Judicial Commission of Inquiry into State Capture Report: Part VI

Vol. 2: State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight

Corrected Version

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 VI: Vol. 2 Corrected Version

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Explanatory Note

This volume of the Commission's Report is the corrected Volume 2 of Part VI of the Report and it replaces the version of Vol 2 of Part VI that was handed over to the President on 22 June 2022. The words: "corrected version" appear on the outside cover of this volume to make sure that this volume is not confused with the one it replaces. That will enable everyone to know whether a particular copy of the Volume is the corrected and official volume or whether it is the uncorrected one which is not an official version.

The replacement of the version of Vol 2 of Part VI of the Report that was handed over to the President on 22 June 2022 by the corrected Vol 2 of Part VI is in compliance with the order of the High Court, Pretoria, of 5 October 2022 issued under case number 22791/22. The corrections do not affect the substance of the Report or the recommendations of the Report.

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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 VI

Vol. 2: State Capture Established

Chairperson: Justice R.M.M Zondo
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STATE CAPTURE ESTABLISHED

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THE CONCEPT OF STATE CAPTURE IN THE COMMISSION'S TERMS OF REFERENCE

Introduction

1. This Commission is the result of remedial action directed by the former Public Protector, Ms. Thuli Madonsela, on 2 November 2016, in her report titled *State of Capture*. The report was issued in terms of section 182(1)(b) of the Constitution read with section 8(1) of the Public Protector Act.[1]

2. The State of Capture report relates to an investigation into complaints of alleged improper and unethical conduct by former President Zuma, certain state functionaries and the Gupta family in the appointment and removal of cabinet ministers and directors of SOEs which possibly resulted in the improper and corrupt award of state contracts and other benefits to the Gupta family.

3. The essential task of the Commission, as stated in the Proclamation[2] establishing it, is to investigate allegations of state capture, corruption and fraud. The terms of reference of the Commission ("the TORs"), discussed more fully later, are broad in scope, with the Commission being appointed "to investigate matters of public and national interest concerning allegations of state capture, corruption and fraud." As will appear later, this broad formulation is narrowed somewhat by the terms of particular TORs.

4. The Proclamation specifically requires that in investigating, reporting and making recommendations the Commission shall be guided by the Public Protector's State of

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[1] Act 23 of 1994

[2] Proclamation No. 3 of 2018 GN 41403 GG 25 January 2018

Capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016. While the concept of state capture is the central framing issue of concern for the Commission, neither the Public Protector's report, nor the High Court judgment, nor the TORs define the concept. There is also no legal definition of the concept to rely on.

5. Accordingly, understanding what is meant by "state capture" in the context of the Public Protector's report, the judgment and order of the High Court of 13 December 2017, and the TORs is thus of central importance to the Commission's work. A workable delineation of the concept of state capture is necessary to guide the Commission in determining how to approach the facts before it; in determining what conclusions or findings it can and should make; and in determining the related recommendations.

State capture as understood in the public discourse

6. The term state capture has in recent years gained popularity in the South African public discourse, where it has been used generally to describe an increasing degree of corrupt private influence over state power. The term has been used in the media since 2013 but the beginnings of its pervasive use can be traced to the aftermath of the dismissal of the then Finance Minister, Mr. Nhlanhla Nene, on 9 December 2015.

7. When the Public Protector produced her report, the term state capture had not yet gained the wide currency it has today. Although, as said, it had surfaced in public discourse in the early part of 2016, it only gained traction in the South African media after the release of the Public Protector's report. The publication of the report was the catalyst for civil society and the media to put together the pieces of the big picture of state capture in South Africa. The "Gupta-leaks" emails revealing the extent of state capture entered the public domain after the Public Protector's report was published. The

term state capture quickly settled in the public discourse due to its increasing use in media reports and has since permeated the public consciousness in South Africa.

8. Generally speaking, state capture is a term of art used in the lexicon of agencies and institutions involved in anti-corruption strategies and endeavours internationally. It has no precise, universal meaning and is used variously in different contexts to encompass both illegal and illegal activities by private actors and enterprises intent on their own enrichment by capturing state processes, regulatory functions and procurement, with the assistance of corrupt state functionaries. This conduct is often criminal in nature and depending on the circumstances may constitute the offences of corruption, fraud, money laundering and racketeering.

9. The Commission's mandate as proclaimed is directed at state capture, corruption and fraud in the public sector. In general terms, corruption in the public sphere concerns the unlawful exercise of influence over political and administrative decisions, and often the unlawful appropriation of public funds and benefits. It is essentially the abuse of entrusted power for private gain. Corruption is endemic in many countries and may in certain contexts become so prevalent that standard systems of accountability and law enforcement become inadequate and unable to restore constitutional standards of governance. The situation that was taking hold in South Africa threatened to have that outcome, and has required an intervention, namely the establishment of this Commission, to provide a comprehensive understanding of what occurred and how it occurred with a view to making recommendations regarding accountability and reform.

10. Against that background it is therefore necessary to determine an adequate and appropriate definition of state capture. Establishing the meaning of state capture for the purpose of the Commission involves identifying the key elements that make up the

overall concept with a view to determining if these elements have been shown in evidence substantially to exist.

11. The concept of "state" is generally understood to mean the civil government and organised public sphere of a country, and includes the legislative and executive branches of government, but also all the public mechanisms and institutions whereby public services are delivered to the citizenry by all levels of government. Section 239 of the Constitution helpfully encompasses the notion of the state in the South African constitutional order. It defines an "organ of state" primarily to mean any department of state or administration in the national, provincial or local sphere of government. However, the definition goes further and includes "any other functionary or institution" exercising a power or preforming a function in terms of the Constitution, a provincial constitution or any legislation. It expressly does not include a court or a judicial officer. The Public Finance Management Act,[3] ("the PFMA") which regulates financial management in national and provincial government, further defines the state in South Africa. It applies to all national public entities. These include national government business enterprises[4] and public companies which are publically funded.

12. The word "capture" ordinarily and relevantly means the taking into one's possession or control by force. In the context of state capture, the taking of control is not necessarily by force, but rather by illegitimate means. The taking of control need not be absolute. Rather, capture is attained where sufficient control can be exercised to achieve the corrupt purposes of improper enrichment or benefit. What is the answer to those who express the view that, since the state comprises three arms, Parliament, the Executive

[3] Act 1 of 1999
[4] These are juristic persons financed by government and under the ownership control of the national executive and assigned financial and operational authority to carry on a business activity and the provision of goods and services.

and the Judiciary, there can be no state capture if not all three arms of state have been captured? It is this, if somebody wishes to capture another person who is running away, he will have captured him if he successfully grabs his leg – not even both legs and has a good grip on the other person. The person who captures the other must have a good control of the person he has got. The person does not need to grab every limb of the person that he or she is capturing. It cannot be said that that person has not been captured.

