is the analysis of that evidence and other evidence in so far as it relates to Mr Gordhan’s resistance to wrongdoing, his dismissal and the determination of President Zuma’s reasons for Mr Gordhan’s dismissal.

#### **THE DISMISSAL OF MR GORDHAN AND MR JONAS AS MINISTER OF FINANCE AND DEPUTY MINISTER OF FINANCE RESPECTIVELY AND MR GORDHAN’S REPLACEMENT BY MR MALUSI GIGABA**

213. It will have been gathered from Mr Gordhan’s evidence that he was told that on either 27 or 28 March 2017 there had been a meeting of the ANC’s top 6 officials and that at this meeting President Zuma had told the other officials that he intended to drop him from his Cabinet. In the affidavits provided by Mr Gwede Mantashe,<sup>143</sup> Ms Jessie

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<sup>143</sup> Exhibit GG (f).4.

Duarte<sup>144</sup> and Dr Zweli Mkhize<sup>145</sup> to the Commission about that meeting, these officials stated that President Zuma told them that he was in possession of an intelligence report which was to the effect that Mr Gordhan and Mr Jonas were undertaking or were going to undertake the overseas trip that they were undertaking around those days in order to lobby international bodies against the South African government and economy.

214. The three ANC officials referred to above stated in their affidavits that President Zuma did not share the intelligence report with them.<sup>146</sup> In his affidavit to this Commission President Ramaphosa said<sup>147</sup> that President Zuma showed them (the other officials of the ANC) the intelligence report on which he was relying in seeking to fire Minister Gordhan and Deputy Minister Jonas. In his affidavit President Ramaphosa said it was a document that consisted of three pages in very large font and was very badly drafted. He said it was shown to them but he was not provided with a copy. President Ramaphosa testified that at the meeting of the Top 6 he objected to President Zuma's intention to dismiss Minister Gordhan and Mr Jonas particularly on the basis of the alleged intelligence report. President Ramaphosa has testified that he told President Zuma that he would express his opposition publicly. President Ramaphosa was Deputy President at the time. President Zuma said in effect that in any event, irrespective of the reliability or otherwise of the intelligence report, his relationship with Mr Gordhan had irretrievably broken down. Dr Zweli Mkhize has stated in his affidavit that between some time in 2016 and early 2017 President Zuma had told ANC officials that his relationship with Minister Gordhan had broken down irretrievably. Dr Mkhize said that President Zuma said that there was no collegiality between him and Mr Gordhan anymore.

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<sup>144</sup> Exhibit GG (f).3.

<sup>145</sup> Exhibit GG (f).5.

<sup>146</sup> Exhibit GG (f).4, p 2017, para 10.

<sup>147</sup> Exhibit BBB3.

215. Notwithstanding the fact that Mr Zuma was not furnishing the Commission with any affidavits or statements to respond to numerous allegations made against him and to mounting evidence that was being given by various witnesses against him in the Commission, I requested Mr Gordhan to depose to an affidavit or affirmed declaration and disclose events or facts of which he was aware which could be said to have been the basis for Mr Zuma saying that their relationship had broken down irretrievably. Mr Gordhan deposed to an affidavit and furnished it to the Commission. In that affidavit he in effect said he did not know of any incidents or events that could be said to have irretrievably broken down his relationship with President Zuma except for his resistance to wrong doing that he dealt with in his affidavit and oral evidence.
216. The alleged intelligence report will be dealt with shortly. However, it is convenient to deal first with the statement that in the meeting with the Top 5 of the ANC, President Zuma sought to justify his intention to fire Minister Gordhan on the basis that his relationship with Mr Gordhan had irretrievably broken down. Mr Zuma fled the Commission before he could give evidence about his dismissal of Minister Gordhan and Deputy Minister Jonas and before he could be questioned on his reasons for dismissing Minister Gordhan and Deputy Minister Jonas, including on whether he did say to the ANC Top 5 that his relationship with Minister Gordhan had irretrievably broken down. Accordingly, he elected not to place before the Commission his side of the story including the grounds upon which he said that his relationship with Mr Gordhan had irretrievably broken down if, indeed, he did say that to the Top 5 of the ANC. Therefore, he has not substantiated any allegation that his relationship with Mr Gordhan had irretrievably broken down. President Zuma may well have been using that as an excuse to get rid of Minister Gordhan as Minister of Finance or as Minister so that he could appoint a Gupta associate in his place.

217. There is no evidence on the basis of which it can be said that the reason why President Zuma dismissed Mr Gordhan was that his relationship with Mr Gordhan had irretrievably broken down. Therefore, it cannot be said that that was the reason. Therefore, the question remains: why did President Zuma dismiss Minister Gordhan at the time he did and, in the manner in which he did?
218. Mr Gwede Mantashe, Ms Jessie Duarte and Dr Zweli Mkhize were also asked to deal in their affidavits with Mr Gordhan's evidence that apparently when President Zuma spoke to the ANC Top 5 about his intention to remove Minister Gordhan as Minister of Finance, he had also told the Top 5 that he intended to appoint Mr Brian Molefe as Minister Gordhan's replacement. In their affidavits to the Commission, Mr Gwede Mantashe, Ms Jessie Duarte and Dr Zweli Mkhize confirmed that, indeed, President Zuma informed the Top 5 of the ANC that he intended to appoint Mr Brian Molefe as Mr Gordhan's replacement. These three officials said in their affidavits that the Top 5 rejected the idea that Mr Brian Molefe should be appointed as Mr Gordhan's replacement and they asked Mr Zuma to reconsider the matter.<sup>148</sup>
219. There might not be a lot for which the ANC leadership from 2009 to 2017 may deserve to be credited with regard to their handling of President Zuma as a member and leader of the ANC, and, as President of the country and his relationship with the Guptas, corruption and state capture but for standing up to President Zuma and stopping him from appointing Mr Brian Molefe as Minister of Finance, they deserve credit. Now that one knows from Part 2 Vol 1 of this Commission's Report what damage Mr Brian Molefe and other Gupta associates did to Transnet when he was the Group Chief Executive Officer of Transnet, one shudders to think what would have become of the National

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<sup>148</sup> Exhibit GG(f).3, p 2011, para 12; Exhibit GG(f).4, p 2017, para 12.

Treasury if President Zuma had not been stopped from appointing Mr Brian Molefe as Mr Gordhan's replacement.

220. Although the Top 5 of the ANC (leaving out Mr Zuma) deserve credit for stopping President Zuma from appointing Mr Brian Molefe as Minister of Finance, it is also justifiable to ask the question: why did they and the ANC Deployment Committee not stop Mr Molefe from being appointed as the Group CEO of Transnet after the Gupta newspaper, *The New Age*, had published an article in their first ever edition on 6 or 7 December 2010 in which it said that Mr Brian Molefe would be appointed as the new GCEO of Transnet? It cannot be that many of them were not aware of that article. If many of them did become aware of that article, what did they think was happening at Transnet and in Government when, indeed, Mr Molefe was appointed as GCEO of Transnet three months after that article? Of course, they also did not stop Mr Brian Molefe's secondment from Transnet to Eskom nor did they stop the secondment of Mr Anoj Singh from Transnet to Eskom. The question is: What did the ANC leadership think was happening as all these things were happening? Did they bother to ask themselves these questions? If they did not, why did they not?
221. To return to Mr Gordhan's dismissal by President Zuma, ultimately President Zuma dismissed Mr Gordhan and appointed Mr Malusi Gigaba as Minister of Finance. President Zuma also dismissed Mr Jonas at the same time as Deputy Minister of Finance. A day or two after Mr Gordhan's dismissal, the then Deputy President of the ANC and of the country, Mr Ramaphosa was interviewed by journalists and asked to comment on the dismissal of Mr Gordhan and Mr Jonas by President Zuma. President Ramaphosa furnished the Commission with an affidavit dealing with this matter.<sup>149</sup> When he testified before the Commission, he also covered it. He told the media that President Zuma had told the officials of the ANC that he intended to remove Minister

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<sup>149</sup> Exhibit BBB 3.



Gordhan and Deputy Minister Jonas from their positions because he had obtained an intelligence report to the effect that they were going to use their trip overseas in order to lobby foreign governments against the South African government.<sup>150</sup> President Ramaphosa explained to the journalists during the interview that he had strongly disagreed with President Zuma on the dismissal of the Minister and Deputy Minister and had rejected the intelligence report on which President Zuma relied. Mr Ramaphosa also told the media that he had made it clear to President Zuma at that meeting that he would express his views publicly on this matter. Mr Ramaphosa rejected any notion that people such as Minister Gordhan and Deputy Minister Jonas could have undertaken a trip overseas in order to lobby foreign governments against their own government. He said that this did not make any sense at all.<sup>151</sup>

222. Mr Zuma did not place before the Commission any evidence that could have shown that, indeed, he had an authentic and credible intelligence report on which he relied to dismiss Mr Gordhan and Mr Jonas. Nevertheless, the Commission heard evidence from Dr Dintwe<sup>152</sup>, who was the Inspector-General of Intelligence at the relevant time and who investigated the existence of this alleged intelligence report after he had received complaints from the Democratic Alliance and the South African Communist Party.<sup>153</sup> The Communist Party had issued a media statement at the time in which it said that President Zuma had told the leadership of the SACP of his intention to remove Mr Gordhan and Mr Jonas from their positions on the basis of an intelligence briefing to the effect that the two intended to lobby international bodies against the SA government and the economy.

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<sup>150</sup> Exhibit BBB 3, p 42, para 89.5.

<sup>151</sup> Exhibit BBB 3, p 42-43, para 89.5 – 89.8.

<sup>152</sup> Exhibit YY15.

<sup>153</sup> Exhibit YY15, p 35, para 113.

223. Dr Dintwe testified that the core issues that he needed to investigate were the origin, authenticity and veracity of the alleged intelligence report. Dr Dintwe testified that President Zuma was apparently the only person who was in possession of the intelligence report. Dr Dintwe said that he made numerous requests to President Zuma for a copy of that intelligence report. He said that he made one of those requests in a meeting which he had with President Zuma. He testified that, despite President Zuma promising to provide Dr Dintwe with a copy of such report, he had not done so by the time he resigned as President of South Africa on 14 February 2018 and never thereafter provided Dr Dintwe with a copy of the report.<sup>154</sup>

224. Dr Dintwe went on to say in his affidavit:

“If the former President did indeed receive an intelligence briefing as stated by him at the meeting, one would assume that the report emanated from the Intelligence Services over whom the IGI has the oversight mandate. This office is therefore the only vehicle that could have been used to establish the authenticity and verification of the report so as to establish whether the decision of the former President was credible. The President’s failure to provide the report has made it impossible to verify its origin, authenticity and veracity. It is therefore regrettable that the only person who could have provided this office with the report was former President Zuma and he chose not to respond to the IGI. We were of the view that we could not simply rely on the report leaked to the media in order to authenticate the veracity of the report allegedly provided to the former President?”<sup>155</sup>

225. After referring to other intelligence reports that Dr Dintwe had investigated which had been used to tarnish certain people’s names who were fighting corruption which he had found not to be credible, Dr Dintwe said in his affidavit:

“My experience has been that the common denominator in respect of each of these so-called Intelligence Reports is that they are often compiled in a clumsy, incoherent

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<sup>154</sup> Exhibit YY 15, p 36, para 115.

<sup>155</sup> Exhibit YY 15, p 36, para 114.

and unintelligible manner and the identity of the compiler is frequently unknown. There seems to be no recourse for the citizens whose integrity and careers are destroyed by these reports, even in cases where the compilers are known. It is my view that these reports are relied upon full-knowing that they will not stand up in court as they achieve the desired effect of removing key persons who stand in the way of state capture from their positions. The deleterious effect of this is that the names of these persons are irreparable (sic) besmirched by these reports as by the time the cases are withdrawn against them, it is too late – their careers have been ruined."<sup>156</sup>

226. Why did President Zuma, while in office as President of the country, not produce the intelligence report and give a copy thereof to Dr Dintwe so that Dr Dintwe could investigate its origin, authenticity and the veracity of its contents? Based on President Ramaphosa's evidence that President Zuma showed the ANC officials the intelligence report, the only reason why President Zuma would not have produced the report is that he knew that it was fake or was simply not credible and, if he produced it, Dr Dintwe's investigation was likely to result in an adverse finding against him or those who had given him that report. President Zuma is a former Head of Intelligence in the ANC and, therefore, if such a report did exist, in all probability he knew that it was fake or was for some or other reason not credible. That is why he was not prepared to produce it. President Ramaphosa has said that the report that President Zuma showed them was badly drafted. Dr Dintwe testified that a common feature of intelligence reports that are used to assassinate the character of people is that they are badly written.
227. The question that arises is: why would President Zuma have relied upon a fake intelligence report to fire Minister Gordhan and Deputy Minister Jonas? The answer is: because he had to find a pretext to get them out of the way so that his and the Guptas' agenda including the capture of the National Treasury could be pursued. The Guptas were very determined to capture the National Treasury before President Zuma's second term of office expired and there was by then more or less just over a year left before

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<sup>156</sup> Exhibit YY 15, p 37.

the expiry of his second term. There was no time to waste. They knew, too, that he was not going to stand for the position of President of the ANC in the ANC's elective conference in December 2017. They would also have known that in the South African context and maybe, elsewhere as well, a President becomes weaker and weaker as the end of his last term approaches.

228. The position is, therefore, that President Zuma had to rely on a fake intelligence report because he needed an excuse to get rid of Minister Gordhan and Deputy Minister Jonas. The purpose of his decision to remove these two was to pave the way for the appointment of a Minister of Finance who would cooperate with the Guptas and in the corrupt agenda that they were all pursuing. In that agenda the capture of the National Treasury was central. All the evidence points to this reason and this reason alone for Mr Gordhan's and Mr Jonas' dismissal.

229. In substantiation of the conclusion in the preceding paragraph the following can be said:

229.1. President Zuma and the Guptas must have been really under pressure to have agreed that Mr Gordhan be re-appointed as Minister of Finance to replace Mr Des Van Rooyen and must have wanted him out of that position as soon as possible.

229.2. President Zuma had intended to replace Minister Gordhan with Mr Brian Molefe who, by his own admission before the Commission, was a friend of the Guptas; that President Zuma wanted to appoint Mr Brian Molefe as Minister of Finance in March or April 2017 is astonishing! After all that was publicly known about Mr Brian Molefe by that time – including that the Gupta newspaper said he was going to be the Group CEO of Transnet even before the post had been advertised and he became the Group CEO of Transnet and what the Public Protector's Report "State of Capture" had said about him – and the fact that he

had resigned from Eskom on the basis that he wanted to clear his name and he had not, as yet, cleared his name – how could a President want to put such a person in charge of the country's finances? There are no words to describe this conduct on President Zuma's part except to say that he must have been determined to give the Guptas direct access to the nation's Treasury to hand the control of our National Treasury to the Guptas before he left office. Was this the same man who twice stood in front of the people of South Africa and took an oath and said:

"I, Jacob Gedleyihlekisa Zuma, swear/solemnly affirm that I will be faithful to the Republic of South Africa...I solemnly and sincerely promise that I will always – promote all that will advance the Republic and oppose all that may harm it."

230. Yes, this was the same man.

231. President Zuma was prevented by the ANC officials from appointing Mr Brian Molefe as Mr Gordhan's replacement but, when he realised that he could not appoint Mr Brian Molefe, the Guptas must have told him to appoint another friend of theirs because he then turned to Mr Malusi Gigaba and appointed him as Mr Gordhan's replacement. As will have been seen from Part 2 Vol 1 of this Commission's Report that relates to Transnet, Mr Gigaba had shown himself to be quite co-operative with the Guptas and their agenda. When he gave evidence before this Commission, he admitted that he was friends with Mr Ajay Gupta. So, if the ANC officials thought that they would prevent President Zuma from appointing a friend of the Guptas by preventing the appointment of Mr Brian Molefe as the Minister of Finance, they were mistaken. The Guptas gave President Zuma another one of their friends to appoint, namely, Mr Malusi Gigaba and he appointed him. Although Mr Gigaba was also a Gupta associate, it does not appear that he was able to do much for the Guptas as Minister of Finance.

232. Had it not been for the fact that at the end of 2017 the ANC would have an elective conference where Mr Ramaphosa – who was already Deputy President of the ANC and the country – would stand as a candidate to take over from Mr Zuma, more damage could have been done to the National Treasury under Mr Gigaba than may have been done. In December 2017 Mr Ramaphosa was elected as the President of the ANC and in February 2018 President Zuma reluctantly resigned as President of the country and Mr Ramaphosa was elected as the President of the country. Mr Gigaba was dropped from Cabinet and President Ramaphosa returned Mr Nhlanhla Nene to the position of Minister of Finance. In the meantime, nothing had materialised about the position in the BRICS Bank that Mr Zuma had said Mr Nene was to be deployed to.
233. Earlier, reference was made to Mr Jonas' evidence that the Gupta brother with whom Mr Jonas had a meeting on 23 October 2015 told him that Mr Brian Molefe was one of the people that they were working with and that his career was safe. It is appropriate to affirm that, indeed, what happened in Mr Molefe's career, not only after 2015 but also from December 2010 onwards completely reveals that somebody or certain people were taking measures at ensuring that he always had a job or if he did not have a job, he had a fat pension to which he was not entitled. What follows is taken partly from the judgment of the High Court, Pretoria, and from well-known facts that cannot be disputed.
234. This is what the Public Protector said about Mr Brian Molefe in her State of Capture Report which drove Mr Brian Molefe to decide to leave Eskom on the basis that he thought that considerations of good governance dictated that he should leave Eskom and he expressed the hope that one day he would get a forum in which he would put his side of the story and show that he had done nothing wrong. Indeed, it looks like the Guptas, the Guptas' associates in the Eskom Board, the Guptas' associates in the Cabinet, namely, Mr Malusi Gigaba, Ms Lynn Brown, President Zuma and the ANC took

various special measures to look after Mr Brian Molefe's career and make it safe. The following brief points can be made – leaving out how Mr Brian Molefe became the GCEO of Transnet which is dealt with in Part II of this Commission's Report:

- (a) he was spared the "inconvenience" of a transparent, fair and competitive process before he was appointed as GCEO of Eskom;
- (b) when he left Eskom, Dr Ngubane, a Gupta associate, ensured that he would get a fat pension to which he was not entitled as he was not 63 years old as yet. On 15 November 2015, Dr Ngubane addressed a letter to the Minister of Public Enterprises, where he proposed that Mr Molefe's pension benefit be calculated to age 63 with penalties waived to compensate for the fact that Mr Molefe had been "previously employed on some short term contracts and have not been in the position to accumulate pension benefits over time"; – based on Dr Ngubane's motivation he would be treated as if he had reached that age and Eskom would make such payments as may have been needed to be paid to the pension or provident fund to make that possible;
- (c) in February 2017 the ANC made Mr Brian Molefe one of its members of Parliament when the reason which prompted him to leave Eskom had not fallen away – he had not cleared his name concerning the allegations in the Public Protector's Report;
- (d) it was widely reported in the media that Mr Molefe joined Parliament because President Zuma intended to fire Mr Pravin Gordhan as Minister of Finance and replace him with Mr Molefe;
- (e) about a month or so after President Zuma had failed to appoint Mr Brian Molefe as Minister of Finance to replace Mr Gordhan and had appointed Mr Gigaba

because five of the Top 6 officials of the ANC had objected to President Zuma's intention to appoint Mr Molefe; he resigned from Parliament and the Eskom Board brought him back to Eskom in the most bizarre manner one could imagine. It was a complete circus;

(f) President Zuma and the Guptas must have been behind Mr Molefe going to Parliament because their plan was that Mr Molefe should replace Mr Gordhan; and the ANC facilitated his joining Parliament despite the serious allegations that were hanging over his head which had prompted him to leave Eskom; it appears that none of the people in the ANC who had the power to facilitate this asked the question: if it was bad for Mr Molefe in terms of good governance to remain at Eskom in the light of the Public Protector's Report, how is it good for him to go to Parliament and represent us?

(g) after Mr Molefe had been thrown out of Eskom, he did not go back to Parliament.

235. All of the above reveal that the Guptas, President Zuma, the ANC and the Eskom Board were looking after Mr Brian Molefe's career. Mr Tony Gupta was right: Mr Molefe's career was safe. However, only up to a certain point.

236. To summarise, President Zuma dismissed Minister Gordhan because of his resistance to wrongdoing and because he wanted to appoint a Minister of Finance who carried the blessings of the Guptas. That is why he wanted to appoint Mr Brian Molefe. In this regard it must be remembered that, when President Zuma fired Minister Nene on 9 December 2015, he wanted to appoint a Minister who carried the approval of the Guptas which Mr Van Rooyen carried. However, his and the Guptas' plan was thwarted when he had to move Mr Des Van Rooyen to COGTA and had to re-appoint Mr Gordhan as Minister of Finance. Mr Gordhan was not his preferred choice. He was forced by circumstances to appoint him. He still wanted to please the Guptas by appointing



someone that they were happy with. That is why he wanted to appoint Mr Brian Molefe as Minister of Finance despite the fact that he had not cleared his name after the Public Protector's Report which implicated him in wrongdoing. That is why he wanted to appoint him as Minister of Finance despite the fact that in the Public Protector's Report: State of Capture, he had been implicated in serious wrongdoing. When President Zuma was prevented by the ANC's Top 5 from appointing Mr Brian Molefe as Minister of Finance, he appointed another friend of the Guptas as Minister of Finance. That was Mr Malusi Gigaba. Why is it that when President Zuma sought someone to appoint to replace Mr Nhlanhla Nene as Minister of Finance, he decided upon someone who was a Gupta associate and when he wanted someone to replace Mr Gordhan both his first option, namely Mr Brian Molefe, and his second option, Mr Gigaba, were Gupta associates? The reason can only be that he was determined to replace Mr Gordhan with someone who had the blessing of the Guptas. It is difficult to reflect on this and not be reminded of Mr Themba Maseko's evidence that in or about October 2010 Mr Ajay Gupta told him that President Zuma would do anything they wanted him to do and Mr Jonas' evidence that in his meeting at the Gupta residence on 23 October 2015 Mr Tony Gupta told him that they could get President Zuma to do anything they wanted. President Zuma was captured by the Guptas and they could get him to do whatever they wanted in order to advance their business interests and to advance state capture.

237. In conclusion on the topic of the attempted capture of the National Treasury it is appropriate to say that the fact that the Guptas and President Zuma failed to capture our National Treasury even after relentless attempts to do so over a long period of time is due largely to the Ministers of Finance that South Africa had during those years, namely Minister Nhlanhla Nene and Minister Pravin Gordhan, the men and women at National Treasury, including Mr Fuzile who was the Director-General and his team of senior officials who, in the interest of the country, put up serious resistance to President Zuma's and the Guptas' attempts. The country should be grateful to all of them.

238. Civic organisations, journalists, non-governmental organisations, the opposition political parties in Parliament and the people of South Africa in general who staged marches and demonstrations to protest against the Guptas and President Zuma's role in state capture must all be commended and the country must be grateful to all of them. Certain individuals within the ANC also made their voices heard and they played an important role as well.

239. Our National Treasury nearly fell into the wrong hands, particularly during the difficult four days in December 2015 following Minister Nene's dismissal and Mr Des Van Rooyen's appointment as Minister of Finance. Mr Des Van Rooyen, Mr Bobat and Mr Whitley were already inside the country's National Treasury. Mr Bobat and Mr Whitley had begun to send National Treasury's confidential documents to the Guptas and their associates outside of National Treasury. It is almost a miracle that the National Treasury was saved from the tentacles of the Guptas! I shudder to think what would have happened to this country if President Zuma was not forced to move Mr Des Van Rooyen and his advisors out of the National Treasury and if Mr Van Rooyen and his advisors had been allowed to continue in the National Treasury.

240. **RECOMMENDATIONS**

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

Judicial Commission  
of  
Inquiry into Allegations

of

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

Report: Part IV

Vol. 1: EOH Holdings (Pty) Ltd and the City  
of Johannesburg

Chairperson: Justice R.M.M Zondo

Chief Justice of the Republic of South  
Africa

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## EOH HOLDINGS (PTY) LTD AND THE CITY OF JOHANNESBURG

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### Introduction

242. EOH is a unique case. Alone among all the companies that have been mentioned in the proceedings of the Commission, EOH proactively approached the Commission to be given the opportunity to disclose publicly what wrongdoing had taken place historically within its ranks. It sought also to explain what it has already done, and what it proposes to do, to make reparation for such wrongdoing and to prevent similar wrongdoing occurring within its ranks in the future.
243. EOH's attitude towards the Commission is illustrative of the attitude that it has taken to regulatory and law enforcement authorities more generally. Since the appointment of Mr Stephen van Coller as CEO of EOH in September 2018, Mr van Coller and the Board of EOH have presided over a process where ENS Forensics have been appointed to conduct independent and unfettered investigations into EOH's historical involvement in irregular and corrupt procurements practices. EOH has committed itself to making the results of these investigations public and to assisting regulatory and law enforcement authorities with their investigations into matters that have been revealed by the ENS Forensics investigations.
244. Primary credit for the attitude taken by EOH must be accorded to Mr van Coller. At the time of his appointment in 2018, he was aware of adverse media reports relating to EOH. His response to these reports was not to seek to negate them, but rather to investigate to establish whether they were substantiated. When it became clear that there was substance to several of these reports he put in place a wide range of measures:

- 244.1. to investigate the full extent of historical wrongdoing within the ranks of EOH,
  - 244.2. to draw the historical wrongdoing to the attention of the authorities,
  - 244.3. to engage the affected organs of state so as to reach agreement on the payment of compensation to the by EOH to make good the harm that they had suffered as a result of wrongdoing by EOH executives, and
  - 244.4. to make appointments and establish structures within EOH that would provide safeguards to prevent future repetition of the past wrongs committed by individuals associated with EOH.
245. This chapter does not deal with details of the corporate governance structures introduced at EOH to guard against abuse of public procurement processes and other irregular practices. These issues will be canvassed in a later chapter of the Report of the Commission which makes recommendations in relation to structures and processes in the public and private sectors to guard against State Capture. The present chapter focusses only on the historical facts concerning EOH's involvement in irregular procurement practices. Before addressing these facts, it is important to emphasize that all of the cases discussed in this chapter were first brought to the attention of the Commission by EOH itself. Thereafter, EOH provided ongoing assistance to the Commission in the Commission's investigations of these matters. There is no other Company that has been of greater assistance to the Commission in relation to the investigation of historical wrongdoing within its ranks.
246. The Commission commends EOH, Mr van Coller and the Board of EOH for taking the approach that they have taken in this regard. The Commission also emphasizes the importance of distinguishing

- 246.1. On the one hand, between EOH as a company and the individuals who historically controlled EOH and engaged in corrupt and irregular procurement processes through, and for the benefit of, EOH, and
- 246.2. on the other hand, the need for EOH to make full reparation to affected organs of state, and the need for appropriately targeted punitive measures by the NPA and regulatory authorities.
247. EOH should not be allowed to retain the benefits of historical corrupt and irregular procurement practices. Under the leadership of Mr van Coller and its current Board, EOH does not seek to do so. It is pro-actively investigating its historical involvement in corrupt and irregular procurement processes, bringing the relevant facts to the attention of the authorities and tendering to make reparation to the organs of state at whose expense it profited from these practices.
248. This chapter will examine the following
- 248.1. The recurrent themes disclosed by EOH's investigation into its historical involvement in corrupt or irregular public procurement;
- 248.2. Two specific City of Johannesburg contracts which EOH irregularly influenced through improper payments and donations;
- 248.3. The attempt by Mr Jehan Mackay to manipulate his relationship with Mr Zizi Kodwa, currently Deputy Minister of State Security who, however, was not directly involved in government at the time, to distort public procurement practices.

### **The Environment in which Wrongdoing was facilitated at EOH**

249. In his evidence, Mr van Coller elaborated on the general environment in which wrongdoing was allowed to thrive at EOH. He identified six broad features in this regard:

- 249.1. opaque delegations of authority (DOA) with significant responsibilities granted to a few executives;
- 249.2. artificial/inflated software licence sales;
- 249.3. a succession of apparent tender irregularities;
- 249.4. the use of politically connected middlemen that are suspected to have been used as introducers and sales agents;
- 249.5. payments being made to subcontractors in circumstances where there was no evidence that work was done by these subcontractors, and
- 249.6. inappropriate gifting, sponsorships and donations.<sup>157</sup>

250. The absence of an appropriate delegation of authority framework meant that several key executives of EOH were effectively given a free hand to take significant executive decisions without any oversight or check on their authority. Thus, if one or more of these executives was to be engaging in corrupt practices, there was no structural check to prevent them from taking structural decisions without the knowledge and participation of other executives.<sup>158</sup>

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<sup>157</sup> Exhibit VV1, p 5.

<sup>158</sup> Transcript 23 November 2020, pp 33-35.



251. A recurrent feature of the irregular procurement in which EOH had been involved historically was the over-invoicing of public sector clients and the inflation of prices to those clients with the collusion of individuals within the relevant organs of state. To illustrate this theme, Mr van Coller referred to two Microsoft licensing deals with the Department of Defence and an SAP licensing agreement with the Department of Water Affairs. In all of these cases, with the collusion of individuals within the relevant organs of state, EOH was able to bypass procurement procedures conducted by the State Information Technology Agency (SITA) and to sell directly to Departments. It then charged for more licences than it delivered and charged a rate per licence that was significantly higher than it would have been able to charge had it been subjected to competitive procurement processes administered by SITA.<sup>159</sup>
252. The pattern to which Mr van Coller spoke in this regard is one that the Commission has seen elsewhere in many cases of corrupt and irregular procurement that do not involve EOH. One example is the relationship that existed between Regiments Capital and Mr Phetolo Ramosebudi, the ACSA Treasurer who, as has been shown in Part 1 of this Commission's Report, took kickbacks from Regiments Capital in return for allowing it to extract tens of millions of rands from ACSA by acting as an intermediary between ACSA and Nedbank in terms of arrangements that appear never to have been subject to any regulated procurement process.<sup>160</sup>
253. Other repeated tender irregularities which Mr van Coller identified in EOH's past were
- 253.1. a succession of sole source public procurement contracts of which EOH was the beneficiary;

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<sup>159</sup> Transcript 23 November 2020, pp 33-35.

<sup>160</sup> See Part 1 of the Report of this Commission pp 306 to 309.

- 253.2. cases where EOH employees were allowed to frame the terms of a tender and thus to tailor those terms to the advantage of EOH; and,
- 253.3. cases where EOH put in bids for tenders at below cost so that it could win the tender and be appointed in the expectation that, once it was in place, it would be allowed to change the terms of its appointment and inflate the contract.<sup>161</sup>
254. Another familiar theme to which Mr van Coller testified was the use of politically connected intermediaries and sub-contractors apparently as conduits for kickbacks. EOH's public sector contracts regularly involved commission payments to "introducers", substantial payments to sub-contractors who appeared to have performed no material work on contracts and "teaming agreements" that were not linked to any particular work, but which served as the justification for in multi-million rand payments out of the proceeds of public sector contracts. EOH was able to identify R865 million that it spent on arrangements of this nature.<sup>162</sup>
255. The last general theme identified by Mr van Coller in relation to irregular procurement was EOH's payment of donations to the ANC, suspicious personal and organizational sponsorships and excessive entertainment amounts to influence procurement practices in organs of state apparently liable to influence from the individuals who had solicited those payments or benefited thereby.<sup>163</sup>
256. The general evidence of Mr van Coller in relation to donations and sponsorships was amplified by that of Mr Powell. Mr Powell showed that EOH and its former executive, Mr Jehan Mackay, had paid tens of millions of rands in:

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<sup>161</sup> Transcript 23 November 2020, pp 36-37. See also Transcript 25 November 2020, pp 62-63.

<sup>162</sup> Transcript 23 November 2020, pp 37-39.

<sup>163</sup> Exhibit VV1, p 5, para 38.6. Transcript 23 November 2020, pp 46-48.

- 256.1. direct payments to individuals holding office within the ANC,
- 256.2. direct donations to the ANC, and,
- 256.3. the payment of ANC expenses through intermediaries and "sub-contractors".<sup>164</sup>

**The Improper Relationship between EOH and Mr Geoff Makhubo and EOH Contracts with the City of Johannesburg**

- 257. Tactical Software Solutions Managed Services (Pty) Ltd ("TSS Managed Services") is a company that was acquired by EOH in 2011. TSS Managed Services (Pty) Ltd was later renamed EOH Afrika (Pty) Ltd. Prior to the EOH acquisition, TSS Managed Services had been owned by Mr Jehan Mackay and his father, Mr Danny Mackay. Mr Jehan Mackay was the Managing Director of TSS Managed Services when it was acquired by EOH and he remained in that position after the acquisition.
- 258. Mr Patrick Makhubedu had been employed within the TSS Group prior to the EOH acquisition in 2011. His employment was transferred to EOH on 1 March 2014. From that date, Mr Makhubedu was employed by EOH as a Business Development Executive focusing on the public sector and working closely with Mr Jehan Mackay. Mr Makhubedu had a close personal relationship with the late Mr Geoff Makhubo who became the Mayor of Johannesburg. He and Mr Makhubo were partners in several private companies, in several cases, together with Mr Reno Neil Barry, a former Group Financial Manager at Tactical Software Solutions (Pty) Ltd, a company owned by Messrs Jehan and Danny Mackay but not acquired by EOH. Mr Barry also provided

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<sup>164</sup> Transcript 25 November 2020, pp 13 to 22. Exhibit VV2, pp 630 to 661.

accounting services to entities in which Mr Makhubo and Mr Makhubedu were interested.<sup>165</sup>

259. Mr Makhubedu assisted EOH to procure several contracts worth hundreds of millions of rands from the City of Johannesburg. Mr Makhubedu resigned from EOH on 11 March 2019, the day before he had been called to an interview with ENS Forensic Services in relation to some of the public sector contracts he had assisted EOH to procure.<sup>166</sup>

260. The relevant entities in which Mr Makhubedu, Mr Makhubo and Mr Barry had interests were the following:<sup>167</sup>

260.1. Molelwane Consulting CC ("Molelwane") was an entity owned by Mr Makhubedu and his mother. It received payments from TSS Managed Services and loans from Mfundi Mobile Networks (Pty) Ltd ("Mfundi Mobile"), an entity whose directors were Mr Barry and Mr Mongezi Duma, a former Tactical Software Solutions Group Financial Analyst;

260.2. Mfundi Mobile concluded a "teaming agreement" with the SAP Services Business Unit of EOH Mthombo (Pty) Ltd ("EOH Mthombo"). As is shown below, this "teaming agreement" appears to have been a cover for Mfundi Mobile to make payments for the benefit of Mr Makhubo and the ANC in return for the grant of contracts to EOH by the City of Johannesburg;

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<sup>165</sup> Transcript 25 November 2020, pp 23-25.

<sup>166</sup> Transcript 25 November 2020, p 23.

<sup>167</sup> Exhibit VV2, p 16; Powell Day 312 pp 25 to 40.

260.3. Prime Molecular Technologies (Pty) Ltd ("Prime Molecular") is an entity whose directors were Mr Makhubedu and Mr Marry. It apparently acted as a conduit for EOH by paying R70 000 to Molelwane.

261. Prior to its acquisition by EOH, TSS Managed Services entered into a "teaming agreement" with Molelwane. The agreement designated Mr Makhubedu as the contact person for TSS Managed Services in relation to the agreement. It had an effective date of 1 October 2009 and described a range of nebulous services that Molelwane was to provide for TSS Managed Services: business advisory services, business development services, advisory services and change management services.<sup>168</sup> At the time of the conclusion of the teaming agreement, Mr Makhubo was not yet an executive of the City of Johannesburg, but he was Treasurer of the Greater Johannesburg Region of the ANC. He took office as MMEC for Finance in the City of Johannesburg in May 2011 and occupied that position until the ANC lost control of the City after the municipal elections in August 2016.<sup>169</sup>

262. In the course of 2012 EOH paid R1.35 million to Molelwane.<sup>170</sup>

263. Over the period of the "teaming agreement" with Molelwane, EOH concluded the following agreements with the City of Johannesburg.

263.1. COJ A387, a contract awarded to TSS Managed Services for ICT LAN and WAN services with a tender award value of R38.4 million and to EOH Mthombo for ICT Security Services with a tender award value of R26 million. The tender was awarded for a two-year period from December 2010 to November 2012 but was thereafter irregularly extended on several occasions;

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<sup>168</sup> Exhibit VV2, pp 114 to 118.

<sup>169</sup> Exhibit VV3, p 23, paras 20 to 22.

<sup>170</sup> Transcript 25 November 2020, p 55.