13. However, it is important to note that state capture is not just about corruption and similar offences. It is not even just about widespread corruption. Corruption may be part of state capture but state capture is more than that. State capture, at least in theory, concerns a network of relationships, both inside and outside government, whose objective is to ensure the exercise of undue influence over decision-making in government and organs of the state, for private and unlawful gain. The task of the Commission is to consider the various *ad hoc* instances of corruption and to determine if there has been a coordinated and deliberate project of state capture. As is evident in various parts of this report, the Commission has identified repeated patterns of conduct of corruption or state capture as well as networks of persons, entities, government office bearers and state officials involved. Herein is the answer to the question as to whether an organised and recognisable project of state capture occurred in the period under review, which it manifestly did.

The Public Protector's State of Capture Report

14. The State of Capture report was based on various complaints filed with the Public Protector. The complaints requested the investigation and determination of several allegations including the following: i) the veracity of allegations that the then Deputy Minister of Finance, Mr Mcebisi Jonas, and Ms Vytjie Mentor, a Member of Parliament,

were offered positions in cabinet by members of the Gupta family; ii) all the business dealings of the Gupta family with government departments and SOEs to determine whether there were irregularities, undue enrichment, corruption and/or undue influence in the award of contracts, mining licences, government advertising or other governmental services; iii) President Zuma's role in the alleged offer of cabinet positions to Mr Jonas and Ms Mentor; iv) President Zuma's role in relation to the alleged corrupt offers and Gupta family involvement in the employment of cabinet members and directors of SOE boards; v) whether President Zuma acted improperly and in violation of the Executive Ethics Code; and vi) the role and conduct of the cabinet in holding banks accountable for withdrawing banking facilities for Gupta owned companies and whether it was appropriate for cabinet to assist private business in this regard.

15. The Public Protector identified a number of issues as relevant for investigation. These included whether: i) President Zuma had breached the Ethics Act and had acted improperly and in violation of the Code of Ethics; ii) President Zuma had allowed members of the Gupta family and his son, Mr. Duduzane Zuma, to be involved in the process of removal and appointment of the Minister of Finance in December 2015; iii) President Zuma had allowed members of the Gupta family and his son to engage in or become involved in the process of removal and the appointment of various members of cabinet; iv) President Zuma had allowed members of the Gupta family and his son to be involved in the process of appointing members of boards of directors of SOEs; v) President Zuma had enabled or turned a blind eye in violation of the Ethics Code to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointment of cabinet ministers and board members to *quid pro quo* conditions; vii) President Zuma had improperly and in violation of the Code of Ethics exposed himself to any situation involving the risk of a conflict between his official duties and his private interests or used his position or information entrusted to him to enrich himself and the businesses owned by the Gupta family and/or his son so as to be given preferential

treatment in the award of state contracts, business financing and trading licences; viii) other Cabinet ministers had improperly interfered with the relationship between banks and Gupta-owned companies thereby giving preferential treatment to such companies when they should have been handled by an independent regulatory body; ix) any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the appointment or removal of ministers and directors or boards of directors of SOEs; x) any state functionary in any organ of state or person acted unlawfully, improperly or corruptly in connection with the awarding of State contracts or tenders to Gupta-linked companies or persons; xi) any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to the Gupta-linked companies or persons; and xii) any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the exchange of gifts in relation to Gupta-linked companies or persons.

16. As mentioned, the State of Capture report contains no definition of state capture, but there are a number of indications of what the Public Protector understood by the concept which had begun to emerge as part of the public discourse in South Africa prior to her report. The title of the report, "*State of Capture*" was presumably intended as a play on the term. State capture is broader in its conceptual reach than State of Capture which does not specify who (e.g. the President) or what (e.g. the state or government) has been or is being captured. "State of Capture" simply denotes that there is a situation, circumstance or setting of capture, with the application of the concept depending on the factual information filled in — whether implying a form of regulatory capture, or the capture of particular state institutions or SOEs, or more specifically the capture of the President by the Gupta family.

17. The term state capture appears in only one paragraph of the Public Protector's report. This paragraph reads:

> "The media reports alleged that the relationship between the President and the Gupta family had evolved into 'state capture' underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state provided business finance and the award of business licences".[5]

18. While the paragraph reflects the essence of state capture as it has occurred in South Africa, (the improper influence of the Gupta enterprise in relation to the appointment of cabinet ministers and the directors and executives at SOEs in order to influence procurement and financing decisions), the concept is broader than this. The sub-title of the report and the issues identified for investigation envisage a broader scope. The focus of the report is on the improper and unethical conduct by the President and other state functionaries relating to improper relationships with the Gupta racketeering enterprise and involving *inter alia* the removal and appointment of cabinet ministers and directors and employees at SOE's resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta enterprise.

19. A reading of the State Capture as a whole reveals that the Public Protector accepted the following elements as being the essential components of state capture in South Africa: i) improper relationships between influential state actors and private individuals or enterprises; ii) the resultant involvement and influence of those private individuals or enterprises in the appointment of cabinet ministers, directors and executives of SOEs, and other senior state officials; iii) the leveraging of the relationships so formed resulting

[5] Page 5 at para viii, repeated verbatim on page 30 at para 2.6

in the improper and corrupt award of state contracts and benefits to the private individuals concerned; and iv) the consequent (mostly unlawful) financial and other benefits to those private individuals, their businesses and their associates.

20. After a review of the issues she identified for investigation, the Public Protector in paragraph 8 of the report proposed the following remedial action:

> "8.4 The President to appoint, within 30 days, a Commission of Inquiry headed by a Judge solely selected by the Chief Justice who should provide one name to the President.
>
> 8.5 The National Treasury to ensure that the Commission is adequately resourced.
>
> 8.6 The Judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.
>
> 8.7 The Commission of Inquiry to be given powers of evidence collection that are no less than that of the Public Protector.
>
> 8.8 The Commission of Inquiry to complete its task and to present the report with findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his or her intentions regarding the implementation to Parliament within 14 days of releasing the report."

The judgment of the High Court

21. In December 2016, former President Zuma launched an application under case number 91139/16 in the Gauteng Division of the High Court, Pretoria to review and set aside the remedial action of the Public Protector instructing him to appoint a commission of inquiry. The former President sought an order that the matter be remitted to the Public Protector for further investigation on the basis that the Public Protector lacked the power to

delegate her functions to a commission of inquiry. The review was directed, in the main, at the lawfulness and rationality of the remedial action with the primary question being whether the President's constitutional power to appoint a commission of inquiry could be limited by remedial action taken by the Public Protector.

22. A full bench of the court found that the President's power under section 84(2)(f) of the Constitution to appoint a commission of inquiry is not untrammelled and must be exercised within the constraints of the Constitution. The Public Protector's powers in terms of section 182(1)(c) of the Constitution included the power to direct members of the executive (including the President) to exercise powers entrusted to them under the Constitution including the power (in appropriate circumstances – such as when the President was conflicted) to direct the President to appoint commissions of inquiry and to direct the manner of implementation.