263.2. COJ A472, a contract awarded to EOH Mthombo for SAP Support Services. The tender was awarded for 4-year period from 2012 to February 2016 but was thereafter irregularly extended on several occasions. It appears that Mr Makhubo was involved in preventing a new SAP Support Services tender being advertised to replace COJ A472 when its term expired. In the context of the contract a range of suspect payments were made by EOH to third parties who appear to have performed no work on the contract.<sup>171</sup>

264. In addition to the above contracts, the Commission heard detailed evidence in relation to two contracts in respect of which Messrs Makhubo, Makhubedu, Barrie and Mackay appear to have conspired corruptly to procure the appointment of SAP by the City of Johannesburg.

264.1. The first was a contract awarded to SAP without any competitive procurement process on the basis of an unsolicited proposal for the upgrading of the City's Network and Security Infrastructure;

264.2. The second was the contract awarded to SAP under tender COJ A647, an SAP upgrade contract for the period June 2016 to June 2019.

These two contracts are discussed in detail below.

### **The 2014 Network and Security Infrastructure Upgrade Contract between the City of Johannesburg and TSS Managed Services**

265. The detailed chronology in relation to the Network and Security Infrastructure Upgrade project is the following:

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<sup>171</sup> Exhibit VV2, pp 306-307.

- 265.1. On 16 April 2014, EOH submitted an unsolicited proposal for the upgrading of the City's Network and Security Infrastructure;<sup>172</sup>
- 265.2. The price in the unsolicited proposal was R106 185 395.36 inclusive of VAT;<sup>173</sup>
- 265.3. On the same day EOH Managed Services donated R3 million to the Greater Johannesburg Region of the ANC. A letter acknowledging receipt of the donation and thanking EOH Managed Services was addressed by Mr Makhubo to Mr Makhubedu;<sup>174</sup>
- 265.4. On 6 August 2014, Mr Makhubo emailed Mr Makhubedu asking for a donation to cover the accommodation costs related to the Regional ANC Youth League relaunch that was due to take place that weekend. Attached to the email of Mr Makhubedu was an accommodation invoice issued to the ANC in the amount of R582 100;<sup>175</sup>
- 265.5. On the same day, Mr Makhubedu forwarded the email to Ms Rene Jonker who was one of the divisional finance directors within the EOH Group, who replied indicating that she would make the payment the following day;<sup>176</sup>
- 265.6. On 7 August 2014, TSS Managed Services transferred the amount of R R582 100 into the bank account of the ANC Greater Johannesburg Region;<sup>177</sup>
- 265.7. On 8 August 2014, Mr Makhubo, in his capacity as Regional Treasurer of the Greater Johannesburg Region of the ANC addressed a letter to the Mr Jehan Mackay in his capacity as Executive Director of EOH Mthombo soliciting a

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<sup>172</sup> Exhibit VV2, pp 691.

<sup>173</sup> Exhibit VV2, p 706.

<sup>174</sup> Exhibit VV2, p 558.

<sup>175</sup> Exhibit VV2, pp 535-6.

<sup>176</sup> Exhibit VV2, p 532.

<sup>177</sup> Exhibit VV2, p 537.

donation to the ANC Greater Johannesburg Region. Attached to the letter was a detailed breakdown of anticipated expenses aggregating to R6 180 000;<sup>178</sup>

- 265.8. On 20 August 2014, Mr Makhubedu paid R20 527.30 to the Sandton Convention Centre on behalf of the ANC. The payment was made from the account of Prime Molecular and proof of payment was emailed to Mr Makhubo on the same day;<sup>179</sup>
- 265.9. On 22 August 2014, Mfundu Mobile paid R70 000 to the ANC and Mr Makhubedu emailed proof of payment to Mr Makhubo;<sup>180</sup>
- 265.10. On the same day, Mfundu paid Molelwane R80 000. Prior to the payment the credit balance in the account of Molelwane was only R621.45;<sup>181</sup>
- 265.11. In his internal management accounts for Mfundu, Mr Barry reflected the payments to the ANC and to Molelwane a "costs of sales" on "sales" by Mfundu to EOH;<sup>182</sup>
- 265.12. Another "cost of sales" on "sales" by Mfundu to EOH was a R1 200 000 payment by Mfundu to Mr Makhubedu in August 2014, which payment corresponded exactly with a "special invoice" issued by Mfundu to EOH in June 2014;<sup>183</sup>
- 265.13. On 27 August 2014, Mr Makhubedu emailed to Mr Makhubo the EOH unsolicited proposal, 16 April 2014, for the upgrading of the City's Network and Security Infrastructure.<sup>184</sup>

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<sup>178</sup> Exhibit VV2, pp 539 to 540.

<sup>179</sup> Exhibit VV2, pp 541-2.

<sup>180</sup> Exhibit VV2, pp 543-5.

<sup>181</sup> Exhibit VV3, p 1200; and Exhibit VV2, p 267.

<sup>182</sup> Exhibit VV2, p 267.

<sup>183</sup> Exhibit VV2, p 267.

<sup>184</sup> Exhibit VV2, p 690.



- 265.14. To his knowledge, as an elected official and MMEC of the City, Mr Makhubo had no business involving himself in procurement matters,<sup>185</sup> particularly not unsolicited proposals from an entity from which he had recently solicited substantial donations for the ANC.
- 265.14.1. Mr Makhubo did not deny receiving the unsolicited proposal from Mr Makhubedu but could provide no explanation for why it was sent to him.
- 265.14.2. Mr Makhubo was aware from the evidence of Mr Powell that he would be questioned on his receipt of the unsolicited proposal from Mr Makhubedu. Yet in the six months after the evidence of Mr Powell and before his own evidence, he claimed not to have raised this issue with Mr Makhubedu. He could provide no explanation for his failure to do so, beyond the risible suggestion that he "did not think it was important to raise";<sup>186</sup>
- 265.15. On 29 August 2014 Mr Makhubedu emailed to Mr Makhubo an invoice issued by TSS Managed Services to the City in the amount of R106 185 395.36 for the Upgrading of Network and Security Infrastructure;<sup>187</sup>
- 265.16. Once again Mr Makhubo:
- 265.16.1. did not deny receipt of the invoice;
- 265.16.2. could provide no explanation as to why the invoice had been emailed to him by Mr Makhubedu; and

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<sup>185</sup> Exhibit VV3, pp 558-9.

<sup>186</sup> Transcript 17 May 2021, pp 12-14 at p 14 line24.

<sup>187</sup> Exhibit VV2, pp 708 to 708.1.

- 265.16.3. could provide no explanation for his failure to confront Mr Makhubedu on the issue of the invoice either in 2014 or in the 6 months before his evidence at the Commission when the evidence of Mr Powell would have refreshed his memory in relation to the invoice;<sup>188</sup>
- 265.17. On 1 September 2014 at the instruction of Mr Makhubedu Mr Barry transferred R100 000 into the account of Molelwane providing for the funds to be cleared immediately.<sup>189</sup> Prior to the transfer, the balance in the account of Molelwane was only R597.45;<sup>190</sup>
- 265.18. On 9 September 2014 Mr Makhubedu reminded Mr Makhubo of the donations made by EOH to the ANC by emailing Mr Makhubo drafts of donation receipt letters to be placed on an ANC Greater Johannesburg Region letterhead, signed and returned to EOH Managed Services.<sup>191</sup> The letters were dated 19 June 2014 although they were still in draft form on 9 September 2014. They reflected the following donations:
- 265.18.1. A donation of R151 000 made on 11 November 2013;<sup>192</sup>
- 265.18.2. A donation of R2 million made on 13 December 2013;<sup>193</sup> and
- 265.18.3. The donation of R3 million discussed above which was made on 16 April 2014, the date of the unsolicited proposal.<sup>194</sup>

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<sup>188</sup> Transcript 17 May 2021, pp 43-45 and 68-73.

<sup>189</sup> Exhibit VV2.

<sup>190</sup> Exhibit VV3, p 1200.

<sup>191</sup> Exhibit VV2, pp 546-9.

<sup>192</sup> Exhibit VV2, p 549.

<sup>193</sup> Exhibit VV2, p 547.

<sup>194</sup> Exhibit VV2, p 548.

- 265.19. On 12 September 2014 the City issued a payment order directing immediate payment to TSS Managed Services of the amount of R109 737 278.52 in respect of ICT Infrastructure Network WAN and LAN services;<sup>195</sup>
- 265.20. The amount of R109 737 278.52 was slightly over the price of R106 185 395.36 in the unsolicited proposal and the invoice emailed from Mr Makhubedu to Mr Makhubo;<sup>196</sup>
- 265.21. On 15 September 2014 Prime Molecular paid R70 000 to Molelwane. Prior to receipt of the payment from Prime Molecular,<sup>197</sup> the balance in the Molelwane account stood at 959.92;<sup>198</sup>
- 265.22. Also on 15 September 2014 Mr Makhubedu emailed to Mr Makhubo a draft of a letter of award from the City to TSS Managed Services referring to the (unsolicited) proposal from TSS Managed Services for the provision of Network Infrastructure and Security Services. The draft letter was framed as a letter from the City addressed to Mr Makhubedu on behalf of TSS Managed Services. It stated the following:
- "We have pleasure in advising you that after careful consideration of the proposals received and the evaluation thereof, your proposal has been successful and that you have been nominated as the preferred supplier for the Upgrading of the City of Johannesburg Network and Security Infrastructure.
- Your participation in this tender process is highly appreciated."<sup>199</sup>
- 265.23. Mr Makhubo did not deny receiving this blank letter of award, but could provide no explanation as to why Mr Makhubedu, being an EOH executive and not a

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<sup>195</sup> Exhibit VV2, p 712.

<sup>196</sup> Exhibit VV2, p 706.

<sup>197</sup> Exhibit VV2, p 269.

<sup>198</sup> Exhibit VV3, p 816.

<sup>199</sup> Exhibit VV2, pp 713-4, para 714.

City official, would have drafted such a letter, still less as to why Mr Makhubedu would have emailed the letter to him. He also could not explain why he had not confronted Mr Makhubedu in relation to the prima facie improper blank letter of award that Mr Makhubedu had emailed to him;<sup>200</sup>

- 265.24. On 18 September 2014 Mr Ebrahim Laher of EOH emailed Mr Makhubedu to brief him as to the needs of EOH in relation to City of Johannesburg IT contract issues in advance of Mr Makhubedu's "meeting now with Geoff". "Geoff" appears to be a reference to Mr Makhubo;<sup>201</sup>
- 265.25. On the same day Mr Makhubedu forwarded to Mr Jehan Mackay and Ms Rene Jonker a request from the Tshwane ANC Regional Secretary for a donation of R300 000;<sup>202</sup>
- 265.26. On 19 September 2014 Mr Makhubo emailed to Mr Makhubedu a request for financial assistance in relation to the ANC Greater Johannesburg Region regional conference. His request included a breakdown of conference costs aggregating to R4 300 000. Mr Makhubedu forwarded the request to Mr Jehan Mackay and Mr Ebrahim Laher on 20 September 2014. Mr Jehan Mackay responded by asking by when the required funds were needed;<sup>203</sup>
- 265.27. On 20 September 2014 TSS Managed Services paid R570 000 to Molelwane;<sup>204</sup>

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<sup>200</sup> Makhubo Day 396 pp 55-75.

<sup>201</sup> Exhibit VV2, p 715.

<sup>202</sup> Exhibit VV2, pp 717-8.

<sup>203</sup> Exhibit VV2, pp 550-3.

<sup>204</sup> Exhibit VV2, p 226.

- 265.28. On 2 October 2014 TSS Managed Services transferred R1.5 million into the bank account of the Greater Johannesburg Region of the ANC. Mr Makhubedu emailed Mr Makhubo proof of payment of this amount on the same day.<sup>205</sup>
266. The evidence described above leads inexorably to the conclusion that Mr Makhubedu, Mr Barrie and Mr Makhubo conspired to procure the improper acceptance by the City of the 16 April 2014 unsolicited proposal from TSS Managed Services for the provision of Network Infrastructure and Security Services to the value of over R100 million.
- 266.1. The improper process involved repeated payments to Mr Makhubo's entity, Molelwane, from EOH entities or indirectly through Mfundi or entities of Mr Makhubedu to whom Mfundi had paid R1 200 000 as a cost of sales on an Mfundi EOH special invoice;
- 266.2. It also involved regular donations to the ANC from the same sources, both in the form of direct donations to the ANC and in the form of payment of expenses of the ANC.
267. There is reason to believe that Mr Jehan Mackay and Mr Ebrahim Laher were also party to this improper process.
268. Mr Makhubo is now deceased. However, the EOH related parties to the *prima facie* corrupt arrangements between the City and TSS Managed Services are not. The Commission accordingly recommends that
- 268.1. the law enforcement agencies investigate the City's 2014 award to TSS Managed Services of a contract for the Upgrading of the City of Johannesburg

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<sup>205</sup> Exhibit VV2, pp 554-5.

Network and Security Infrastructure with a view to the prosecution of Mr Makhubedu, Mr Barry, Mr Jehan Mackay, Mr Ebrahim Laher and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted.

### **The City of Johannesburg A647 SAP Upgrade Contract with EOH Mthombo**

269. The detailed chronology in relation to the award to EOH of the COJ A647 SAP upgrade contract is the following:

269.1. On 2 November 2015, Mr Nyiko Mutileni of EOH emailed Mr Jehan Mackay to inform him that the City had issued a tender for the relevant services. In his email, Mr Mutileni stated: "I have also notified Mr Makhubedu because of Geoff's influence". Geoff" appears to be a reference to Mr Makhubo;<sup>206</sup>

269.2. On 13 November 2015, Mr Mutileni forwarded to Mr Jehan Mackay an email from Lerato Ngwenya of the City of Johannesburg soliciting donations from EOH in relation to a promotional campaign being run by the City;<sup>207</sup>

269.3. On 20 November 2015, Mr Laher emailed Mr Asher Bobot, the Group CEO of EOH, to inform him that the tender was now out. He wrote:

"Am meeting with Parks people tomorrow afternoon.

Have spoken to Pat and Jehan and will manage that angle separately.

Am hopeful we will know more after tomorrow."<sup>208</sup>

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<sup>206</sup> Exhibit VV2, p 410.

<sup>207</sup> Exhibit VV2, pp 413-6.

<sup>208</sup> Exhibit VV2, p 386.

269.4. The references to "Parks", "Pat" and "Jehan" appear to be references to Mr Parks Tau (the then Mayor of Johannesburg), Mr Makhubedu and Mr Jehan Mackay.

269.5. On 1 December 2015, Mr Laher wrote to the team working on the tender to give an update on the talks relating to the consortium that EOH was seeking to put together. In his email, he stated:

"I have asked Ashley to contact KPMG as per Pat's conversation with Geoff"<sup>209</sup>

269.6. Once again, the references to "Pat" and "Geoff" would appear to be references to Mr Makhubedu and Mr Makhubo.

269.7. Mr Laher responded on 2 December 2015. In his email, he asked Mr Laher and Mr Makhubedu to investigate what donations could be made to the ANC. He wrote with self-conscious euphemism:

"Ebs/Pat we need a number urgently that can be allocated for goodwill :) to the organization"<sup>210</sup>

269.8. On 1 February 2016, Mfundu paid R200 000 to Molelwane. Prior to the payment, the balance on the Molelwane bank account stood at R63.19.<sup>211</sup>

269.9. On 2 February 2016, Mr Laher emailed the EOH team expressing his concerns in relation to the pending tender. He wrote:

"COJ - am very concerned about the City allowing people to reprice - seems to be a way to catch us out on scope. We need to be careful here.

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<sup>209</sup> Exhibit VV2, p 417.

<sup>210</sup> Exhibit VV2, p 417.

<sup>211</sup> Exhibit VV3, p 1234.

Actions - I will meet with Geoff<sup>212</sup>

The reference to "Geoff" would appear to be a reference to Mr Makhubo.

- 269.10. On 25 April 2016 Mfundi paid Molelwane R50 000. Prior to the payment, the balance on the Molelwane bank account stood at R617.77.<sup>213</sup>
- 269.11. On 30 April 2016, Molelwane invoiced TSS Managed Services in the amount of R500 000 plus VAT in respect of LAN and WAN services.<sup>214</sup> The ENS Forensics team that has been given unfettered access to the records of EOH has not been able to find evidence of any work that was done by Molelwane for EOH that could relate to the invoice.<sup>215</sup>
- 269.12. On 17 May 2016, Mr Mutileni forwarded to Mr Laher a request for sponsorship of a project run by Ms Pilisiwe Tau, the wife of the then Johannesburg Mayor, Mr Parks Tau, which project would take students on a trip to New York;<sup>216</sup>
- 269.13. On 19 May 2016, Mr Makhubo emailed Mr Bobot, copying Mr Makhubedu, with a request for donations for the ANC Greater Johannesburg Region municipal election campaign. Attached to his letter was a budget of R50 million;<sup>217</sup>
- 269.14. On 25 May 2016, Mr Makhubedu emailed Ms Jonker instructing her to pay the R500 000 Molelwane invoice as soon as possible.<sup>218</sup>

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<sup>212</sup> Exhibit VV2, p 418.

<sup>213</sup> Exhibit VV3, p 1240.

<sup>214</sup> Exhibit VV2, p 124.

<sup>215</sup> Transcript 25 November 2020, p 162 lines 5 to 20

<sup>216</sup> Exhibit VV2, p 425-7.

<sup>217</sup> Exhibit VV2, p 427-430.

<sup>218</sup> Exhibit VV2, p 123.



- 269.15. On 26 May 2016, the invoice was queried by Mr Rob Godlonton, an EOH Executive, in an email to Mr Peter Wynne of EOH. Mr Wynne responded:
- "ED [enterprise development] for City of Joburg. It was budgeted for in the financial year 16 numbers. I asked Rene for a schedule at the time of ED payments budgeted when we compile the budgets then if the amount is in the budget I do not ask any further questions."<sup>219</sup>
- 269.16. On 26 May 2016, Mr Makhubo emailed Mr Makhubedu, Mr Laher and Mr Jehan Mackay to ask for feedback in relation to his ANC donation requests.<sup>220</sup>
- 269.17. On 30 May 2016, TSS Managed Services paid R570 000 (R500 000 plus VAT) to Molelwane. Prior to the payment, the balance on the Molelwane account stood at R268.48;<sup>221</sup>
- 269.18. On 31 May 2016, Mr Makhubo transferred R200 000 of the TSS Managed Service payment out of the Molelwane account and into his personal account;<sup>222</sup>
- 269.19. On 2 June 2016, the Executive Adjudication Committee addressed a letter to EOH Mthombo informing them that their bid for the A647 Contract had been successful. The letter of award provided for an aggregate contract price of R404 million;<sup>223</sup>
- 269.20. On 27 June 2016, EOH Mthombo ordered (ostensibly for itself) R204 095 worth of computer equipment from its Infrastructure technologies division;<sup>224</sup>

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<sup>219</sup> Exhibit VV2, p 730.1; Powell Day 312 p 171.

<sup>220</sup> Exhibit VV2, p 433.

<sup>221</sup> Exhibit VV3, p 856.

<sup>222</sup> Exhibit VV3, p 1437.

<sup>223</sup> Exhibit VV2, p 434.

<sup>224</sup> Exhibit VV2, p 437.

- 269.21. On 30 June 2016, a delivery note was issued in respect of the computer equipment. Although the delivery note reflected that the equipment was going to be delivered to EOH Mthombo (Pty) Ltd, the delivery address was the address of the ANC Greater Johannesburg Region and the note indicated that it was for the attention of "Geoff or Justice". The cellphone number given on the note for "Geoff or Justice" was the cellphone of Mr Makhubo;<sup>225</sup>
- 269.22. On 29 June 2016, EOH Mthombo issued a purchase order in the amount of R 512 000 for payment to Serendipity Tours of New York travel expenses related to the project of Mrs Tau in respect of which the City had solicited funds from EOH;<sup>226</sup>
- 269.23. On 19 July 2016, Mfundu issued invoices to EOH in the aggregate amount of R16 million plus VAT;<sup>227</sup>
- 269.24. Mfundu accounted for the R16 million in its internal accounts as income from "Sales - COJ SAP Support Special"<sup>228</sup>
- 269.25. Mfundu then proceeded to spend at least R15 439 068 of the R16 million to pay election expenses incurred by the Greater Johannesburg ANC on its municipal election campaign. On 6 July 2016, Mr Barry emailed Mr Makhubedu a detailed reconciliation of the expenditure of the R15 439 068. The reconciliation was headed "Mfundu Mobile Expenses ANC - GM".<sup>229</sup> It appears that the reference to "ANC – GM" is a reference to ANC Geoff Makhubo. This can be inferred from the fact that the majority of the expenses reflected on the reconciliation can be linked to emails sent by Mr Makhubo to Mr Makhubedu requesting EOH

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<sup>225</sup> Exhibit VV2, p 436; Transcript 25 November 2020, p 182 lines 17-20.

<sup>226</sup> Exhibit VV2, p 451; Transcript 25 November 2020, p 183-188.

<sup>227</sup> Exhibit VV2, pp 455-460.

<sup>228</sup> Exhibit VV2, p 276.

<sup>229</sup> Exhibit VV2, p 275.

to pay the ANC expenses in question, and the list also includes travel expenses for Mr Makhubo himself.<sup>230</sup>

270. The evidence described above suggests that Mr Makhubedu, Mr Barrie, Mr Makhubo, Mr Jehan Mackay, Mr Laher and Mr Mutileni conspired to procure the improper award to EOH Mthombo by the City of the COJ A647 SAP contract worth R404 million.

270.1. The improper process involved repeated payments to Mr Makhubo's entity, Molelwane, from EOH entities or indirectly through Mfundi out of amounts which Mfundi accounted for as income from "Sales - COJ SAP Support Special";

270.2. It also involved regular donations to the ANC from the same sources, both in the form of the direct donation of computer equipment to the ANC by EOH Mthombo and in the form of payment of election expenses of the ANC by Mfundi out of the R16 million paid to Mfundi by EOH Mthombo and accounted for by Mfundi as income from "Sales - COJ SAP Support Special".

271. Mr Makhubo is now deceased. However, the remaining parties to the prima facie corrupt arrangements between the City and EOH Mthombo are not. The Commission accordingly recommends that

271.1. the law enforcement agencies investigate the City's 2016 award to EOH Mthombo of the COJ A647 SAP contract with a view to the prosecution of Mr Makhubedu, Mr Barrie, Mr Jehan Mackay, Mr Laher and Mr Mutileni and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted.

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<sup>230</sup> Exhibit VV2, pp 592 to 622; Transcript 25 November 2020, pp 197 to 221.

**The Attempt by Mr Jehan Mackay to manipulate his relationship with Mr Zizi Kodwa to Distort Public Procurement Practices.**

272. Mr Ncediso Goodenough "Zizi" Kodwa *has been Deputy Minister in the Presidency responsible for State Security since 5 August 2021. At the time of the events covered by this report, Mr Kodwa was not a public official but was an employee of the ANC and its spokesperson.*
273. Over the period 28 April 2015 to 2 February 2014, EOH related entities and Mr Jehan Mackay made aggregate cash payments in the aggregate amount of R1 680 000 to Mr Kodwa and another R30 000 for his benefit.<sup>231</sup>
274. Included within this aggregate amount was an amount of R1 million which, according to Mr Kodwa, was loaned to him by Mr Jehan Mackay for the purposes of purchasing the Jeep motor vehicle that he purchased on 6 June 2015 for the purchase of a car.<sup>232</sup> Although Mr Kodwa is clear that this amount was a loan, the transaction reference on the Tactical Software Solutions statement for *the* account from which it was paid, described the R1 million payment as "*NG KODWA (ANC DONA-JM)*". This suggested that Tactical Software Solutions had been informed that the million rand payment was a donation to the ANC, or possibly to Mr Kodwa himself.
275. In addition, Mr Jehan Mackay and EOH related companies paid hundreds of thousands of rands for luxury rental accommodation for Mr Kodwa.<sup>233</sup> Mr Kodwa testified that he was unaware that the accommodation in question was rental accommodation and that he believed that the properties in question were owned by Mr Jehan Mackay.<sup>234</sup>

<sup>231</sup> Transcript 25 May 2021, pp 61-2 and p 124; Exhibit VV11, p 12, para 11; Transcript 28 June 2021, p 37 lines 8 to 13.

<sup>232</sup> Transcript 25 May 2021, pp 82-3; Exhibit VV11, p 2 and p 13, para 14.

<sup>233</sup> Transcript 25 May 2021, pp 110-6.

<sup>234</sup> Affidavit of Kodwa pp 13-4 paras 16 and 17.

276. Mr Kodwa testified that all of the aggregate R1 710 000 payments were made at his request, by or on behalf of Mr Jehan Mackay, at times when he was in financial difficulties. On his own version, Mr Kodwa has never been in a position to repay Mr Jehan Mackay the amounts of the loans advanced to him and has not repaid any of these amounts.<sup>235</sup> However, he insists that they were not payments made as a quid pro quo for any assistance on his part. In particular, he denies that the payments and the luxury accommodation were in any way related to the procurement of government contracts by EOH or related companies.<sup>236</sup>
277. Alongside the benefits Mr Jehan Mackay provided to Mr Kodwa, he also regularly engaged with Mr Kodwa in relation to substantial donations to be made to the ANC by the EOH group. Thus Mr Jehan Mackay and his PA, Charze Gordon, addressed emails to Mr Kodwa:
- 277.1. on 5 August 2015 inviting Mr Kodwa to send a letter to EOH requesting a R1 million donation in the form of a sponsorship "whatever the purpose";<sup>237</sup>
- 277.2. on 11 and 12 August 2015, in connection with the payment by EOH Mthombo of R1 million to the Elections Agency apparently on behalf of the ANC;<sup>238</sup>
- 277.3. on 30 September 2015 and 1 October 2015, asking Mr Kodwa's views in relation to a request for a R704 250 donation by way of direct payment of accommodation costs incurred by the Eastern Cape ANC;<sup>239</sup> and

<sup>235</sup> Transcript 28 June 2021, p 40 line 20 to p 42 line 13.

<sup>236</sup> Exhibit VV11, Affidavit of Kodwa p 12 paras 10 to 11.

<sup>237</sup> Exhibit VV2.3, p 64.

<sup>238</sup> Exhibit VV2.3, pp 65 to 70; Transcript 28 June 2021, p 54 lines 1 to p 55 line 20.

<sup>239</sup> Exhibit VV2.3, pp 135-144.

277.4. between 8 December 2015 and 18 January 2016 in connection with an EOH donation to the ANC in the form of 2500 printed ANC T-shirts.<sup>240</sup>

278. Whatever the subjective intentions of Mr Kodwa, it is clear that Mr Jehan Mackay was attempting to buy influence by making the "loans" that he made to Mr Kodwa and by providing Mr Kodwa with luxury accommodation. Mr Jehan Mackay repeatedly attempted to engage Mr Kodwa in relation to pending EOH Group tenders:

278.1. On 14 July 2015 Mr Jehan Mackay addressed an email to Mr Kodwa in relation to a Department of Home Affairs tender. He wrote as follows:

"I hope you good. If it's possible please can you ask the chair to look into DHA RFB 1303/2014 there are games being played. Initially we were number 1 then Pandelani and the head of procurement decided to re-evaluate the bids and now it seems we are disqualified. The total value is about R360million.

Also please don't forget to talk to the regional funding coordinator to understand what their funding requirements are."<sup>241</sup>

278.2. This request to "as the chair to look into" the disqualification of EOH from the tender was made barely a month after Mr Kodwa had purchased his Jeep with the R1 million loan from Mr Jehan Mackay. It also insinuated that Mr Jehan Mackay might be holding out the prospect of a large donation to the ANC as a quid pro quo for Mr Kodwa's requested intervention.

278.3. When the offending tender was subsequently cancelled, thus freeing up EOH to compete for the work again, Mr Jehan Mackay forwarded the letter of cancellation to Mr Kodwa by email on 2 November 2015.<sup>242</sup>

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<sup>240</sup> Exhibit VV2.3, pp 160 to 204.

<sup>241</sup> Exhibit VV2.3, p 50.

<sup>242</sup> Exhibit VV2.3, p 51.

- 278.4. Mr Jehan Mackay also forwarded to Mr Kodwa internal EOH correspondence of 30 September 2015 to clarify whether the Eastern Cape ANC request for the R704 250 donation discussed above, was a request for a quid pro quo against grant of a pending EOH tender in joint venture with ELCB for an Eastern Cape Provincial Government document management contract.<sup>243</sup>
- 278.5. Mr Jehan Mackay billed R656 200 spent on luxury accommodation for Mr Kodwa as an expense relating to "Project Ingrid" which was the "enterprise development" contribution linked to the SASSA EOH Oracle tender.<sup>244</sup>
- 278.6. Mr Jehan Mackay's R1 million loan / donation to Mr Kodwa was also billed to "Project Ingrid" suggesting that it was an expense relating to the SASSA EOH Oracle tender.<sup>245</sup>
279. Mr Jehan Mackay's apparent attempts to induce Mr Kodwa to interfere with procurement processes in the interests of EOH appear *prima facie* to contravene section 3(b) of the Prevention and Combating of Corrupt Activities Act 12 of 2004.
280. Although the Commission has seen no evidence to show impropriety on the part of Mr Kodwa in relation to the attempts by Mr Jehan Mackay to induce him to interfere with procurement processes in the interests of EOH, it is important to point out that the Commission was not able, due to time constraints, to investigate what Mr Kodwa may or may not have done. It would not be difficult for an influential or important figure in a political party that is the majority party in a municipality to influence either officials within such a municipality or councillors of such municipality to influence relevant officials within the municipality. This point is made here in general and not necessarily

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<sup>243</sup> Exhibit VV2.3, p 135.

<sup>244</sup> Exhibit VV2.3, pp 146.1 and 231.

<sup>245</sup> Exhibit VV2.3, pp 146.1 and 231.

suggesting that the Commission is aware of any evidence that Mr Kodwa did not influence anybody to do anything improper or unlawful. How the point is made to emphasise the need to appreciate that it would be very easy for a service provider to use, for example, an ANC person who is not in government to influence ANC members or leaders who are in government to act in a particular way. However, as Deputy Minister for State Security, Mr Kodwa now finds himself in an impossible position.

280.1. Mr Kodwa is beholden to Mr Jehan Mackay to whom he owes more than R1.7 million rands. On his own version, this is a debt which he cannot immediately repay;

280.2. If the recommendations of this Commission are implemented, Mr Jehan Mackay will be the subject of multiple criminal investigations;

280.3. It is untenable for the Deputy Minister of State Security to find himself in a position where he is beholden to a suspect in multiple criminal investigations.

281. The Commission accordingly recommends that:

281.1. the law enforcement agencies investigate the attempts of Mr Jehan Mackay described above to induce Mr Kodwa to interfere with procurement processes in the interests of EOH with a view to the prosecution of Mr Jehan Mackay and any other suspects identified in the investigation on charges under the Prevention and Combatting of Corrupt Activities Act 12 of 2004 if the investigation reveals that such prosecution is warranted;

281.2. the President considers the position of Mr Kodwa as Deputy Minister of State Security having regard to the fact that Mr Kodwa appears to find himself in a position where he is beholden to Mr Jehan Mackay.



282. The terms of reference of the Commission are so wide that it was required to investigate even all kinds of allegations of corruption, state capture, fraud and other wrongdoing even in municipalities. The Commission did not engage in any investigations involving municipalities other than Johannesburg and even then only two or so tenders. However, when one realises what EOH and Mr Makhubo were doing, one realises that there may be many municipalities in which certain entities do exactly what EOH used to do in relation to the City of Johannesburg.

Judicial Commission  
of  
Inquiry into Allegations

of

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

Report: Part IV

Vol. 1: Alexkor

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

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## ALEXKOR

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

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

## BACKGROUND

286. An understanding of the issues concerning Alexkor requires brief reference to the successful land claim of the Richtersveld Community decided by the Constitutional Court in 2003.<sup>246</sup> The Richtersveld is part of Little Namaqualand in the north-western corner of the Northern Cape Province of South Africa. The land claimed by the Richtersveld Community ("the subject land") runs parallel to the Atlantic Ocean and extends southwards from Alexander Bay, at the mouth of the Garib (Orange) River, to just south of Port Nolloth. The original inhabitants of Namaqualand were Khoi Khoi, San and Khoisan. Namaqualand (including the Richtersveld) was annexed by the British Crown in 1847. During the 1920's a rich deposit of diamonds was found at the mouth of the Garib River at Alexander Bay. A state alluvial digging was then established on the subject land in 1928 and its area consistently extended by Proclamation in terms of the Precious Stones Act.<sup>247</sup> The members of Richtersveld Community were progressively denied access to the subject land for the purposes for which they had utilized it in the past.

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<sup>246</sup> See *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] (4) All SA 563 (LCC); *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA); and *Alexkor Limited and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

<sup>247</sup> Act 44 of 1927.

287. In 1989, the Alexander Bay Development Corporation was established under the Alexander Bay Development Corporation Act<sup>248</sup> and all assets, liabilities, rights and obligations of the state in the alluvial diggings were passed to it. Ownership of the land was transferred to the corporation. The alluvial diggings were de-proclaimed and a prospecting and digging agreement was entered into between the corporation and the state with effect from 1 May 1989. Three years later, through the Alexkor Limited Act,<sup>249</sup> the Alexander Bay Development Corporation was converted into a company under the Companies Act, Alexkor, to which the rights of the state to the land were transferred. On 20 April 1995 all the title deeds of the land were endorsed to the effect that a certificate of mineral rights in respect of all rights in minerals on or under the land was issued in favour of Alexkor. Alexkor is a Schedule 2 public entity in terms of the PFMA. The government, through the Minister of Public Enterprises, is the sole shareholder of Alexkor.
288. Section 2(1)(d) of the Restitution of Land Rights Act<sup>250</sup> provides that a person shall be entitled to restitution of a right in land if it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices. The Richtersveld Community filed a land claim in terms of this provision and alleged that it had been dispossessed of its rights in the subject land by legislative and executive state action after 19 June 1913 as a result of racially discriminatory laws and practices.
289. The Constitutional Court held that the Richtersveld Community had been in exclusive possession of the subject land prior to and after its annexation by the British Crown in 1847 and had the indigenous rights to use its water, to use its land for grazing and hunting and to exploit its natural resources above and beneath the surface. The relevant

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<sup>248</sup> Act 46 of 1989.

<sup>249</sup> Act 116 of 1992.

<sup>250</sup> Act 22 of 1994.

colonial legislation, the Crown Lands Acts of 1860 and 1887,<sup>251</sup> did not extinguish the land rights of the Richtersveld Community. The Precious Stones Act of 1927, however, provided that all occupants of the land except registered surface owners lost their right to occupy and exploit the land. This legislation accordingly failed to recognise indigenous law ownership and treated the subject land as state land. On the other hand, registered ownership (held predominantly by whites) was recognised, respected and protected. The non-recognition of indigenous law ownership hence meant that the Richtersveld Community had been dispossessed of its indigenous land rights by racially discriminatory laws and practices. The Richtersveld Community was therefore entitled to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.

290. Subsequent to the decision of the Constitutional Court a settlement agreement was concluded between the Richtersveld Community, Alexkor and the government on 22 April 2007 and made an order of court.<sup>252</sup> In terms of clause 8.3 of the settlement agreement it was agreed that a joint venture would be pursued between Alexkor and the Richtersveld Community, styled the Pooling and Sharing Joint Venture Agreement ("PSJV"). It was agreed that Alexkor would retain its marine mining rights, but would transfer its land mining rights to a company formed by the Richtersveld Community, the Richtersveld Mining Company ("RMC"), to be exploited by them jointly. Alexkor would hold 51% of the shares in PSJV and that the remaining shares (49%) would be held by RMC.

291. The PSJV was established in April 2011 and mandated to conclude marine mining contracts on behalf of Alexkor and land mining contracts on behalf of RMC. The PSJV does not itself conduct mining operations and all its land, beach and marine mining

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<sup>251</sup> Crown Lands Act 2 of 1860 and Crown Lands Disposal Act 15 of 1887.

<sup>252</sup> Exhibit XX4, p 129.

operations are conducted by contract miners, such as Mr Craythorne, who are subcontracted to the PSJV in mine areas allocated to them under their contract with the PSJV.