23. In the light of the compelling evidence that the relationship between President Zuma and Gupta family had evolved into state capture and the Public Protector's lack of capacity to conduct an investigation on the scale required, the court held that a judicial commission of inquiry was pre-eminently suited to carry out the task of investigating the allegations of state capture contained in the report. Given that the President was implicated in the allegations of state capture, his insistence that he alone select the judge to head the commission of inquiry was at odds with the legal principle of recusal.

24. The court accordingly dismissed President's application with costs *de bonis propriis*. In addition, the court declared the report to be binding and directed the President to appoint a commission of inquiry within thirty days to be headed by a judge selected by the Chief Justice.[6]

[6] President of the Republic of South Africa v Office of the Public Protector and Others [2018] 1 All SA 800 (GP)

25. In reaching its decision, the High Court did not analyse the concept of state capture in any detail. It merely observed as follows:

> "There is thus compelling prima facie evidence that the relationship between the President and the Gupta family had evolved into "State Capture", underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of SOEs and leveraging these relationships to get preferential treatment in state contracts, access to state provided business finance and the award of business licences…. The issue of "State Capture" is a matter of great public concern. The outcome of her investigation is that there is deeply concerning evidence of serious malfeasance and corruption, but she does not have the resources to complete the investigation. She has reasoned that a commission of inquiry is the appropriate remedial action in light of her findings and constraints."[7]

26. It added later:

> *"There can be no question that this aspect of the remedial action is both necessary and appropriate. Since the release of the Report, further allegations of "State Capture" have become public in the form of the so-called "Guptaleaked emails". The Public Protector's remedial relief is broad enough to encompass the investigation of these issues…"*[8]

27. Both the Public Protector's report and the High Court judgment upholding her remedial action are thus foundational documents which guide the Commission in discharging its mandate. Taking the broad approach to the concept of state capture in these two documents, two features can be identified as having the main focus: i) improper conduct by the President or state functionaries enabling improper involvement or undue

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[7] President of the Republic of South Africa v Office of the Public Protector and Others [2018] 1 All SA 800 (GP) para 128-129

[8] President of the Republic of South Africa v Office of the Public Protector and Others [2018] 1 All SA 800 (GP) para 154

influence by the Gupta enterprise in the appointment of cabinet ministers and directors and executives of SOEs; and ii) the fact that those improper relationships were leveraged to give undue and preferential treatment in state contracts and other benefits to the Gupta enterprise. These two features while not exhaustive of the investigative tasks identified in the Public Protector's remedial action are central to the state capture thesis. The High Court judgment pointed to serious misconduct or impropriety also on the part of other persons, functionaries and entities referred to in the report.9 The Public Protector's report, read with the High Court judgment, thus provide the background and context within which to construe the practical meaning to be given to the concept of state capture as it appears in the TORs of the Commission.

The academic literature

28. Before turning to the concept of state capture envisioned in the TORs, it may help to comment briefly on the term as used in the works of reputable academics and in evidence before the Commission. A review of the academic commentary on the concept "state capture" reveals that there is no single or standard academically or internationally accepted usage of the term. Rather, the term has been used to describe different manifestations of what has been termed "state capture" in different political contexts and at different periods in history. Hence, establishing a contemporary definition appropriate in the South African context, which accurately reflects the Commission's mandate, while being appropriately informed by the academic discourse, must look primarily at sources within the South Africa context.

29. Much of the literature describes state capture as occurring when institutions of the state can no longer function without high levels of corruption. Viewed through this lens, state

[9] President of the Republic of South Africa v Office of the Public Protector and Others [2018] 1 All SA 800 (GP) paras 106-107

capture is a situation where corruption has become so routinised as to become institutionalised, and where the shape and future trajectory of state institutions are determined by capturers through corrupt and clandestine means. State capture normally involves a distinct network structure where corrupt actors cluster around a particular part of the state, enabling it to launch privately constituted goals at the expense of the public interest.[10]

30. In the early stages of the inquiry, the Commission heard testimony from Prof Hellman and Dr Kaufmann. They testified that state capture is not confined to developing countries or to countries in transition (although they are particularly vulnerable). It is to be found also in countries with a traditionally robust constitutional and legal system, in which the laws have not been refreshed and amended to keep pace with developments, where grey areas have developed between the legal and the illegal, and advantage is taken of loopholes in the law, as well as of official discretion.[11]

31. In their original work, Prof Hellman and Dr Kaufmann discussed and analysed the phenomenon of state capture which had come to the fore in the turbulent transition from state to private ownership in the countries of the former Soviet Union and bloc. These countries, in the midst of simultaneous economic and political transitions, were particularly vulnerable to state capture since they were in the process of both redistributing property rights and redrafting the basic rules by which their markets, polities and societies were governed.[12] In the context of the former Soviet bloc, Prof Hellman and Dr Kaufmann defined state capture as shaping the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-

[10] See e.g. Mihály Fazekas and István János Tóth, 'From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary', *Political Research Quarterly* 69, no. 2 (1 June 2016): 320–34, https://doi.org/10.1177/1065912916639137.

[11] Transcript 19 September 2018 pp 55-57

[12] Exhibit G1 p 33 para 10

transparent private payments to public officials.[13] That definition is too narrow for purposes of this Commission.

32. The transition in South Africa, from apartheid and white minority rule to majority rule and democracy, was significantly different at a number of levels. Our transition was not accompanied by a comparable collapse of the existing state. Although in the dying days of the apartheid era some measures were adopted to shift public resources away from the state for the benefit of a few, the new constitutional order closed off immediate opportunities for large-scale looting of the state. The relevant context within which the Commission has to consider and evaluate the threat and onset of state capture and rampant corruption here differs, therefore, in fundamental respects from the particular context addressed in the initial work of Prof Hellman and Dr Kaufmann.

33. In developing the concept of state capture, Prof Hellman and Dr Kaufmann, as just mentioned, adapted the then prevailing conception of regulatory capture in the post-Soviet societies that they had examined.[14] However even that narrow conception, which was limited to the formation of regulatory rules, has since undergone significant development. Regulatory capture may now be understood as the result or process by which regulation, in law or in its application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.[15] The concept of state capture itself requires a similarly broadened approach, applying of course not necessarily to whole industries but to firms, groups of firms, and individuals.

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[13] Hellman, Jones, and Kaufmann, *'Seize the State, Seize the Day'*, 3.

[14] Exhibit G1 p 33 para 9

[15] Daniel Carpenter and David A. Moss, eds., *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge: Cambridge University Press, 2013), 13.