292. The joint operations of the PSJV are conducted by an executive management team under the control of a joint board, with three directors representing Alexkor and three directors representing the RMC ("the joint board"). The deed of settlement was later supplemented by a further agreement referred to as "the unanimous resolution" ("the resolution").<sup>253</sup> In terms of paragraph 6.1 of the resolution, the joint board is responsible for: i) the prospecting and mining for precious stones in the pooled operations area; ii) the "carrying out of the recovery and sale, at the highest prices possible, of precious stones produced from the pooled operations areas.; and iii) carrying out all ancillary and incidental activities for those purposes. The chair of the joint board of the PSJV is always the chair of Alexkor. The CEO of the PSJV reports to the CEO of Alexkor.
293. In his submission to the Commission, Mr Craythorne alleged that there was state capture at Alexkor and the PSJV by the Gupta racketeering enterprise and persons associated with it. The Commission accordingly conducted a preliminary investigation into the allegations of state capture pursuant to its Terms of Reference 1.1 and 1.6 which permit the Commission to determine whether attempts were made through any form of inducement or for any gain of whatsoever nature to influence directors of the boards of SOE's and whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts in the business dealings of the Gupta family with SOE's.
294. Mr Craythorne's submission was supported in some respects by the forensic investigation conducted by Gobodo and the investigation conducted by Mr Dekker, who

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<sup>253</sup> Exhibit XX4, p 203.



is employed by the Commission as a forensic accountant. Mr Dekker performed an analysis of the business and trading activities of Alexkor, the PSJV and Scarlet Sky Investments 60 (Pty) Ltd ("SSI"), which in 2018 changed its name to Alexander Bay Diamond Company (Pty) Ltd ("ABDC"). SSI was appointed by the PSJV in 2015 to market and sell all of the diamonds produced by the PSJV. The evidence reveals that SSI had links to the Gupta enterprise through its main shareholder, Mr Kuben Moodley. It was a dormant company with no diamond licence or track record in the diamond industry.

295. The DPE also commissioned Fundudzi Forensics ("Fundudzi") to conduct an investigation in 2018 into numerous allegations levelled against the DPE and in particular into the appointment of Mr Trevern Haasbroek ("Haasbroek") as a non-executive director to the Alexkor Board by Ms Lynne Brown when she was Minister of Public Enterprises. In addition, the CEO of the PSJV, Mr Mervyn Carstens contracted Mr James Allan to conduct an independent review and audit of the process from sourcing (mining) the diamonds through to the sale point. This investigation was finalised in May 2019. Neither Fundudzi nor Mr Allen testified before the Commission.

#### **The thesis of state capture at Alexkor – links to the Gupta enterprise**

296. The thesis advanced by Mr Craythorne is that there was an orchestrated plan of state capture of Alexkor and the PSJV with two specific aims. The first was to implement a plan to diversify the mining operations of Alexkor, which had hitherto been restricted to diamond mining, to include coal and lime mining in order to supply coal to Eskom pursuant to contracts from which the Gupta enterprise could benefit. This would have excluded the Richtersveld Community from the business of Alexkor as its joint venture with Alexkor in terms of the settlement agreement is limited to its diamond assets. The

second objective was for SSI to assume exclusive control of the sale of the diamonds of the PSJV, allegedly for the illegitimate benefit of the Gupta enterprise.

297. The process for the repurposing of Alexkor to coal mining was commenced with the assistance of the two Ministers of Public Enterprises appointed by former President Zuma, Mr Malusi Gigaba and Ms Lynne Brown, who both made significant appointments to the boards of Alexkor and the PSJV after they took office, and then announced the new strategic direction for Alexkor to diversify from a diamond mining concern into the production of coal and lime to supply Eskom. There was subsequently some engagement between executives of Alexkor with Regiments Capital (Pty) Ltd ("Regiments"), the company aligned with the Gupta enterprise that played a key role in state capture at Transnet and Eskom discussed in other volumes of this report. However, as explained presently, no firm contractual arrangement appears to have been concluded between Alexkor and Regiments. SSI, as just mentioned, was then appointed to control the valuation, sale, beneficiation and marketing of the diamonds of Alexkor and the PSJV.
298. The investigators of the Commission have established by means of cell phone records that the key executives and senior employees of Alexkor and the PSJV had links or contact with associates and role players of the Gupta enterprise in the relevant period.
299. Former President Jacob Zuma appointed Mr Gigaba as Minister of Public Enterprises on 1 November 2010 after he dismissed Ms Barbara Hogan as Minister for opposing the appointment of Mr Siyabonga Gama as the GCEO of Transnet. Mr Gigaba appointed Mr Rafique Bagus as chairperson of the board of Alexkor in September 2012. He was previously the Chief Executive of Trade and Investment, South Africa and Deputy Director-General of the Department of Trade and Industry. Mr Bagus' cell phone records reflect that he made regular telephonic contact with associates of the Gupta

enterprise. He had contact with: i) Mr Iqbal Sharma 60 times between the periods between 2008 and 2013; ii) Mr Ashu Chawla eight times between 2008 and 2013; iii) Mr Ajay Gupta 26 times between July 2015 and March 2016; and iv) Mr Rajesh Gupta seven times between May 2015 and March 2016. Mr Bagus also attended the notorious Gupta wedding at Sun City in May 2013.

300. On appointment as chairperson of Alexkor, Mr Bagus immediately commenced with the new strategic direction of diversification of Alexkor into coal mining. He was also instrumental in awarding the tender to SSI, granting it the exclusive rights to market and sell the diamonds produced by the PSJV.
301. On 7 September 2012, at a Special General Meeting with the newly appointed board, Mr Gigaba mandated the board to prioritise the recruitment of a new CEO and ensure that the matter was finalised within three months. The board appointed Mr Percy Khoza as CEO of Alexkor on 4 March 2013. Prior to his appointment at Alexkor, Mr Khoza was a General Manager at Optimum Colliery, the corrupt purchase of which by Tegeta, a company associated with the Gupta enterprise, is the subject of investigation before the Commission. Mr Khoza was evidently recruited in order to pursue Mr Gigaba's agenda to diversify Alexkor into coal mining.
302. Mr Mervyn Carstens was appointed as CEO of the PSJV by the PSJV board in August 2012. Mr Carstens was a mining executive with over 30 years' experience in the mining industry, working for De Beers, Anglo American and Trans Hex. He played an important part in the irregular appointment of SSI as the sole marketing and sales agent for the PSJV. His cell phone records reflect at least 107 calls with Gupta associates. He was in contact with Mr Kuben Moodley 97 times between September 2015 and May 2017. Mr Carstens was also in contact with Mr Shane, another Gupta associate, approximately 10 times between February and July 2016.

303. Ms Zarina Kellerman was appointed on 1 October 2013 as the Chief Legal Officer of Alexkor and remained in the position until 2 November 2015. It was during her period at Alexkor that SSI was awarded the contract to be the sole agent to sell and market Alexkor's diamond production. Despite the fact that SSI had no diamond license and Mr Kuben Moodley, the majority 60% shareholder in SSI, had no diamond industry background, Ms Kellerman verified the bid of SSI as being compliant with the legal requirements. Ms Kellerman's cell phone records indicate that she had regular contact with Mr Moodley. She made 479 calls to Moodley with a total call duration of 24,112 minutes between August 2015 and April 2018. After Ms Kellerman resigned from Alexkor on 2 November 2015, she was appointed as an adviser to the Minister of Mineral Resources, Mr Mosebenzi Zwane from April 2016 to March 2018 and acted the secretary to Zwane's Inter-Ministerial Committee Inquiry into the closure of the Gupta bank accounts by various commercial banks. Ms Kellerman has confirmed that she took up the position with Minister Zwane at the suggestion of Mr Moodley.<sup>254</sup>

#### **The role of Regiments at Alexkor**

304. Shortly after the announcement by Mr Gigaba that Alexkor would be expanding into the coal business to supply Eskom, Regiments (a key player in the Gupta enterprise) started engaging with Kellerman and Khoza at Alexkor. On 1 October 2013, Mr Jonathan Loeb of Regiments sent an email to Mr Khoza, which in relevant part read:

"Please see attached for your review a draft NDA [Non-Disclosure Agreement] between Regiments and Alexkor. Please distribute to your team as I did not receive email addresses. If you're comfortable with the document as is, please fill in the blank spaces, sign and scan back to me for counter-signature. Should you have any comments or proposed edits, please mark these up on the document. Once finalised, we would be in a position to receive and review the master coal supply agreement."<sup>255</sup>

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<sup>254</sup> Exhibit XX2 p 022 para 56.

<sup>255</sup> Exhibit XX2, p 37.

305. On the same day, Mr Khoza forwarded the email with the attached non-disclosure agreement to Ms Kellerman. On 3 October 2013, Ms Kellerman corresponded with Mr Loeb and copied to Mr Wood and Mr Gebreselasie of Regiments, and Mr Khoza, regarding amendments to the non-disclosure agreement and provided him with the proposed Master Coal Supply Agreement between Alexkor and Eskom, the receipt of which Mr Loeb acknowledged and undertook to keep confidential.<sup>256</sup>
306. Both parties signed the non-disclosure agreement on 3 October 2013.<sup>257</sup> Paragraph 2 of the non-disclosure agreement reads:
- "2.1 The parties are in discussion regarding the potential provision of financial and advisory and other services to Alexkor by Regiments.
- 2.2 It is inevitable that in relation to the above each party will disclose confidential information to the other party. The parties thus herein agree on the terms and conditions of disclosure of confidential information."
307. The non-disclosure agreement essentially imposed restrictions on both Regiments and Alexkor and regulated the disclosure and use of each other's confidential information.
308. On 11 October 2013, Mr D Walker of Werksmans Attorneys sent a letter<sup>258</sup> to Ms Kellerman providing an initial high level view on any key procurement and competition issues that need to be considered by Alexkor and Eskom when negotiating a contract (a co-operation agreement) to "identify, evaluate and implement coal and/or lime supply opportunities" and to "co-operate exclusively in relation to such projects so as to achieve their respective strategies and transform the coal mining industry". Werksmans was requested to take into account the fact that Alexkor's ultimate objective was to secure the ability to supply to Eskom approximately 20% of its new coal supply requirements and to structure all coal supply agreements between Alexkor and Eskom

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<sup>256</sup> Exhibit XX2, p 136.

<sup>257</sup> Exhibit XX2, p 138-150.

<sup>258</sup> Exhibit XX2, p 152-158.

on a "cost plus" basis. Werksmans advised that, based on its initial analysis, it was not aware of any law that prohibited the implementation of the proposed arrangements.

309. On 7 October 2013, Mr Gebreselasie of Regiments sent an email to Ms Kellerman, which he copied to Mr Khoza, Mr Wood, and Mr Loeb which reads:

"As promised, we are in the process of preparing the RFP document for the panel of financial services providers. We will be able to send it to you before close of business today. Can you please forward me your standard adjudication template and standard scorecard, if you have any? Your prompt response is highly appreciated."<sup>259</sup>

310. Ms Kellerman responded immediately by attaching a RFP for the Land Rehabilitation Plan, intended to serve as a template or prototype to assist Regiments in drafting the RFP for the Financial Services Panel.<sup>260</sup>

311. Two days later, on 9 October 2013, Mr Gebreselasie sent an email to Ms Kellerman, copied to Mr Khoza of Alexkor and Mr Mohohlo, Mr Pillay and Mr Wood of Regiments, attaching the RFP for the Financial Services Panel.<sup>261</sup> The specification for the appointment in the RFP explained that Alexkor's management had been directed to refocus its activities and play a significant role in ensuring other government parastatals and SOEs had access to crucial commodities to conduct their mandated activities. The refocus, it was stated, had led to Alexkor's new coal mining and lime business. The RFP stated that the coal mining strategy was driven by Eskom's shortfall in strategic coal supply and was intended to contribute to ensuring energy security in the country. The lime supply strategy was said to be driven by Eskom's need of limestone for its fuel gas desulphurization plants and the demand from other industries such as the steel and construction industries. In line with its commitment to address inequity, the RFP stated

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<sup>259</sup> Exhibit XX2, p 160.

<sup>260</sup> Exhibit XX2, p 162.

<sup>261</sup> Exhibit XX2, p 203-235.

that Alexkor sought to partner with black emerging miners to realise the strategy. For those reasons, Alexkor intended to establish a panel of "suitable and experienced professional service providers to assist it with the different aspects of its financial affairs" to provide" i) strategy advice; ii) treasury function; iii) financial risk management; iv) corporate finance; capital funding plan; v) fundraising; and vi) programme management.<sup>262</sup>

312. On 14 January 2014 Ms Kellerman sent an email<sup>263</sup> to Mr Wood and Mr Loeb of Regiments stating the following:

"I trust that you are well and that 2014 will be a blessed year for you. I have left a message for you at the office. We will be putting out the tender shortly for financial advisors but for now, I am advised that we require your assistance on something specific. As a result, I attach a standard consulting agreement. Have a look at it and we can hopefully finalise this by email. But you are welcome to contact me on my mobile. We will require you to tender in the normal course and if you are successful, a more detailed agreement will follow. Let me have your comments."

313. The next day, 15 January 2014, Loeb sent an email<sup>264</sup> to Mr Wood, Mr Pillay and Mr Gebreselasie of Regiments regarding a fee proposal for Alexkor:

"Please see below our Alexkor fee proposal. Transactions of this nature typically include four main work streams:

1. Valuations.
2. Due diligence.
3. Transaction advisory.
4. Capital raising.

Valuations and due diligence

The majority of consultancies charge for valuations and due diligence work on a time and materials basis. An hourly rate per resource coupled with pre-agreed rates

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<sup>262</sup> Exhibit XX2, p 218-219.

<sup>263</sup> Exhibit XX2, p 246.

<sup>264</sup> Exhibit XX2, p 234-235.

for travel, communications, accommodation, etc. is agreed upon by the parties and the number of hours expected is generally agreed upon upfront. This fee is not a success based payment and is charged monthly in arrears.

#### Transaction advisory

Transaction advisory is a bit more complex. For transactions between R100M and R1bn, a corporate finance fee of 2%-3.5% of transaction size is charged as a success fee. This percentage reduces slightly as the transaction size increases over R1bn. A monthly retainer is charged to cover costs and is typically offset against the final success fee charged.

For smaller transactions (i.e. R10M -- R100M) a fixed fee is generally negotiated between the parties. This fee would typically not be reliant on success and large investment banks would not often engage in these mandates.

#### Capital raising

Capital raising fees are usually success based, based on a percentage of funding raised:

Senior debt: 1%

Mezzanine: 1.5%-2.5%

Equity: 2.5%-3.5%

#### Alexkor fee proposal:

Due to the nature of the transactions and for the sake of simplicity and transparency, we propose the following hybrid approach:

All work done is charged on a time and materials basis, based on our standard rates table below. These rates will be charged monthly in arrears. In order to incentivise the successful and timely completion of transactions, we propose a small success fee of 1% (of the transaction size) over and above the time and materials fees charged.

Capital raising fees are to be charged separately on a success fee basis at the rates shown above..."

314. The standard rates table referred to in the email included hourly rates as follows: i) Analyst R3333; ii) Senior Analyst R4167; iii) Corporate Financier R3333; iv) Senior Corporate Financier R4167; v) Due Diligence Analyst R3000; vi) Senior Due Diligence Analyst R4167; and vii) Mining Expert R5000. The Department of Public Service and Administration (DPSA) issues guidance on hourly fee rates to be used when contracting



contractors. The hourly DPSA rates recommended for consultants, with effect from 1 April 2013 until 31 March 2014, prescribed a maximum fee of R3156 per hour.<sup>265</sup> Most of the rates proposed by Regiments thus exceeded the maximum DPSA rates and were questionable.

315. On the same day Mr Wood emailed Mr Salim Essa (a key associate of the Gupta enterprise) attaching a fee proposal for Alexkor.<sup>266</sup> Evidence discussed in other volumes of this report has established that Mr Essa had an arrangement with Regiments in which he or shell companies forming part of the Gupta enterprise received up to 50% of fees paid to Regiments by state owned companies. The email read:

"Hi Salim, Fee proposal as discussed, please give me a ring once you have gone through the contents."

316. Later that day, Mr Wood sent an email<sup>267</sup> to Ms Kellerman stating:

"Post our meeting with Humphrey and the team yesterday, we have put forward our thoughts on the fee structuring as detailed below. It does appear difficult to fit this approach into the consulting agreement you sent me yesterday, but would be happy to discuss and expedite in the most efficient manner."

317. Ms Kellerman replied by email<sup>268</sup> on 16 January 2014 stating:

"Thank you for your email and our discussion yesterday. We have now had an internal meeting on this and from our side, we would like to engage you on the valuation and DD [due diligence] at this time only. This will give us time to work through the tender and will assist in curbing Board approvals. In this regard, we can then look at a general consultancy agreement. I would just need to get an indication from you on anticipated man hours. If you are happy with this, could someone from your legal team send a marked-up consultancy agreement for consideration and finalisation? Looking forward to your urgent response on this."

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<sup>265</sup> Exhibit XX2, p 244.

<sup>266</sup> Exhibit XX2, p 241.

<sup>267</sup> Exhibit XX2, p 234.

<sup>268</sup> Exhibit XX2, p 237.

318. Mr Wood responded immediately to Ms Kellerman stating that Regiments was happy to proceed on this basis and undertook to get the team to "mark-up" the consultancy agreement.<sup>269</sup>

319. On 16 January 2014, Mr Loeb sent an email<sup>270</sup> to Ms Kellerman including a copy of Regiments' standard consultancy agreement and stating:

"Please see attached our mark-up to the consultancy agreement including our best estimates of fees per transaction. Please note that our internal legal is still reviewing the agreement and will revert with comments during the course of tomorrow. In the interim, we can proceed based on the attached."

320. The unsigned consultancy agreement attached to Mr Loeb's email provided that Regiments was to be appointed for the period 13 January 2014 to 31 March 2014 or until such time as the contractual duties of Regiments were fulfilled.<sup>271</sup> The contract made provision for renewal and extension by agreement at the discretion of Alexkor. The envisaged duties were: i) commercial due diligence investigations; and ii) target asset and investment valuations. The remuneration payable under the contract was in terms of the fee proposal put forward by Mr Loeb and Mr Wood in the preceding email correspondence. The expected total fee payable was R986 668. It is not clear from the consultancy agreement whether the envisaged contractual performance related to the refocusing of Alexkor into coal and lime mining.

321. There is no evidence before the Commission indicating that the contract was eventually concluded between Regiments and Alexkor, the work (if any) performed in terms of it, and the fee paid to Regiments for any such work. Mr Bishop, the Commission's investigator, has suggested that the proposal put forward to Alexkor was designed

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<sup>269</sup> Exhibit XX2, p 237.

<sup>270</sup> Exhibit XX2, p 255.

<sup>271</sup> Exhibit XX2, p 256.

solely to benefit Regiments.<sup>272</sup> However, as said, there is no evidence before the Commission of the work performed by Regiments under this contract or of any fee paid to it for such work.

322. After Alexkor advertised the tender for the Financial Services Panel in January 2014, Regiments prepared and presented its own proposal to Alexkor. There is an unsigned letter on record dated 31 January 2014 from Mr Wood addressed to Ms Kellerman attaching a proposal for Regiments to be appointed to the Financial Services Panel of Alexkor.<sup>273</sup> It reads in relevant part:

"Regiments Capital (Regiments") is pleased to submit the accompanying proposal for the above mentioned tender... This proposal covers a description, methodology, experience and project plan for all the services that Regiments is bidding for as well as a brief profile on Regiments. In submitting this proposal, Regiments hereby complies and agrees to be bound by the rules of the RFP submission as contained in the request for proposals..."

323. Several companies tendered to be on the panel.<sup>274</sup> It seems Regiments could have been successfully nominated with a number of other bidders. However, it is not clear from the presentation document if Regiments was in fact at any point appointed to the panel. On 21 August 2014, the board decided to place a moratorium on tenders for the Financial Services Panel.<sup>275</sup>
324. While there is no evidence that a consultancy contract was in fact concluded with Regiments or regarding the nature of the services (if any) provided by or fees paid to Regiments, there were evidently regular engagements between Regiments and Alexkor. Mr Bishop has examined cell phone records which indicate that executives at Alexkor had ongoing contact with staff at Regiments and other well-known Gupta

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<sup>272</sup> Exhibit XX2, p 34, para 70.

<sup>273</sup> Exhibit XX2, p 266.

<sup>274</sup> Exhibit XX2, p 110.

<sup>275</sup> Exhibit XX2, p 23, para 62.

associates over a sustained period of time. However, there is no evidence regarding the content of these calls or if they were contemporaneous with any relevant transaction involving Alexkor or any company associated with the Gupta enterprise. Some of the Alexkor executives attended the notorious Gupta wedding at Sun City.

325. In the final analysis, the role actually played by Regiments in the attempted state capture of Alexkor has not been sufficiently clarified. The relationship between Regiments and Alexkor requires further investigation and no finding of any specific wrongdoing can be made in that regard.

#### **The irregular appointment of SSI as the PSJV's sole marketing agent**

326. In early 2016, the Audit and Risk Committee of Alexkor ("the ARC") conducted a review of the appointment of SSI as the marketing agent for the PSJV's diamonds. The report sets out the following timeline of events leading to the appointment.<sup>276</sup>
327. On 21 October 2013, the PSJV technical committee raised a concern with management regarding the manner in which diamonds were being marketed and the prices obtained in the market by the then service provider, Diamond Marketing Consultants ("DMC"), which had been appointed before the land claim. During 2013, the PSJV's marine diamond production traded on average at 30.2% below the market. The committee advised management to request approval from the board to appoint a new service provider on a trial basis to determine whether there would be an improvement in pricing. On 23 October 2013, the PSJV management team obtained approval from the PSJV joint board to appoint a new service provider on a trial basis. On 1 January 2014 management appointed Diamond Realisations t/a Fusion Alternatives ("Fusion") on a trial basis and cancelled the marketing and sales agreement with DMC. On 16 April

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<sup>276</sup> Exhibit XX4, p 251, para 254-264.

2014 the PSJV joint board gave approval for the management team to begin a tender process for the appointment of a permanent service provider to take the place of DMC.

328. An RFP was published on 31 October 2014.<sup>277</sup> The RFP invited qualified parties to present innovative proposals for enhancing the revenue of the mine through the marketing and post extraction treatment, processing and beneficiation of diamonds extracted in the Richtersveld. The RFP indicated that post the land restitution claim, the PSJV planned to produce in excess of 70000 carats per annum and that it was necessary for the PSJV to develop and implement a strategy to introduce viable and economically sustainable activities in the Richtersveld that extend beyond primary minerals extraction activity. The post minerals extraction treatment, processing and beneficiation entail the diverse industrial minerals processing activity extending across the various stages of value chain beneficiation including manufacturing production of final consumer products. Beneficiation entails the transformation of minerals to higher value products – value addition. The RFP was thus aimed at post-mineral extraction services contributing to additional economic benefit for the members of the Richtersveld community that rely on the primary extraction activity for their economic survival. The PSJV intended to leverage its position as primary producer of diamonds to participate in post extraction treatment, processing and beneficiation of its produce that would deliver additional benefits to the PSJV and the Richtersveld community.
329. In terms of the RFP, the bidders were required *inter alia* to implement processes that would achieve continuous improvements of prices for the PSJV produce. To that end the bidders had to demonstrate an ability to provide all resources (premises, staff, transportation and safe custody) including *inter alia* “legal entities including permits and licences to conduct the business of trading in and/or processing of rough diamonds and/or polished diamonds”. Interested bidders were required to formally submit an

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<sup>277</sup> Exhibit XX4, p 266.

expression of interest by 7 November 2014, to attend a compulsory briefing on 10 November 2014 and to submit a formal written proposal by 24 November 2014.

330. Nine interested companies, including SSI, submitted written expressions of interest to participate in the tender. SSI's expression of interest dated 6 November 2014 on a letterhead that indicated that the directors of SSI were Mr Daniel Nathan and Mr Kuben Moodley, an associate of the Gupta enterprise. At that date, the sole director of SSI was Ms Hazel Ammann, a shelf company stand-in.<sup>278</sup> Company records indicate that Mr Nathan and Mr Moodley in fact only became directors on 4 December 2014. SSI's own company structure shows that they became shareholders on 20 November 2014 through their respective companies Daniel Nathan Trading ("DNT") and Kimomode (Pty) Ltd ("Kimomode").<sup>279</sup> Hence, until 4 December 2014, the date upon which Mr Moodley and Mr Nathan officially became directors, SSI was a shelf company. The date upon which they became directors was eleven days after the official closing date of 24 November 2014 for formal written proposals. Mr Moodley, the purported 60% BEE shareholder of SSI, had no diamond industry background at all.
331. Even though there were only seven bids, Mr Carstens, the CEO of the PSJV, outsourced the shortlisting of bids to Gamiro Advisory Services ("Gamiro"), a company controlled by Ms Heather Sonn. Ms Sonn, together with Mr Christo Wiese of Trans Hex later played some part in Alexkor's plans to diversify into coal.
332. Gamiro shortlisted three companies, namely SSI, CS Diamonds and Diamond Realisations (Fusion), who were all invited to make further presentations to the tender committee. Fusion, the incumbent service provider, scored the highest with 75 points; SSI came in second with 71.5 points; and CS Diamond third, with 67 points. SSI was shortlisted although it held no diamond license and Gamiro had awarded it zero points

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<sup>278</sup> Exhibit XX1, p 028, para 1.5.3.

<sup>279</sup> Exhibit XX1, p 028, para 1.5.3.

for the licence requirement. Mr Nathan's company, DNT, however, did have a diamond licence, but this could not legally be utilised by SSI.

333. Various licences are required by players in the diamond industry in terms of the Diamonds Act.<sup>280</sup> Section 19 prohibits the sale of unpolished diamonds and provides that no person shall sell any unpolished diamond unless he or she is: i) a producer; ii) has manufactured that diamond, if it is a synthetic diamond; iii) is a dealer; or iv) is the holder of a permit referred to in section 26(h). Section 20 prohibits the purchase of unpolished diamonds and provides that no person shall purchase any unpolished diamond unless he or she is a licensee or is the holder of a permit referred to in 40(1)(b).<sup>281</sup> Section 44 prohibits the utilization of unregistered premises as a diamond trading house and provides that no person shall utilize any premises as a diamond trading house unless he or she holds a diamond trading house license and those premises are registered as a diamond trading house in terms of the Diamonds Act.

334. Mr Bishop and Mr Dekker both maintain that SSI did not comply with these provisions. Any person convicted of contravening section 19 or section 20 of the Diamonds Act is liable to a fine not exceeding R250 000, or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment. A contravention of section 44 of the Diamonds Act carries a penalty of a fine not exceeding R50 000, or to imprisonment for a period not exceeding two years, or to both such fine and imprisonment. The South African Diamond and Precious Metals Regulator ("SADPMR") has confirmed that SSI had no licences and instead improperly relied on the licence of DNT.

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<sup>280</sup> Act 56 of 1986.

<sup>281</sup> Section 20 of the Diamonds Act provides that: "No person shall purchase any unpolished diamond unless- (a) he is a licensee; or (b) he is the holder of a permit referred to in section 40 (1) (b)."

335. Gamiro was aware that SSI had no diamond licences as evident from the fact that it awarded it no points for diamond licences.<sup>282</sup> SSI should have been disqualified at this stage as a diamond licence was a minimum requirement of the RFP.
336. The final selection was conducted on 11 December 2014, at Alexkor's office in Johannesburg by a tender committee comprising: Mr Bagus, Mr Duncan Korabie and Dr Roger Paul. All three scored SSI the highest. The highest score per member was as follows: Dr Paul: SSI=54 points; Mr Korabie: SSI=100 points and Mr Bagus: SSI=66 points. Despite all three adjudicators awarding SSI the highest points, it appears there was a significant lack of clarity about its proposal and what exactly SSI had committed to in terms of funding, pricing, beneficiation and community investment.
337. SSI's original proposal was to procure rough diamond production through an outright purchase of production at the price determined by an independent diamond valuer. This was somewhat curious in that the RFP was intended to introduce a new system different from the outright purchase arrangement that had hitherto prevailed under Diamedel (De Beers), the erstwhile service provider.<sup>283</sup> The SSI proposal also indicated no cost for handling the rough diamonds as it was an outright purchase. This led to SSI being awarded the 10 points on price, despite this model not being the preferred model of the PSJV which should have resulted in disqualification. SSI was at some stage permitted to change its proposal to the selling of rough diamonds through an auction process to the highest bidder and to include 1.5% handling fee for handling the rough diamonds. This is an indication that SSI was favoured. There are accordingly reasonable grounds to believe that the outcome of the tender process was a foregone conclusion and not in accordance with section 217 of the Constitution requiring a fair, equitable, transparent, competitive and cost-effective tender process.

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<sup>282</sup> Exhibit XX1, p 028, para 1.5.9.

<sup>283</sup> Exhibit XX1, p 089, para 11.9.5.



338. All three tender committee members allocated the full five points to SSI for possessing diamond licences, despite Gamiro awarding no points to SSI for licences.<sup>284</sup> This is a further indication that the process was manipulated to favour SSI at the expense of the highest scoring bidder, Fusion.<sup>285</sup> The tender committee recommended the award of the contract to SSI when quite evidently it failed to comply with an essential requirement.
339. The PSJV awarded the tender to SSI on 27 February 2015 notwithstanding that it failed to meet the specified minimum requirements of the tender, more particularly in that SSI had: i) no track record in the diamond industry; ii) no experience in trading in diamonds or in cutting and polishing rough diamonds; iii) no cutting or polishing factory; iv) no licence to buy rough diamonds; v) no licence to sell rough diamonds; vi) no licence to cut and polish rough diamonds; vii) no diamond trading house licence; and viii) no BEE certificate (which it only acquired after being awarded the tender). These were all minimum requirements for the tender; thus, to repeat, SSI's bid was non-responsive and should have been disqualified at the outset.
340. Having won the tender, SSI went from being a dormant shelf company to suddenly appearing on the local diamond trading scene as the PSJV's new marketing and sales service provider, taking delivery of its first tranche of multimillion rand rough diamonds on 15 March 2015 at its new offices located in Johannesburg. The business address of SSI is the physical address of Mr Nathan's company, DNT and Knox Titanium Vault Company ("Knox"). Mr Moodley and his wife, as well as other Gupta associates such as Mr Anoj Singh, the former GCFO of Transnet, had personal safety deposit boxes at Knox, which were subject to search and seizure orders by the Commission in 2019 and in respect of which there is a reasonable suspicion that they were used to deposit cash bribes received from the Gupta enterprise.

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<sup>284</sup> Transcript 11 January 2012, p 42.

<sup>285</sup> Exhibit XX1, p 028, para 1.5.16-1.5.17.

341. The agreement to sell the diamonds and the eventual sale of them (at a value of almost R2 billion) by the PSJV and the purchase of them by SSI probably constituted criminal offences in terms of sections 19, 20 and 21<sup>286</sup> of the Diamond Act punishable by a fine not exceeding R250 000, or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment.
342. As mentioned, the SADPMR has confirmed that SSI has never applied for a diamond trading house licence. It instead used the licence of DNT to trade the PSJV diamonds from inception of the contract. The decision of the three members of the tender committee, Mr Bagus, Dr Paul and Mr Korabie, to award the tender to SSI committed the PSJV to a course of criminal conduct. There are accordingly reasonable grounds to conclude that they were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act<sup>287</sup> to advance and protect the interests of the PSJV. Likewise, there are also reasonable grounds to believe that in making the recommendation to the board of the PSJV, the members of the tender committee deliberately made a misrepresentation to the actual or potential prejudice of the PSJV and possibly thereby committed fraud. By the same token, it must follow that there are strong grounds to believe that SSI may have been unlawfully in possession of rough diamonds and each sale by the PJSV to SSI was in contravention of the Diamonds Act. It will therefore be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of these persons on a charge of fraud and contraventions of the Diamonds Act.
343. Mr Dekker pointed to other possible irregularities by SSI. He alleged that ABDC (the erstwhile SSI) acquired a back-dated diamond trading house licence on the pretext of

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<sup>286</sup> Section 21 of the Diamonds Act provides that: No person- (a) referred to in section 19 (1) shall sell any unpolished diamond to any person other than a person referred to in section 20; and (b) referred to in section 20 shall purchase any unpolished diamond from any person other than a person referred to in section 19 (1).

<sup>287</sup> Act 71 of 2008.

a name change when no licence was ever conferred to or in the name of SSI and without having to satisfy the requirements of the legislation. Mr Nathan is alleged to have informed the SADPMR that the name of his company DNT (which had a licence) was changed to ABDC and thus in this manner he was able to obtain a licence for ABDC (SSI). This information was false in that SSI (which had no licence) and not DNT was the company that changed its name to ABDC.<sup>288</sup> There are therefore reasonable grounds to believe that Mr Nathan, or other employees of SSI (ABDC) an/or DNT wilfully furnished information to the SADPMR or made a statement which was false or misleading and thus contravened section 86 of the Diamonds Act. Accordingly, it will be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution for contravention of this provision.

344. The award of the tender to SSI was perhaps illegal for another reason. About five months prior to the award of the tender to SSI, on 4 September 2014, just before the publication of the RFP, the Western Cape High Court declared that certain persons (Dr John Bristow, Mr Duncan Korabie, Mr Willem Vries and Mr Dennis Farmer) purporting since 22 November 2013 to be the directors of RMC (Alexkor's partner in the PSJV), had been unlawfully appointed directors of RMC. The court reinstated Mr Craig Matthews as the sole director of RMC.<sup>289</sup> On the same day, Mr Matthews wrote to Alexkor and the CEO and secretary of the PSJV informing them that Dr Bristow, Mr Korabie, Mr Vries and Mr Farmer were not directors of the RMC and could not serve as representatives of RMC on the PSJV.<sup>290</sup> He stated:

"The further implications are very serious in that any decisions that were taken by the PSJV Board since November 2013 are on the face of it invalid for the mere fact that the RMC representatives were not appointed by the RMC and had no authority

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<sup>288</sup> Exhibit XX3, p 10, para 8.2.

<sup>289</sup> Exhibit XX4, p 467.

<sup>290</sup> Exhibit XX4, p 483.

to take decisions on behalf the company and the PSJV Board. You were advised in previous communications that subsequent to the finalisation of the aforementioned Court matter that the RMC may review all decisions taken by the PSJV Board since November 2013."<sup>291</sup>

345. On 11 September 2014, Mr Bagus replied to Mr Matthews claiming incorrectly that as neither Alexkor nor the PSJV were party to the litigation the court order was of no consequence to them and that an appeal had been lodged against the order.<sup>292</sup> Ms Kellerman reiterated that position in a letter dated 7 November 2014.<sup>293</sup> Subsequent correspondence establishes that an appeal was not prosecuted and had lapsed in early 2015.<sup>294</sup> Despite the evident illegality, Mr Bagus, Mr Korabie and Dr Paul (the members of the tender committee) recommended the award of the tender to SSI. In consequence, when the PSJV concluded the contract<sup>295</sup> with SSI on 4 March 2015, its board was in all probability improperly constituted and thus the validity of the contract is in question on this ground also. There are also reasonable grounds to believe that some of the board members of the PSJV acted in breach of their fiduciary duties and Mr Bagus, Mr Korabie and Dr Paul were possibly in contempt of the court order.<sup>296</sup> It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of these persons on a charge of contempt of court.
346. In addition, there is a debate about whether Ms Kellerman and Mr Carstens misrepresented to the board that a due diligence had been conducted prior to the award of the tender to SSI.

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<sup>291</sup> Exhibit XX4, p 484, para 7.

<sup>292</sup> Exhibit XX4, p 488.

<sup>293</sup> Exhibit XX4, p 498.

<sup>294</sup> Exhibit XX4, p 501.

<sup>295</sup> Exhibit 8, p 361.

<sup>296</sup> Transcript 11 January 2012, p 5-26.

347. Some months after the contract was concluded with SSI, on 11 September 2015, RMC submitted a complaint to the Public Protector regarding the irregular awarding of the contract to SSI.<sup>297</sup> The author of the complaint on behalf of RMC was Mr Korabie, one of the directors who had sat on the tender committee and had scored SSI 100 points. In the complaint, Mr Korabie referred to a conversation he had with Mr Bagus on 17 December 2014 in which he was requested to approve the conditional appointment of SSI. Mr Bagus later confirmed to the ARC that the reason he sought conditional approval was to ensure that all concerns of the tender committee were addressed even though SSI had attained the highest score.<sup>298</sup> Mr Korabie maintained in his complaint that it was a condition of the award that a due diligence be done, but that this appears not to have been done. SSI was a shelf company and there was insufficient information about who its directors were. Mr Korabie complained that the CEO, Mr Carstens, did not report to the tender committee on due diligence and had not been provided with adequate documentation.<sup>299</sup> Mr Korabie concluded that SSI had been created specifically for the purposes of the tender and the condition of its approval had not been fulfilled as it had not been subjected to a proper due diligence.
348. In November 2015, following a meeting with the Minister of Public Enterprises, RMC agreed not to proceed with the complaint to the Public Protector and for the matter to be investigated internally by the ARC.<sup>300</sup>
349. The ARC report (dated 29 February 2016) records that on 18 December 2014 SSI was informed that the tender was conditionally awarded subject to a due diligence and verifications process. It noted that the due diligence was done by the CEO, Mr Carstens, and the verification was done by Ms Kellerman, the Chief Legal Officer. According to

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<sup>297</sup> Exhibit XX4, p 813.

<sup>298</sup> Exhibit XX4, p 258.