34. Prof Hellman and Dr Kaufmann distinguished state capture from two other types of interactions between firms and the state. These are *administrative corruption* and the *exercise of influence*. They are distinct but potentially overlapping.[16] Administrative corruption is the practice of making illicit and non-transparent payments to public officials in order to alter the implementation or application of laws, regulations and rules for the illicit gain of the firm or associated network. The proceeds of administrative corruption primarily accrue to corrupt public officials. However, in state capture, "the rents" are shared between the corrupt officials and the capturing firms. This is because state capture allows firms to build significant advantages into the rules of the game. Influence is the ability to alter the formation of laws and other rules without recourse to such payments. Influence is often considered to be within the bounds of acceptable practice, as in the case of lobbying and consultative pressure. If that influence reaches levels of shaping or controlling of the legal and regulatory environment, subordinating it to the influence, then it has become state capture.

35. The term "state capture", as defined by Prof Hellman and Dr Kaufmann, identifies a form of corruption in which firms and public officials collude in sharing rents, as distinct from forms of extortion (bribery) in which rents are monopolised by public officials.[17] This is a helpful distinction for our purposes, and more relevant to the South African context than the rule-changing definition of state capture that was applicable to post-Soviet societies. State capture involves something more than — and qualitatively different from — particular acts of bribery and corruption, however large, occurring in relative isolation from each other with the aim of altering or evading the implementation of one or more particular laws. A systematic project of securing illicit and corrupt influence or control

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[16] Hellman, Jones, and Kaufmann, '*Seize the State, Seize the Day*', 7.

[17] Hellman, Jones, and Kaufmann, '*Seize the State, Seize the Day', 2–3*. 'Rent' as an economic concept refers to an amount of money earned that exceeds that which is economically or socially necessary. In the corruption literature, 'rent-seeking' is a common term used to describe the behaviour of an entity that seeks to gain added wealth without any reciprocal contribution of productivity.

over the decision-making and conduct of state institutions cannot be considered as anything other than a project of state capture, even if it has not (yet) entailed efforts to shape the formation of laws, rules, and even policies. Such a project may evolve as particular, initially separate, acts of bribery and corruption, combined to form a pattern to which the description "state capture" should rightly be applied. This has quite evidently been the case in South Africa.

36. Dr Kaufmann when testifying before the Commission did not remain glued to the initial narrow definition but confirmed that the concept of state capture could legitimately be extended to include the control and allocation of public assets and public finances, including the tax system, how expenditures are allocated and so on, and it varies from country to country which one is more prevalent.[18] He was able to draw in particular on his knowledge and research relating to state capture and corruption in Latin American countries.

37. Prof Hellman and Dr Kaufman, while conceding that there is no all-embracing concept of state capture, identify key institutional reforms aimed at its notable common features. State capture is principally a product of institutional deficiencies and a systemic failure of governance; and thus more than a criminal issue. However, some legal and judiciary initiatives and reforms (including those that can be preventive and not necessarily punitive) should also feature as a component in a strategy to address state capture. Reducing the risk of state capture therefore requires focus on institutional and policy reforms. It is critical to have an in-depth diagnostic of the unique socio-political and institutional context of each affected country so as to elaborate country-relevant action programs. To develop an action program, country-specific expertise is essential yet still general lessons of experience globally may also be useful in pointing to an array of

[18] Transcript 31 August 2018 p 92

potential reforms and initiatives that can have an impact. The range of potential reform areas is substantial. However, they generally fall into a few broad reform categories – political and economic contestability; political finance; conflict of interest; procurement; sector-specific initiatives, as well as transparency reforms generally.

38. Procurement is often a focus for state capture as public procurement can be a major source of economic rents for firms closely tied to politicians and political parties. Using state capture to shape the procurement playing field to the benefit of specific firms is perhaps one of the most common forms of state capture, as was certainly the case in South Africa. As a result, procurement reform is generally an important starting point in the effort to combat state capture.

39. As experience of state capture and the evidence before the Commission has shown, state-owned enterprises are used to cement the ties between politicians and private actors. They are often critical transmission mechanisms through which state capture occurs, and though potential vehicles for fostering the state's interests, powerful state-owned firms can use their close relationships to state actors to shape laws, policies and regulations in their own interest. Moreover, the murky boundaries between ownership and control rights in state-owned enterprises can give leeway to managers to manipulate their ties to the state for their own interests. As a result, to prevent state capture emanating from state-owned enterprises, there needs to be a clear separation of the management of state-owned companies and politics, as well as the empowerment of professional, independent boards, which should also be selected through a meritocratic process, emphasizing technical expertise over political patronage. Further, ensuring transparency and oversight by disclosing revenues, costs, revenue flow between SOEs and the state, as well as disclosing data on production, plans, trading activities as well as quasi-fiscal activities, are essential preventive mechanisms. Independent financial audits and an effective level of legislative oversight are also very important.

40. At root, state capture is a manifestation of a conflict of interest. Private individuals or firms seek to engage politicians and public sector actors through the provision of private benefits to shape public decisions in their interests. As a result, robust legislation to regulate conflicts of interest and the interaction between public officials and private actors is critical to prevent state capture.

41. There is also a growing body of academic literature on state capture and corruption in South Africa [19] that offers various elaborations of the meaning of state capture. For example, *party* state capture is said to occur when the state is used as an instrument to deal with issues that have typically remained within the confines of political party structures. A ruling party may hollow out state institutions, substituting the party machinery for the state. The power of the state apparatus is then used to deal with intra-party political and administrative issues.[20] *Corporate* state capture occurs when public power is exercised in the interests of particular corporate formations.[21] The concept of *elite capture* focuses on corruption that occurs around initiatives that are meant to promote economic or infrastructural development; elites capture the resources that have been mobilized for development.[22] It can be observed in the siphoning off of value towards an elite grouping with ties to the upper reaches of the state, such as rural elites (the chieftan class) embezzling funds from a rural economic development project. Public goods and their value in this scenario are effectively extracted by elites for their own narrow benefit.[23]

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[19] See Swilling et al, *Betrayal of the Promise: How South Africa is Being Stolen*, State Capacity Research Project, May 2017; and Chipkin, Swilling et al, *Shadow State: The Politics of State Capture*, Wits University Press, 2018.

[20] Anna Grzymala-Busse, 'Beyond Clientelism: Incumbent State Capture and State Formation', *Comparative Political Studies* 41, no. 4–5 (1 April 2008): 638–73,

[21] Abby Innes, 'The Political Economy of State Capture in Central Europe', *JCMS: Journal of Common Market Studies* 52, no. 1 (January 2014).

[22] Vivi Alatas et al., 'Does Elite Capture Matter? Local Elites and Targeted Welfare Programs in Indonesia', *AEA Papers and Proceedings* 109 (1 May 2019): 334–39; Diya Dutta, 'Elite Capture and Corruption: Concepts and Definitions', *National Council of Applied Economic Research*, 2009, 1–16.

[23] Dutta, 'Elite Capture and Corruption: Concepts and Definitions'.