<sup>299</sup> It is not clear why Mr Korabie scored SSI 100 points despite having concerns about the lack of a due diligence and the absence of information. Mr Korabie did not testify before the Commission and has not filed an affidavit.

<sup>300</sup> Exhibit XX4, p 818.

the ARC report, the due diligence report ("Annexure S" of the ARC report) was finalized and circulated to the board members on 29 January 2015 and the tender was awarded to SSI on 27 February 2015 subsequent to the completion of the due diligence and verification process.<sup>301</sup> The ARC concluded that the CEO of the PSJV, Mr Carstens, did "a proper due diligence on all the technical aspects and submitted the report to members of the tender committee in an email dated 29 January 2015".<sup>302</sup>

350. The document referred to as Annexure S, the email of 29 January 2015, is relatively short email and addressed a handful of issues. It is doubtful that it constituted an adequate due diligence for a tender to market diamonds valued in excess of R2 billion. It reads:

"Subsequent to our due diligence process on Scarlet Sky Investment I can confirm the following:

**1. Beneficiation**

Scarlet Sky will select stones ranging between 1 and 4 carats (+- 15 % of our run of mine production) for cutting and polishing. These stones will be valued by an independent valuator after which they will pay us valuation price plus a premium of 5% upfront. They will further pay us 30% of the upside from prices fetched post cutting and polishing. Any other single stone/stones selected to be cut and polished would be dealt with on the same basis.

**2. Tender Process**

The remainder of the run of mine production would be sold on an open or closed tender process (agreeing that we would alternate between the two models until such time as we are in agreement on what the best option is for achieving maximum prices for the diamonds.

**3. Bank Guarantee**

Scarlet Sky has a bank guarantee of R50 million with Investec.

**4. Training**

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<sup>301</sup> Exhibit XX4, p 257.

<sup>302</sup> Exhibit XX4, p 257.

They will train 4 community members per year for a period of 5 years in cutting and polishing.

5. Legal compliance

They confirmed and will provide copies of valid licences required by the Diamond Regulator (DMR) for diamond dealing and selling at their premise and would offer the required 10% of run of mine production to the State Diamond Trader as required by law.”

351. The issue of the adequacy of the due diligence was not explored meaningfully during Mr Craythorne’s testimony. He testified that he had seen no evidence of a proper due diligence report and suggested that the ARC report was trying to pass off the perfunctory email of 29 January 2015 from Mr Carstens as a due diligence report.<sup>303</sup> He added that the due diligence appears to have been restricted to a few technical aspects and this was insufficient especially in the absence of SSI having the relevant diamond licences.<sup>304</sup>
352. The ARC report does not deal specifically with the question of licences, presumably because that issue was not raised in the complaint to the Public Protector. The ARC appears to have relied simply on the assurance that Ms Kellerman had done the necessary verifications, which, given that there were no valid licences, she clearly had not.
353. The Gobodo investigation concluded that no due diligence had been performed and that Mr Carstens had misled the board in that regard.<sup>305</sup> Mr Torres of Gobodo confirmed in his testimony to the Commission that the award to SSI was conditional upon the performance of a due diligence. Gobodo interviewed Mr Carstens who told it that a due diligence had been done and that he had informed the board accordingly. Gobodo then repeatedly requested a copy of the due diligence report and was unable to obtain one.<sup>306</sup>

<sup>303</sup> Transcript 11 January 2021 p 38, line 5.

<sup>304</sup> Transcript 11 January 2021 p 37, line 8.

<sup>305</sup> Exhibit XX1, p 028, para 1.5.15; and Exhibit XX1, p 091, para 11.9.14.

<sup>306</sup> Transcript 8 January 2021, p 53, lines 1-10.

This suggests that beyond the email, no proper due diligence was performed. This position is corroborated by what Mr Raygen Phillips, the company secretary, told Mr Torres during the course of the Gobodo investigation. In his evidence before the Commission, Mr Torres stated:

"Well Mervin Carstens the CEO actually wrote an email to Board members confirming that he had conducted a due diligence and based on that they accepted it and awarded the contract to SSI...Right from the beginning of our investigation the due diligence report was one of the things that we asked them for. Eventually right at the end they confessed and said, the company secretary actually, Raygen Phillips, said look no due diligence was done...but the email said I have conducted the due diligence."<sup>307</sup>

354. This evidence is *prima facie* evidence, giving rise to reasonable grounds to believe, that Mr Carstens and Ms Kellerman may have made a significant misrepresentation to the board and possibly have committed the offence of fraud. Ms Kellerman and Mr Carstens in affidavits filed with the Commission strongly deny that and put up the email of 29 January 2015 in support of their claim that a due diligence was in fact done. Accordingly, it will be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to determining whether fraud was committed in this instance.
355. The insufficiency of the due diligence and verification exercise, if only the absence of the relevant licences, also brings into question whether the members of the ARC (Ms M Lebhobye, Mr T Haasbrook and Mr V Bansi)<sup>308</sup> conducted their investigation with the required diligence and fidelity in accordance with their fiduciary duties.
356. Moreover, the ARC did not properly investigate all the allegations made in the complaint to the Public Protector. The RMC specifically challenged the regularity of the

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<sup>307</sup> Transcript 8 January 2021, p 67, lines 3-21.

<sup>308</sup> Exhibit XX4, p 252.



appointment of SSI. Yet in its report the ARC recorded that it had “no response” to this key allegation.<sup>309</sup> It likewise failed to deal meaningfully with the allegations that SSI: i) was a shelf company without any track record in the diamond industry specifically created for the purpose of the tender; ii) provided no beneficiation of the diamonds for the benefit of the community; and iii) did not comply with BBBEE legislation.<sup>310</sup> On the basis of its incomplete and unsatisfactory investigation, the ARC concluded that there had been no fundamental breach of procurement procedures in the award of the contract to SSI. The conclusions of the ARC on the basis of its wholly inadequate investigation are mostly unsustainable.

357. The award of the tender to SSI, according to the ARC report, was ratified via a round robin resolution by Mr Bagus, Dr Paul, Ms Z Ntsangula, Mr W Vries and Mr J Bristow.<sup>311</sup> In the complaint to the Public Protector, RMC maintained that Mr Bristow was never appointed by it to the tender committee. His appointment as a director of the board of the RMC, like Mr Korabie’s appointment, according to the judgment of the Western Cape High Court, was unlawful and invalid.
358. The contract with SSI was extended shortly after the ARC report was finalised in February 2016 pursuant to a tender process conducted in March-June 2016, which according to Gobodo also was attended by irregularities in relation to the short-listing and scoring of bidders that ultimately appeared to favour SSI.<sup>312</sup> The contract with SSI was eventually terminated by the PSJV on 11 August 2020 and the parties remain in a contractual dispute. There is no evidence that SSI provided any meaningful beneficiation services, a key objective of the contract which was intended to benefit the Richtersveld Community.

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<sup>309</sup> Exhibit XX4, p 260.

<sup>310</sup> Exhibit XX4, p 261-262; and Transcript 11 January 2021, p 53-55.

<sup>311</sup> Exhibit XX4, p 257.

<sup>312</sup> Exhibit XX1, p 092, para 12.

### **The allegations regarding the valuation of the diamonds sold to SSI**

359. The contract between the PSJV and SSI provided that all diamonds produced by the PSJV were to be marketed and sold by SSI at the highest prices obtainable. The diamonds were sold from the premises in Houghton, where Knox Vaults is situated. According to Mr Craythorne, after the involvement of SSI in the value chain, the price received for the Alexkor diamonds decreased significantly to the detriment of the members of the joint venture, the private mining contractors and the Richtersveld community. He claimed that during 2015, the PSJV's marine diamond production traded at 47.1% below the market.<sup>313</sup> However, it should be kept in mind that during 2013, prior to the appointment of SSI, the PSJV's marine diamond production traded at 30.2% below the market.<sup>314</sup>

360. The valuation process for the Alexkor diamonds when SSI was the marketing agent was evidently problematic for a number of reasons. The gravel mined by the private contractors was delivered to two diamond recovery plants at Alexander Bay for batch processing by the contractors with officials from the PSJV. The diamonds recovered by each contractor were then counted, weighed and documented. After being sorted into parcels of equal size diamonds, they were sent to Johannesburg where they were cleaned, sorted and valued by Mr Nathan and Mr Horne of SSI. Valuation of the smaller diamonds was not done on an individual basis. The diamonds were sorted by taking a sample divided into categories and a valuation placed on each category. Mr Nathan would then arrive at a weighted average value for the sample and a weighted average for the category. The diamonds were then sold in mixed and singles parcels. After the sale, each producer would receive the average price per carat for the contributions they made towards the total weight of each of the various assortments/lots. The special

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<sup>313</sup> Exhibit XX4, p 028, para 119.

<sup>314</sup> Exhibit XX4, p 003, para 14.

stones over 6.8 carats were sold individually and producers only received price information on the special stones they produced.

361. Mr Craythorne alleges that the PSJV diamonds have been undervalued over the years to the detriment of Alexkor, the Richtersveld community and the private diamond contractors. This he alleges was achieved by: i) undervaluing the diamonds mined by the private contractors at the mine; ii) undervaluing the diamonds sold to the SDT and for beneficiation; and iii) manipulating the tender process to ensure that the diamond parcels are sold to the local diamond traders at reduced prices for on-sale to international buyers at substantially higher prices. He referred also to four corrupt methods used to deprive the producers of fair diamond prices: i) switching - which involves the swapping out of high-grade stones and replacing them with low grade stones of the same weight; ii) cherry picking - which involves the removal of the highest quality diamonds from the various categories of mixed diamonds prior to the auction, which brings down the price of tender bids dramatically; iii) sawn kap theft - which involves the theft of diamond offcuts, known as "sawn kaps", which arise when the shape of a diamond is such that it would be more profitable to saw a diamond in two and the smaller offcut is written off as waste and then sold as a cut (but not polished) stone; and iv) tender collusion - which involves collusion between the buyers who attend the diamond auctions and the auction service provider.
362. Prior to the dispatch of diamonds by the PSJV to SSI, the quantity of diamonds (carats) to be dispatched were determined by an inexperienced valuator, Ms Adams, who calculated the carat weight of the diamonds from which she estimated the value of diamonds sent to SSI for insurance purposes. Ms Adams did not take into consideration the colour, clarity and cut of the diamonds, which are crucial elements in ascertaining the value of the diamonds produced. The colour, clarity and cut are factors of quality of the diamond and the carat is the quantity or weight of a diamond. The value of a

diamond is influenced by all four factors, i.e. a diamond of better colour, clarity and cut will obtain a higher value than a diamond with a lesser colour, clarity and cut of the same size or carat.

363. On receipt of the diamonds by SSI, processes were in place to ensure that the total weight in carats dispatched from the mine by the PSJV coincided with the weight in carats received by SSI. There was no similar mechanism to determine that the value of the diamonds dispatched, in terms of carat, colour, clarity and cut, were the same as those received. This is because it was only on receipt of the diamonds in Johannesburg by SSI that the diamonds underwent a process of cleaning. The diamonds were valued by Mr Nathan (diamonds larger than 2.5 carat / 8 grams) and Mr Horne for the smaller diamonds, only after the diamonds had been cleaned. There was no independent valuation by a person representing the PSJV at this stage, leaving the determination of value solely to Mr Nathan or SSI.
364. As the diamonds were not properly valued prior to their dispatch from the PJSV, there was a risk that the diamonds could be undervalued by Mr Nathan to his advantage or that of the buyers and to the prejudice of the mining contractors. This is the nub of Mr Craythorne's complaint. There was also the risk of the diamonds being substituted with lesser value diamonds of the same carat weight, but of inferior quality, prior to their valuation. The PSJV had no control over the profitability of its own business as it relinquished control of the valuation of its produce to an outside party with conflicting interests.
365. Following cleaning and valuation, the diamonds were sorted for sale according to the contract with SSI which required 10% to be set aside for sale to the State Diamond Trader ("SDT"), 5% be made available for beneficiation purposes and the remainder (85%) be set aside for sale in a closed tender process. The 10% for the SDT and 5%

for beneficiation (purchased by Mr Nathan and passed on to an associated company) was prepared by Mr Nathan. The remaining 85% of the diamonds was sold in a closed tender process, the integrity of which Mr Dekker regarded as questionable.<sup>315</sup> The auction process on line allegedly put Mr Nathan in a position of knowing the top three bidding prices and the true value of the diamonds (having himself valued them) and thus he could inform potential bidders of high value diamonds being sold at below market prices. It was further alleged that SSI did not market the diamonds aggressively thus allowing for possible abuse, which Mr Nathan denies.

366. Mr Craythorne maintains that in his "expert" opinion the Alexkor diamonds were marketed by SSI at between 30-40% of their true value between 2015 and 2018. Mr Craythorne was not qualified as an expert witness before the Commission and given his financial interests cannot fairly be considered as independent. However, Gobodo performed a comparison of the USD selling price per carat between SSI and two price indexes, the Zimnisky and Bloomberg Prices Indexes. It concluded that for the period 2015-2017 the Zimnisky average USD selling price for the period was 12.27% higher than the SSI selling price and the Bloomberg average USD selling price for the period was 9.47% higher than the SSI selling price. For the period 2017-2018 the Zimnisky average USD selling price for the period was 22.08% higher than the SSI selling price.<sup>316</sup>
367. In view of the incomplete evidence before the Commission, it is not possible at this point in time to offer a full explanation for the price differentials or to make a definitive finding of any wrongdoing on the part of SSI and Mr Nathan in the sale and marketing of the diamonds. Nonetheless, it remains incumbent on the board of Alexkor and the PSJV to determine if true and fair value was received for the sale of diamonds to SSI in the period 2015-2019.

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<sup>315</sup> Exhibit XX3, p 015, para 9.5.

<sup>316</sup> Exhibit XX1, p 119, paras 14.7.4-14.7.5.

368. Mr Dekker also performed an analysis of the monthly registers of SSI, required in terms of section 57 of the Diamonds Act. The registers reflected that several different names were entered as the diamond trading house licence holder, namely Daniel Nathan Trading CC; Daniel Nathan Trading House; Alexander Bay Diamond Company Trading House; and Alexander Bay Diamond Company. This gives rise to reasonable suspicion of a misrepresentation having been made to the SADPMR by the executives or employees of SSI, as the diamonds were in fact traded by SSI, an unlicensed trader.<sup>317</sup> The incomplete evidence does not permit the making of a definitive finding in this regard, but the matter requires further investigation with a view to possible prosecution by the law enforcement agencies for a contravention of section 86(c) of the Diamonds Act, which provides that any person who falsely gives himself out to be a holder of a licence under the Act shall be guilty of an offence.
369. Mr Dekker also compared the purchases of diamonds declared by SSI in its registers to the diamonds delivered to SSI by the PSJV in the PSJV registers between May 2015 and July 2019. The PSJV recorded sales to SSI of 253 507.78 carats, with a value of approximately R1.737 billion. The SSI register however recorded a purchase of 253 311.63 carats, with a value of approximately R1.732 billion. Thus, the SSI register failed to account for 196.15 carats valued at R5.136 million. Mr Dekker accordingly recommended that this difference should be further investigated to determine if any crime was committed and to establish whether the PSJV had a cause of action for recovery of the alleged underpaid amount.<sup>318</sup>
370. Mr Nathan, in an affidavit filed with the Commission, but which was not admitted on the record, disputes Mr Dekker's calculation.<sup>319</sup> He maintains that Mr Dekker ignored the fact that SSI was entitled to 1.5% commission on the sales price of the diamonds sold

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<sup>317</sup> Exhibit XX3, p 024, para 9.26.3.

<sup>318</sup> Exhibit XX3, p 024, para 9.26.9.

<sup>319</sup> Affidavit of Mr Daniel Nathan dated 19 February 2021 para 6.19.

on auction and that DNT (notably not SSI) purchased a portion of the diamonds from the PSJV for beneficiation purposes which was paid separately (presumably by DNT) to the PSJV. He maintained that if the commission payable by the PSJV to SSI is subtracted and the amount paid by DNT for the diamonds to be beneficiated was added back there was no shortfall. Mr Nathan provided no arithmetical calculations or relevant documentation in support of this particular contention. There is no indication in the registers of any purchases made by DNT from the PSJV. Moreover, because of the time constraints facing the Commission, Mr Dekker was not afforded an opportunity to respond to the allegation that he had made a miscalculation and neither Mr Dekker nor Mr Nathan testified before the Commission. Nevertheless, given the serious nature of the alleged theft or fraud, further inquiry into the matter is required and it will be recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to a possible prosecution.

371. Mr Dekker also alleged that SSI underpaid the PSJV an amount R1.718 million in relation to a sale of parcel 248.<sup>320</sup> Mr Nathan denied this in his affidavit. He maintained that 86.94 carats of the shipment were removed and sold to DNT for beneficiation purposes. In support of his version he annexed an invoice from the PSJV to SSI (not DNT) in the amount of approximately R2.368 million, which does not correspond with the alleged missing value. This matter too requires the law enforcement agencies to conduct such further investigations as may be necessary.<sup>321</sup>
372. In its report Gobodo indicated that SSI had failed to disclose to it the full identity of the buyers of the rough diamonds sold by it in the auctions. There has been some suggestion (though no clear evidence) that some of the buyers may have had links with the Gupta enterprise. Gobodo consequently recommended that further investigation be

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<sup>320</sup> Exhibit XX3, p 024, para 12.

<sup>321</sup> Affidavit of Mr Daniel Nathan dated 19 February 2021 para 6.23.

conducted to identify the buyers of the rough diamonds and the related prices for the rough diamonds to ensure that the buyers had the required licences and that the sales had been registered with the relevant authorities in accordance with the provisions of the Diamonds Act.<sup>322</sup>

373. It will accordingly be recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any possible contraventions of sections 18, 19, 20 and 21 of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law.

374. Sections 18, 19, 20 and 21 of the Diamonds Act read as follows, respectively:

375. Section 18:

"Save as is otherwise provided in this Act, no person shall have any unpolished diamond in his possession unless-- (a) he is a producer who has won or recovered that diamond from the sea or from land or debris in accordance with any licence, permit, lease or other authority granted to him under the Precious Stones Act, 1964 (Act No. 73 of 1964); (b) he has manufactured that diamond, if it is a synthetic diamond; (c) he is a licensee; (d) he is in respect of that diamond the holder of a permit under this Act; (e) he is in possession of that diamond in implementing an agreement entered into by him with a person referred to in paragraph (a), (b), (c) or (d); or (f) he has otherwise come into possession of that diamond in a lawful manner."

376. Section 19:

"(1) No person shall sell any unpolished diamond unless—

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<sup>322</sup> Exhibit XX1, p 158, para 19.3.