42. Professor Tom Lodge describes state capture as a situation in which control or power passes from officials to non-state corporate interests, or where officials themselves (including elected politicians) become corporate, primarily individually- and entrepreneurially-oriented actors.[24] He further argues that it may not be necessary to actually capture the regulation process itself in order to gain control of an institution. Regulatory capture may be superfluous in environments in which regulations or laws are under-developed. In such cases captors might focus on a single state department to secure decisive influence over its procurements.[25] Thus, state capture implies that the state has become unable to function in such a way as to serve broad social interests or to make decisions that might achieve long-term developmental goals. It is unable to do these things because it has become harnessed to a very particular and especially narrow set of private interests.[26] This is more in line with what has happened in South Africa.

Engagement with state capture in the Commission

43. References to state capture and assertions as to its true meaning in the South African context appear in the evidence of a number of witnesses who testified before the Commission.

44. Mr Gordhan, current Minister of Public Enterprises and with long prior ministerial and public service experience, testified that state capture "became a sophisticated scheme or racket" which involved: advancing false narratives; enlisting the assistance of facilitators such as consulting and legal firms to entrench the project; marginalising public servants who possessed integrity and honesty; and fostering an enabling

[24] Exhibit BBB3-MCR-RSA-09 para 18; Tom Lodge, 'State Capture: Conceptual Considerations', in *State Capture in Africa: Old Threats, New Packaging*, ed. Melanie Meirotti and Grant Masterson (EISA, 2018), 23.

[25] Exhibit BBB3-MCR-RSA-09 para 18; Lodge, 'State Capture: Conceptual Considerations', 23.

[26] Exhibit BBB3-MCR-RSA-09 para 18; Lodge, 'State Capture: Conceptual Considerations', 14.

environment of impunity for crime and corruption.[27] Mr Gordhan explained that his own understanding of state capture evolved over time as he became more aware of the connections between events that at the time did not seem as significant as they did in hindsight. In his view, these events included repeated and irrational changes to the cabinet, SOE boards and the leadership of key institutions and organs of state for the purposes of plundering resources at those institutions without the risk of prosecution.[28]

45. Mr Gordhan cited analysis from the research report of the State Capacity Research Project titled *The Betrayal of the Promise: How South Africa is being Stolen*[29] and the book *The Shadow State.*[30] He found these works to be instructive in applying the concept of state capture to the South African context and the "politics of capture" in terms of which a schema of brokers, mobility controllers, elites and dealers, all perform various functions towards the maintenance of networks of patronage.[31] The following critical account of state capture appears in the State Capacity Research Project's *Betrayal of the Promise* report:

> "Corruption tends to be an individual action that occurs in exceptional cases, facilitated by a loose network of corrupt players. It is somewhat informally organised, fragmented and opportunistic. State capture is systemic and well-organised by people with established relations. It involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets into private hands. To succeed, this needs high-level political protection, including from law enforcement agencies, intense loyalty and a climate of fear; and competitors need to be eliminated. The aim is not to bypass rules to get away with corrupt behaviour. That is, the term

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[27] Gordhan, Exhibit N1 p 6 para 11

[28] Gordhan, Exhibit N1 pp 8-9 para 14

[29] M Swilling et al: *The Betrayal of the Promise: How South Africa is being Stolen* (May 2017) State Capacity Research Project.

[30] I Chipkin and M Swilling (eds) *Shadow State: The Politics of State Capture* (2018) Wits University Press: Johannesburg.

[31] Gordhan, Exhibit N1 p 6 para 16

> corruption obscures the politics that frequently informs these processes, treating it as a moral or cultural pathology. Yet, corruption, as is often the case in South Africa, is frequently the result of a political conviction that the formal 'rules of the game' are rigged against specific constituencies and that it is therefore legitimate to break them. The aim of state capture is to change the formal and informal rules of the game, legitimise them and select the players allowed to play".[32]

46. The current Transnet board chairperson and former PRASA board chairperson, Mr. Popo Molefe, provided his own analysis on the way that the state capture project manifested in the case of Transnet as follows: key individuals with a common purpose and interests were placed in key executive roles to pursue the rapid accumulation of wealth through companies with links to influential businesses. This was achieved through the flouting of constitutional provisions, the weakening of governance structures and processes in the company, and the dismissal of skilled individuals and their replacement with people who brought a "veneer of professionalism" but who ultimately lacked ethical and moral leadership, all culminating in the corrupt awarding of major contracts to connected entities.[33]

47. Former Deputy Minister of Finance, Mr. Mcebisi Jonas, postulated that state capture in South Africa is the result of the failure of South Africa's "developmental framework". In his testimony, Mr. Jonas explained his belief that South Africa's current economic developmental framework rests on three fundamental pillars. These are (1) the protection of the established elite through property rights protections and other measures; (2) the promotion of the new elite through policies such as Black Economic Empowerment ("BEE"); and (3) the provision of services to the under-classes and the

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[32] State Capacity Research Project, 'Betrayal of the Promise', 5

[33] Molefe, Transcript 7 May 2019 pp 14-16; and Molefe, Exhibit BB1 pp 7-11.

working-class. He asserted that this is effectively a patronage system, where resources to all three layers should be dispensed successfully. However, he continued:

> *"That model depends effectively on three things to work. One, it depends on a strong state and an efficient state. It is a state that is able to manage resources very well and dispense them more efficiently. But secondly, it also depends on growth because … without growth then you would not be able to do those things. The third is revenue, consistent revenue that you have. Now what … I think is [that in] many ways what has come to happen over particularly over the last 10 years has been that model unravelling. It unravels because your state is weak and sometimes it is consciously weakened."*[34]

48. Mr. Jonas went on to explain that the unravelling of this system created tensions across the three layers that are usually mutually supported, and this became the basis of rampant corruption and the fertile ground upon which state capture could occur.[35] He stressed that the easiest vehicle through which the state can be captured is the capture of the ruling party, where the party becomes an instrument used for the project of financial accumulation that state capture is concerned with animating.[36]

49. In his evidence to the Commission, President Cyril Ramaphosa provided his understanding of state capture, which was informed to a large extent by the work of Prof Hellman *et al*.[37] He sought to distinguish influence from state capture. He asserted, in reference to the work of Prof Lodge:

> *"The existence of a multiplicity of interest groups within any given political environment is neither original nor in itself problematic. State capture occurs when one of these*

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[34] Jonas, Transcript 15 March 2019 pp 9-12

[35] Jonas, Transcript 15 March 2019 pp 9-12

[36] Jonas, Transcript 15 March 2019 p 12

[37] BBB3-MCR-RSA-008 para 16

> *interests dominates public power for their own ends. This results in the undermining of the democratic process and the national interest*.[38]

50. Mr Ramaphosa stressed the dynamics of a modern democratic society that consists of varying interests. A state functioning within a democratic system must seek to accommodate divergent interests. This must be reflected in the broader national interest, through the policies and practices of an economic developmental framework. State capture occurs when the national interest is undermined by the interests of a small and confined set of actors. State capture is therefore fundamentally connected to the undermining of the democratic system.

51. In summary, President Ramaphosa's understanding is that state capture involves: [39] i) one of many forms of corruption;[40] ii) an organised, systemic process or project;[41] iii) a network of actors within and outside the state, acting in concert;[42] iv) the redirection of public resources away from the public good and towards private financial gain;[43] v) the shaping of the basic rules of the game (laws, rules, regulations, policy-making processes etc.) of government; [44] v) the appointment of agents of state capture to governance structures, so they are positioned to disperse government benefits to select groups;[45] vi) the use of ideological arguments in order to question legitimate institutions and conceal state capture under the guise of transformation;[46] vii) the deliberate weakening

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[38] BBB3-MCR-RSA-009 para 18

[39] See BBB3-MCR-RSA-008 to BBB3-MCR-RSA-015

[40] BBB3-MCR-RSA-011 para 22

[41] Transcript12 August 2021 p 101

[42] Transcript 12 August 2021 p 99

[43] Transcript 12 August 2021 pp 102–3

[44] BBB3-MCR-RSA-009 ff. paras 18 and 22

[45] BBB3-MCR-RSA-011 para 25 and BBB1-MCR-ANC-939; Transcript 12 August 2021, p 101–8

[46] BBB3-MCR-RSA-013, para 26

and exploitation of law enforcement agencies;[47] viii) entrenchment in the state;[48] ix) the distribution of benefits to small vested interests at the expense of the country, and her citizens, as a whole;[49] and x) an assault on the democratic process undermining the democratic constitutional order.[50]

52. In a constitutionally enshrined democratic order, private citizens or formations are necessarily enabled to influence the political process. In fact, active efforts to do so are fundamental to any functioning democracy. However, there are checks and balances built into the system to ensure that this influence does not subsume the democratically elected government and the institutions of the state that practically administer actions impacting on citizens. The crucial point about state capture is the combination of corrupt and unlawful actions that subvert the entire democratic political system.

53. President Ramaphosa believed that a definition of state capture penned by Ms Catrina Godinho and Ms Lauren Hermanus, both South African-based academics who have examined state capture with specific reference to the conditions prevalent in South Africa was particularly useful for the Commission's purposes. They submit that state capture ought to be understood as:

> *"A political-economic project whereby public and private actors collude in establishing clandestine networks that cluster around state institutions in order to accumulate unchecked power, subverting the constitutional state and social contract by operating outside of the realm of public accountability*.[51]

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[47] Transcript Day 12 August 2021 pp 104–6

[48] Transcript 12 August 2021 p 107

[49] BBB3-MCR-RSA-014 para 29

[50] BBB3-MCR-RSA-015 paras 30 and 34

[51] Ramaphosa, Exhibit BB3, p 12 para 25; Catrina Godinho and Lauren Hermanus: *"(Re)Conceptualising State Capture - With a Case Study of South African Power Company Eskom"* (State Capture and Its Aftermath: Building Responsiveness Through State Reform, Public Affairs Research Institute, 2018).

54. Against the backdrop of the preceding analysis, consideration can now be given to the TORs of the Commission.

The Commission's Terms of Reference

55. In compliance with the order of the Gauteng High Court, and by Proclamation No.3 of 23 January 2018, former President Zuma appointed this Commission. The Proclamation sets out the TORs in relevant part as follows:

> "A Judicial Commission of Inquiry ("the Commission ") is hereby appointed in terms of Section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations of state capture, corruption, and fraud.
>
> 1. The Commission shall inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's state of capture report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016: -
>
> 1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's. In particular, the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;
>
> 1.2. whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family the commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;

1.3. whether the appointment of any member of the National Executive, functionary and /or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so,

1.4. whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or

1.5. the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended.

1.6. whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;

1.7. whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;

1.8. whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;

1.9. the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest…"

56. Thus, paragraph 1 of the TORs sets out in nine sub-paragraphs particular topics of state capture that require investigation. The specific matters stipulated for investigation by the Commission provide particular content to the more generic term of state capture. Since it is merely invoked in the introductory paragraph of the TORs, but not in any particular TOR, state capture is as an overarching animating principle in relation to the subjects of investigation in the particular TORs. Reading paragraph 1 of the TORs in context, it is clear that, while the nine particular topics of investigation are key ingredients in establishing whether or not state capture had occurred, they do not necessarily exhaust that inquiry. State capture is a subject in its own right that the Commission is concerned with and it is not simply subsumed under the concept of corruption, or particular instances of that. The Commission's mandate is not to undertake a free-floating investigation into state capture of every imaginable kind, but rather to apply the concept in a focused manner when evaluating evidence on the particular subject-matter of the TORs.

57. Some of the TORs are narrow and specific but others very wide in scope. Findings and recommendations by the Commission are required and have been made in relation to all of them, which are set out in the different volumes of the Commission's report and are dealt with in the summation contained in this volume.

58. TORS 1.1, 1.2 and 1.3 narrowly focus on attempts to unduly influence politicians and public functionaries and directors of the boards of SOE's though the offer of inducements, including the offer of cabinet positions to two individuals, Mr Mcebisi Jonas and Ms Mentor, by the Gupta enterprise and on whether former President Zuma played any role in that regard; and in particular whether the appointment of any cabinet member or key public functionary was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and announced. TOR 1.8 continues with the theme of improper appointments by requiring investigation of whether

any advisers in the Ministry of Finance were appointed without proper procedures - in particular, two senior advisers appointed by Minister Des Van Rooyen.

59. TORs 1.4 and 1.6 are also narrowly focussed on specific activities and events concerning the Gupta enterprise. The Commission is required to determine whether the former President, members of his executive or public functionaries breached or violated the law by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government and whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's. TOR 1.7 requires special investigation of whether any cabinet member of deputy minister unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for the Gupta enterprise.

60. TORs 1.5 and 1.9 are general and extensive in their ambit. They focus explicitly on corruption associated with procurement (the awarding of contracts and tenders to all service providers) in SOEs (public entities) and by government departments, agencies and entities. The public entities listed under Schedule 2 of the PFMA include those that have been the subject of detailed investigation in other volumes of this report, including: SAA; Transnet; Eskom; Denel; Alexkor and PRASA.

61. The TORs are thus concerned predominantly with the practices of executive members of the state, and the nature of their relationships with private individuals, and specifically the Gupta enterprise.

The Commission's definition of state capture

62. The Commission's investigation into state capture in South Africa in terms of the TORs is therefore concentrated on irregular public appointments, improper conduct by the national executive and public functionaries, the concerted efforts and activities of the Gupta enterprise in gaining control of governance and procurement in SOEs and government agencies and general corruption (including fraud, money laundering, racketeering and various other illegal activities) in public entities and government at all levels.