- (a) he is a producer;
- (b) he has manufactured that diamond, if it is a synthetic diamond;
- (c) he is a dealer; or
- (d) he is the holder of a permit referred to in section 40(1) (a) or (2).

(2) The provisions of subsection (1) shall not be construed so as to authorize such producer, dealer or holder of a permit to sell any unpolished diamond which has come into his possession in an unlawful manner."

377. Section 20:

"No person shall purchase any unpolished diamond unless- (a) he is a licensee; or (b) he is the holder of a permit referred to in section 40 (1) (b)."

378. Section 21:

"No person- (a) referred to in section 19 (1) shall sell any unpolished diamond to any person other than a person referred to in section 20; and (b) referred to in section 20 shall purchase any unpolished diamond from any person other than a person referred to in section 19 (1)."

### **The proposed diversification of Alexkor into coal mining**

379. On 13 September 2013, the Deputy Minister of Public Enterprises, Mr Bulelani Magwanishe made the following media statement:

"I'm pleased to announce today, that the board has responded with a game changing strategy that has a well-crafted compelling value proposition that ...positions Alexkor as a world-class mining company with aspirations to respond to the immediate needs of the country.

Our own analysis shows that Eskom will start experiencing coal supply shortages by 2018. The state has to move fast to avert an energy crisis. Electing to enter coal mining, will fundamentally change the value proposition of Alexkor to the people of South Africa.

Alexkor's new strategy provides the state with a significant lever in engaging with coal majors, who are mainly multinationals, with a narrow responsibility to the

country's economy. Alexkor is expected to be a vanguard for transformation in the coal mining sector, as the government's call for transformation in the sector has effectively gone unheeded.

Black emerging miners are still battling to gain a footing in the sector. Alexkor will partner emerging black, women, youth-owned miners through offering the necessary technical and business expertise to enable graduation of these miners from emerging to established, realising the objectives of the Eskom Emerging Miners Strategy, which as a department we have championed.

The repositioning of Alexkor satisfies another policy imperative. The Minister of Public Enterprises (Mr Gigaba) mentioned during his 2013 Budget Vote speech: the push for SOC-to-SOC collaborations. A year ago an Alexkor-Eskom collaboration at such a strategic level was inconceivable.

Now we are at the threshold of shaping the future of this country; and Alexkor is on the verge of finding its place into South Africa's future sustainable growth story.

Alexkor is also looking at high grade limestone supply to assist Eskom with its flue gas desulphurisation plants, and transportation cost is a major component of the price of burnt lime and leveraging SOC infrastructure will provide a cost advantage. The company's diversification strategy will ensure that it explore mining opportunities on the African continent."<sup>323</sup>

380. The Business Day reported on 16 September 2013 that Alexkor, which at that stage did not have any coal prospecting or mining properties, appeared to be duplicating the mandate of state-owned coal mining company, African Exploration Mining and Finance Corporation ("AEMFC"), which produced coal for Eskom from the Vlakfontein mine near Witbank, and was planning expansion. Answering questions at a press briefing after Alexkor's Annual General Meeting on 13 September 2013 in Pretoria, Mr Magwanishe denied that there was a potential conflict between Alexkor and AEMFC.<sup>324</sup>

381. Alexkor's new coal strategy was a radical departure from the past and was supposedly aimed at transforming Alexkor into a diversified mining company that would ensure the

<sup>323</sup> Exhibit XX2, p 018, para 46.

<sup>324</sup> Exhibit XX2, p 018, paras 48-49.

long-term sustainability of mining operations. In the foreword to Alexkor's 2013 annual report, Mr Bagus stated:

"Halfway through the 2012/13 financial year the new Alexkor board took office, facing challenging circumstances. We were confronted with some stark realities from a business with significant economic challenges. Our new strategy is a radical departure from the past to transform Alexkor into a diversified mining company that will ensure the long-term sustainability of our mining operations. The strategy embraces four key elements, namely:

- Unlocking value from the PSJV;
- Extract value from African diamond mining opportunities;
- Utilise Alexkor's core mining capability to supply coal to Eskom and reduce their coal supply risk; and
- Develop lime resources to supply Eskom.

The Alexkor board has been given the mandate to qualify and quantify mining opportunities for investment consideration. An immediate and urgent opportunity exists to focus on securing thermal coal supply for power generation. Eskom faces a critical and significant shortfall in strategic coal supply that will jeopardise efforts to ensure energy supply to our industries. We can significantly contribute to the development of new coal supply sources by utilising mining methods, processes, technologies and skills that are well within our current core capability.

Eskom will have to ensure that new mines are opened with a preference to procure coal from emerging black miners. Alexkor's diversification strategy supports these initiatives that will broaden economic participation, secure employment, stimulate local investment, and unlock underutilised resources. We will provide market access and mining expertise to emerging black miners that will create significant economic value for local communities.

Various emerging black miners expressed interest to partner with Alexkor in developing coal opportunities. We believe that these opportunities will create a viable second tier mining industry in South Africa.

High grade limestone supply to Eskom is critical for flue gas desulphurisation operations. We are in the process of developing a strategic lime business case to supply Eskom and will report on this progress shortly.

During the next financial year, we will focus on building and expanding strategic relationships with sister state-owned corporations and in particular Eskom and Transnet.

We will also engage the Department of Mineral Resources (DMR) and the state-owned mining company to coordinate coal mining efforts and secure their support of our strategy.

We are also in the process of negotiating better prices for our rough diamonds, which will have a positive impact on future revenues.

We have appointed Mr Percival Khoza, one of the leading mining executives in South Africa, to champion the future growth of Alexkor. His vast knowledge and experience in gold, diamond and coal mining is of immense benefit to the executive team....

A special word of thanks to Honourable Minister Malusi Gigaba, whose powerful vision of the future and insightful guidance and support is of huge value to Alexkor."<sup>325</sup>

382. Corporate documentation produced by Alexkor during 2013-2016 in relation to its strategic objectives and business development discuss the plan to exit diamond mining and to diversify to coal mining.<sup>326</sup> However, no evidence was presented to the Commission of any practical steps taken by Alexkor or other interested parties to give effect to those objectives and plans during that period. As discussed earlier, some attempt was made to on-board Regiments as a financial adviser on the project in 2014, but the evidence is insufficient to determine what role (if any) it played in effecting the new strategy.
383. Some years later, on 8 May 2017, a memorandum of understanding ("MOU") between IPC Beneficiation (Pty) Ltd ("IPC") and Alexkor was signed in Witbank. The MOU stated that a new company would be established and that the shareholding would be Alexkor- 55% and IPC- 45%. It was provided that a new company (Alexcoal) would enter into logistics and supply agreements with WesCoal and Nungu Mining, for the supply of washed coal to Eskom.<sup>327</sup> On 20 October 2017, Ms Hantsi Matseke, the then chairperson of Alexkor and the PSJV wrote a letter regarding the establishment of

<sup>325</sup> Exhibit XX2, p 014, para 36.

<sup>326</sup> Exhibit XX4, p 061-077.

<sup>327</sup> Exhibit XX2, p 0052, para 134 and para 136.

Alexcoal to Ms Lynne Brown, the Minister of Public Enterprises, in which she acknowledged the Minister's conditional approval to proceed with the negotiations with IPC.<sup>328</sup>

384. The Commission's investigating team maintain that the entire coal deal was a strategy of the Gupta enterprise to position itself to control Alexkor coal business, which consisted of IPC, WesCoal and Nungu Mining. This is evident from a bulletin, dated 27 January 2015,<sup>329</sup> released by a company associated with the Gupta enterprise, namely Centaur Holdings Ltd ("Centaur") based in Dubai. The company states on its website that it has interest in developing coal properties in South Africa. Its key shareholders are Mr Aakash Garg Jahajgarhia, who is married to the daughter of Mr Anil Gupta, one of the Gupta brothers. Centaur claimed to have signed a \$100m (R1.4bn) revolving credit facility with an anonymous Dubai based family (possibly the Guptas) to expand its natural resources projects in South Africa. It also contributed towards the R2.15bn purchase price of Optimum Coal Holdings by Tegeta Exploration & Resources, a subsidiary of Oakbay Investments, part of the Gupta enterprise.
385. The Centaur bulletin announced that Centaur had completed a funding package for IPC. Under the terms of a cooperation agreement, Centaur agreed to provide secured capital to expand IPC's existing opencast mining operations at the Nungu Colliery. Evidence before the Commission reveals that plans were already afoot in August 2014 to acquire the Nungu concessions that would form part of the new Alexcoal. An email to Mr Tony Gupta from Mr Ravindra Nath of Oakbay on 28 August 2014 indicates that the Gupta enterprise was involved with Nungu and there was a plan to conclude a coal supply agreement with Eskom.<sup>330</sup>

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<sup>328</sup> Exhibit XX2, p 324.

<sup>329</sup> Exhibit XX2, p 326.

<sup>330</sup> Exhibit XX2, p 358.

386. In his evidence before the Commission Mr Craythorne raised another possible dimension and rationale for the plan of Alexkor to diversify into coal. He maintained that with the appointment of Mr Gigaba as Minister of Public Enterprises in late 2010, “a process of twin state capture began”. At the same time SSI was appointed and the Minister announced the diversification into coal, other companies Trans Hex, and Questco, a corporate adviser, devised a plan to persuade Alexkor to dispose of its diamond assets in the region and to diversify into coal. He claimed that these persons, aligned with executives in Alexkor and the PSJV, intended to: i) take management control of Alexkor’s marine diamond operations; ii) construct a false narrative about the future mining potential of the marine mining rights, by telling all stakeholders that the diamond resource would be depleted within five to ten years, while simultaneously stripping the assets of Alexkor; and iii) purchase Alexkor’s marine diamond operations and take over the 51% stake in the PSJV.
387. This plan, Mr Craythorne said, was given traction when Mr Gigaba repurposed the Alexkor board in order to implement his “Emerging Black Coal Miner Exit Strategy”. Mr Craythorne claims the plan led to Alexkor diverting significant and vital financial resources away from the operations of the PSJV in order to diversify into coal - a mandate that he contends was irrational (given the lack of funding) and extremely harmful to the Namaqualand economy. It was also contrary to the true mandate of Alexkor and the PSJV. Mr Craythorne provided no evidence of the nature and value of the resources that were diverted for this purpose.
388. The evidence upon which Mr Craythorne relied to advance this particular thesis consists of a document prepared by Questco for a presentation to Alexkor in August 2014.<sup>331</sup> The document commences with the following statement:

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<sup>331</sup> Exhibit XX4, p 1203.

"Questco understands that Alexkor has recommended that the Government...exits from all diamond mining interests and pursue opportunities relating to strategic minerals. This presentation proposes mechanisms by which this exit may be achieved in an orderly manner and sustainable value created for all stakeholders. This presentation follows initial meetings with Percy Khoza and his team, and provides more detail in respect of the concepts discussed at this meeting. The concepts set out in this presentation are high level in nature and assumptions made are subject to further discussion and verification – we look forward to further engagement in this regard."

389. The document identified the mechanics of the plan to be the winding up of the PSJV and the exit by government from Alexkor in exchange for cash and shares. Alexkor and RMC would receive shares in Trans Hex in exchange for winding their diamond interests into Trans Hex, which would hold 100% of Alexkor land and marine assets. A management incentive/ownership structure would be introduced for sustainability.
390. According to Mr Craythorne, the central aim of the Questco/Trans Hex plan was to acquire Alexkor's marine diamond assets at a reduced value by: i) winding up the PSJV and populating the executive management structure with Trans Hex proxies; ii) understating the true value of the marine diamond assets; and iii) ensuring the costs of acquisition of the assets are minimal by creating "a false sense of low value regarding the assets and a high level of owner fatigue".
391. There is no evidence before the Commission of any practical steps that were taken between 2014 and 2017 to implement the Questco proposal. However, the plan to diversify into coal was discussed by the Parliamentary Portfolio Committee on Public Enterprises on 16 November 2016 when Alexkor presented its 2015/16 Annual Report, where some scepticism was expressed about the plan and its financial viability.<sup>332</sup>

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<sup>332</sup> Exhibit XX4, p 040.

392. Mr Craythorne seems to have taken up the Questco issue in 2017 and this generated a letter dated 9 March 2017, addressed to the marine contractors (including Mr Craythorne) by Ms Matseke, the chairperson of Alexkor and the PSJV, which in relevant part reads:

"It has come to the attention of Alexkor that certain rumours are being spread...which are without any factual basis and devoid of truth. These untrue rumours are: a) that Alexkor intends to sell off its marine assets; b) that Alexkor is negotiating with two potential purchasers for the marine assets; and c) that the potential purchasers will take over all mining activities in the marine area, with the result that all the current marine mining contracts would be terminated.

On behalf of Alexkor, I state categorically that these rumours are false and without any factual basis."<sup>333</sup>

393. There is no coherent evidence before the Commission confirming that the Questco plan, conceived eight years ago in 2014, has been implemented in any way or that any person associated with it acted illegally or improperly. Mr Craythorne states in his affidavit that the plan is "for all practical purposes is a reality, as the entire Northern Cape is under the direct control of Trans Hex, or its proxy management team in the PSJV – a situation which has enabled Trans Hex and Alexkor to deny the longstanding mining contractors access to all the Northern Cape shallow water concessions..."<sup>334</sup> The statement is short on details, but also reveals Mr Craythorne's partisan concern to advance the interests of his constituency.
394. Given the insufficiency of the evidence, and the fact that those who proposed the Questco plan have not had an opportunity to present evidence about it, the Commission is not in a position to make any findings regarding its legitimacy or of any wrongdoing or impropriety related to it.

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<sup>333</sup> Exhibit XX4, p 1123.

<sup>334</sup> Exhibit XX4, p 059, para 273.



395. In 2018 the Minister of Public Enterprises, Mr Gordhan placed a moratorium on the coal acquisition plans by Alexkor and the proposed coal strategy came to a halt. In the final analysis nothing material came of the plan.
396. While the information regarding the proposed diversification is revealing in some respects of the *modus operandi* and intentions of the Gupta enterprise in relation to Alexkor, and adds to the overall picture of state capture, the limited investigation which the Commission was able to conduct and the evidence in relation to the proposed diversification of Alexkor did not disclose any specific offences on the part of the executives and board members of Alexkor in relation to the plan to diversify into coal mining. The available information nonetheless adds to the body of evidence that some at Alexkor had aligned themselves with the project of the Gupta enterprise. A fuller investigation may well reveal criminal conduct on the part of those involved.

### **Conclusion and recommendations**

397. On 12 September 2019 an Administrator of Alexkor was appointed to assume the positions of executive chairperson of Alexkor and the PSJV and *inter alia* to: i) undertake an extensive review and analysis of the contract mining and revenue sharing models between the Alexkor, the RMC, PSJV and the contractors and provide proposed solutions; ii) launch an investigation into any contractual impropriety and if need be, terminate the marketing and sales contract with SSI and propose solutions/options for the establishment of its own diamond marketing and sales channel; iii) manage the rooting out of corruption and state capture related practices and individuals at Alexkor, RMC and the PSJV; and iv) determine the optimal shareholding structure of the state's marine diamond resources. The Administrator launched an investigation into the impropriety of the contract with SSI, which concluded that the appointment of SSI was questionable from a governance perspective as SSI did not have a diamond trading

license and the contract with SSI was irregular. Alexkor then applied to the SADPMR for a diamond-trading license to enable it to market and sell its own diamonds and the contract with SSI was terminated in August 2020. Other evidence establishes that by 2020 Alexkor was in a parlous financial state.<sup>335</sup>

398. In the light of the preceding discussion and analysis the following recommendations are made:

398.1. It is recommended that the board of Alexkor conduct a full investigation into any contract with and fees paid to Regiments to determine the precise nature of any services rendered by Regiments and whether Alexkor received full consideration and value.

398.2. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, ABDC, Mr Daniel Nathan and the directors and employees of SSI, ABDC or any associated company on charges of contravening sections 18, 19, 20, 21, 44 or other relevant provisions of the Diamonds Act. Section 44 reads:

"44. No person shall utilize any premises as a diamond exchange unless those premises are registered as a diamond exchange in terms of this Chapter."

398.3. It is recommended that the board of Alexkor and the PSJV investigate whether Mr Bagus, Dr Paul and Mr Korabie (the members of the tender committee) were in breach of their fiduciary duties as contemplated in section 76 of the Companies Act by making a misrepresentation to the board regarding SSI's compliance with the tender requirements with a view to an application to declare them delinquent in terms of section 162(5)(c) of the Companies Act.

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<sup>335</sup> Exhibit XX2, p 058- 063.

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

Mr Bagus, Mr Korabie, Dr Paul and other persons who purported to act as board members of the PSJV for contempt of the court order issued by the Western Cape High Court on 4 September 2014.

398.9. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, Mr Daniel Nathan Trading CC, Daniel Nathan Trading House, Alexander Bay Diamond Company Trading House, Alexander Bay Diamond Company, and the directors, executives or employees of these companies, for a contravention of section 86(c) of the Diamonds Act, by falsely giving out in the registers of SSI that such persons were holders of the required licence when the diamonds were in fact traded by SSI, an unlicensed trader. Section 86(c) of the Diamonds Act reads:

"86. Any person who—

- (a) in or in connection with an application in terms of this Act wilfully furnishes information or makes a statement which is false or misleading;
- (b) with intent to defraud alters, defaces, destroys or mutilates any register or document under this Act; or
- (c) falsely gives himself out—
  - (i) to be the holder of a license or permit under this Act;
  - (ii) to be registered as an authorised representative of any juristic person;
  - or
  - (iii) to be an inspector,

shall be guilty of an offence."

398.10. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI, on any relevant charge in

relation to diamonds of 196.15 carats valued at R5.136 million allegedly not accounted for in the SSI register.

398.11. It is recommended that the law enforcement agencies conduct such further investigations as may be necessary with a view to the possible prosecution of SSI, or any director, executive or employee of SSI on any relevant charge in relation to an alleged underpayment to the PSJV of an amount of R1.718 million in relation to a sale of the diamonds in parcel 248.

398.12. It is recommended that the SADPMR conduct an inquiry in terms of section 79 of the Diamonds Act to determine if all the buyers to whom SSI sold rough diamonds were in possession of the requisite licences as contemplated in Chapter IV of the Diamonds Act; and, where appropriate to refer any suspected contraventions of sections 18, 19, 20, 21 or other provisions of the Diamonds Act to the law enforcement agencies for any further investigations as may be necessary with a view to the possible prosecution of such persons for offences under the Diamonds Act or any other law