63. The element of corruption (in a wide sense) in procurement and tendering, as the centrepiece of state capture, accordingly demands examination of the conduct of the role players in terms of the constitutional requirement of an accountable public sector[52] and the legal framework established to deal with corruption, fraud, money laundering and racketeering.

64. In addition to the constitutional principles of an accountable public sector, section 217(1) of the Constitution requires that, when an organ of state contracts for goods or services, it must do so in accordance with a tendering system that is fair, equitable, transparent, competitive and cost-effective. The PFMA gives some effect to these broad principles. Section 51(1)(a)(iii) of the PFMA obliges the board of a public entity to ensure that the public entity concerned has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Section 50 and section 51 of the PFMA require the boards of public entities to exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity[53] and to

[52] Section 195 of the Constitution

[53] Section 50(1)(a) of the PFMA

act with fidelity, honesty, integrity and in the entity's best interests in managing its financial affairs.[54]

65. Corruption is a statutory offence in South Africa in terms of the Prevention and Combatting of Corrupt Activities Act[55] ("PRECCA"). Anybody who accepts any gratification from anybody else, or gives any gratification to anybody else, in order to influence the receiver to conduct himself in a way which amounts to the unlawful exercise of any duties, commits corruption. Gratification is broadly defined in PRECCA, and includes essentially any valuable consideration. The gratification must be accepted or given as an inducement to act in a certain manner.

66. Section 4 of the Prevention of Organised Crime Act[56] ("POCA") outlaws the crime of money laundering. It prohibits any person from entering into any agreement, engaging in any arrangement or transaction,[57] or performing any other act,[58] with anyone, in connection with property that is or forms part of the proceeds of unlawful activities (being any property or any service, advantage, benefit or reward which was derived, received or retained in connection with or as a result of any unlawful activity). The offence is committed if that person knows or ought reasonably to have known that the property constitutes the proceeds of unlawful activities. In addition, the agreement, arrangement or other act must have or be likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the property or the ownership of or interests in relation to it.[59] Section 5 of POCA creates the offence of assisting another to benefit from the proceeds of unlawful activities and section 6 of POCA prohibits any

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[54] Section 50(1)(b) of the PFMA

[55] Act 12 of 2004

[56] Act 121 of 1998

[57] Section 4(a) of POCA

[58] Section 4(b) of POCA

[59] Section 4(a)-(b)(i) of POCA

person from acquiring, using or possessing property that is or forms part of the proceeds of unlawful activities of another person.

67. Many instances of wrongdoing in public procurements in the period under review may constitute planned offences as part of a pattern of racketeering activity conducted by a racketeering enterprise (comprising a group of individuals and companies associated in fact) aligned with the Gupta family and its associated companies. In terms of POCA, a pattern of racketeering activity comprises two planned, ongoing, continuous or repeated offences contemplated in Schedule 1 of POCA including: i) corruption; ii) the common law offences of extortion, theft, fraud, forgery and uttering; iii) offences related to exchange control; and iv) money laundering.

68. In the final analysis much of the evidence presented to the Commission indicates that state capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain. This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services. As just intimated, to a large extent this occurred through strategic appointments and dismissals at public entities and a reorganisation of procurement processes. The process involved the undermining of oversight mechanisms, and the manipulation of the public narrative in favour of those who sought to capture the state. Moreover, the subversion of the democratic process which the process of state capture entailed was not simply about extracting resources but was further geared towards securing future power and consequently shaping and gaining control of the political order (or significant parts of that order) in a manner that was necessarily opaque and intrinsically unconstitutional.

69. A number of them will normally be present in the case of state capture: i) the allocation and distribution of state power and resources, directed not for the public good but for private and corrupt advantage; ii) a network of persons outside and inside government acting illegally and unethically in furtherance of state capture; iii) improper influence over appointments and removals; iv) the manipulation of the rules and procedures of decision-making in government in order to facilitate corrupt advantage; v) a deliberate effort to undermine or render ineffectual oversight bodies and to exploit regulatory weaknesses so as to avoid accountability for wrongdoing; vi) a deliberate effort to subvert and weaken law enforcement and intelligence agencies at the commanding levels so as to shield and sustain illicit activities, avoid accountability and to disempower opponents; vii) support and acquiescence by powerful actors in the political sphere, including members of the ruling party; viii) the assistance of professional service providers in the private sphere, such advisers, auditors, legal and consulting firms, in masking the corrupt nature of the project and protecting and even supporting illicit gains; and ix) the use of disinformation and propaganda to manipulate the public discourse, in order to divert attention away from their wrongdoing and discredit opponents.

70. The evidence discussed in the chapters of this summation, and in other volumes of this report, establishes that all these elements were present in the extensive scheme of corruption and wrongdoing that afflicted public entities, government departments and other state agencies in South Africa during the period under review, mostly, but not exclusively, at the instance of the Gupta enterprise. State capture as contemplated in the TORs occurred in the public sector in South Africa on an extensive scale. I do not propose to deal with all the state owned entities. It will be enough to refer to all the state owned entities. In my view a reading of the evidence of what happened at Eskom, Denel, SARS reveals quite clearly that state capture did take place in those entities. In Eskom the Guptas used President Zuma to remove certain executives and have their own associates appointed and thereafter carried out their scheme. In Transnet the Guptas

used President Zuma to remove a Minister who would not have agreed to work with them and they got President Zuma to appoint their friend Minister Gigaba who then appointed their friend Brian Molefe. They later got Mr Siyabonga Gama to succeed Mr Brian Molefe when the latter was deployed to Eskom. What happened at Transnet under Mr Brian Molefe and Mr Gama is dealt with in Part II of this Commission's Report. At Denel the Guptas also pushed out Mr Riaz Saloojee and two others so that they could have Mr Ntshepe appointed CEO as Mr Ntshepe was prepared to work with them. In SARS it is also clear that Bain captured the Head of State, President Zuma, as well as the Commissioner of SARS, Mr Tom Moyane. BOSASA captured President Zuma and Commissioner of Correctional Services Mr Mti as well as other officials. So, there can be no double that state capture happened in South Africa. A discussion of the evidence of state capture in Transnet, BOSASA and SARS is discussed below. This is in addition to the discussion of that evidence in Part I of this Report in respect of SARS, Part II in respect of Transnet and Part III in respect of BOSASA.

State Capture at Transnet

71. State capture at Transnet involved a systematic scheme of securing illicit and corrupt influence or control over decision-making. Collusion between individuals inside and outside of Transnet, as part of a co-ordinated effort to access and re-direct funds and benefits in substantial procurements, resulted in the strategic positioning of particular individuals in positions of power. A small group of senior executives and directors were positioned to collude in the award of key contracts. The evidence further shows that key employees at an operational level in Transnet were disempowered or marginalised from participation in important procurement decisions which affected their work.

72. The extensive scheme of wrongdoing that afflicted Transnet between 2009 and 2018 was conducted by an enterprise (comprising a group of individuals and companies

associated in fact) aligned with the Gupta family and its associated companies. The relationship of the events at Transnet to one another point to the existence of a common objective that establishes a pattern. The evidence therefore establishes convincingly that state capture occurred at Transnet in the period between 2009 and 2018.

73. The central elements of state capture at Transnet comprised: i) the appointment of Gupta associates to key positions within Transnet; ii) the kickback agreements between CNR/CSR/CRRC and Mr Essa's companies; iii) the inclusion of Gupta linked companies as supplier development partners ("SDPs") on Transnet contracts; iv) the money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley; and v) the payment of cash bribes to officials and employees associated with Transnet presumably for their role in facilitating transactions that favoured the Gupta enterprise.

74. State capture at Transnet began after the resignation of Ms Ramos as GCEO in 2009. Thereafter, President Zuma thwarted the efforts of Ms Hogan to appoint a GCEO for a period of 18 months because he preferred Mr Gama, the then CEO of TFR who was facing serious charges of misconduct, until he replaced her in November 2010 as Minister of Public Enterprises with Mr Gigaba, an admitted associate of the Gupta enterprise who had regular and frequent contact with Gupta family members.

75. Mr Gigaba immediately reconstituted the board of Transnet with his preferred appointees and initiated the process that led to the appointment of Mr Molefe as GCEO. There is clear and convincing evidence that Mr Molefe was an associate of the Guptas and a regular visitor to the Gupta Saxonwold compound and that the Gupta's had some involvement in his appointment as GCEO at Transnet and later at Eskom. Mr Molefe's appointment was accurately predicted by the Gupta owned newspaper, the New Age, and he was recommended for appointment by Mr Sharma who Mr Gigaba attempted

unsuccessfully to have appointed as chairman of the Transnet board. Mr Sharma was a business associate of Mr Essa, a key associate of the Gupta enterprise. Around about the same time, Mr Gigaba appointed Mr Essa as a director of BBI (an SOE in the IT sector), which played some role in attempting to secure IT contracts from Transnet for the benefit of the Gupta enterprise.

76. Thus, Mr Gigaba (a friend of the Guptas) was instrumental in the appointment of Mr Molefe (another friend of the Guptas), with his appointment predicted in the Gupta owned newspaper, the New Age, and initiated by Mr Sharma (another Gupta associate).

77. Mr Sharma went on to serve as the chairperson of BADC, which was established in February 2011 as a subcommittee of the board. Prior to the establishment of the BADC in February 2011, the board of Transnet was not directly involved in procurement. Many of the procurement transactions which favoured the Gupta enterprise after 2011 arose in the context of the Market Demand Strategy ("the MDS") which was developed by Mr Molefe and Mr Singh (then the acting GCFO) and approved by the BADC (chaired by Mr Sharma under its increased authority) in 2011.

78. One week after Mr Molefe was appointed, Mr Gama, who had been dismissed for serious irregularities in 2010, was reinstated as CEO of TFR on 23 February 2011, in terms of a wholly indefensible settlement agreement that included a payment of R17 million to Mr Gama for benefits and legal costs. Mr Gama's early efforts to be appointed as GCEO in 2009 (despite the allegations of impropriety against him and the board of Transnet considering him unsuitable for the position) was vocally and publicly supported by members of President Zuma's cabinet, Mr Gwede Mantashe (then the Secretary-General of the ANC), other high profile persons associated with the ANC, and presumably by the deployment committee of the ANC. After his reinstatement, Mr Gama was centrally involved in key transactions that favoured the Gupta enterprise. The

evidence on record gives rise to reasonable grounds to believe that Mr Gama was reinstated as a consequence of an instruction or direction by President Zuma.

79. It is undisputed that from July 2011 Mr Molefe intensified his contact with the Gupta family, frequently visited the Gupta compound in Saxonwold and was in regular contact with Mr Ajay Gupta in particular. Mr Molefe's driver testified that in the period between July 2011 and August 2014, he transported Mr Molefe to the Gupta compound and reasonably suspected that Mr Molefe received substantial cash payments during those visits. The testimony of the drivers of Mr Gama, Mr Gigaba, Mr Singh and Mr Pita (who replaced Mr Singh as the GCFO) gives rise to reasonable grounds to believe (or suspect in the case of Mr Pita) that they too received cash payments from the Gupta enterprise during the period under consideration.

80. The first transactions tainted by corruption and advancing the interests of the Gupta enterprise concerned the procurement of cranes from ZPMC and Liebherr which were procured in 2011-2014 by corrupt payments to the Gupta enterprise.

81. The procurement of 95 electric locomotives from CSR, shortly after the appointment of Mr Molefe as GCEO and the reinstatement of Mr Gama as CEO of TFR, was the first significant locomotive transaction tainted by corruption. The board approved the acquisition of 95 electric locomotives at its meeting of 31 August 2011. The transaction was approved by Mr Gigaba on 21 December 2011 at an ETC of R2.7 billion.

82. The evidence in relation to the procurement of the 95 locomotives founds reasonable grounds to believe that it was attended by irregularities including: i) a prior decision by Mr Molefe to favour CSR as a bidder; ii) inappropriate communication with CSR prior to the closing of the bid; iii) communication between CSR and the Gupta enterprise during the bidding process; iv) the failure to disqualify the bid by CSR on the grounds of it being non-responsive by not furnishing returnable documents; v) the improper changing of the

evaluation criteria to favour CSR; vi) the failure to obtain the authorisation of the Minister for a cost overrun of R700 million; and vii) the non-recovery of late delivery penalties.

83. All these irregularities favoured CSR and were against the best interests of Transnet and preceded a corrupt payment of USD 16.7 million (made in terms of an agency agreement concluded in relation to the "95 project" in April 2012) by CSR (Hong Kong) to Regiments Asia (Pty) Ltd (a company associated with Mr Essa) and the subsequent laundering of these unlawful proceeds onto companies forming part of the Gupta enterprise.

84. During 2011, work had commenced on the business case of the 1064 locomotives transaction. This transaction was tainted by various irregularities which mostly advanced the interests of the Gupta enterprise.

85. In May 2012, Mr Molefe approved the confinement to the McKinsey consortium of the contract for advisory services related to the acquisition of the 1064 locomotives aimed at strengthening the business case by validating the market demand, reviewing funding options and mitigation of various risks. The contract was only signed in August 2014, but McKinsey commenced work in 2012 in terms of a LOI dated 6 December 2012. On 30 November 2013 the LOI expired with the consequence that although work continued to be performed by the McKinsey consortium there was no valid agreement governing its services to Transnet from that date. Moreover, the contract should never have been awarded to McKinsey as its bid was non-responsive on account of it refusing to furnish its financial statements.

86. The RFPs for the acquisition of the 1064 locomotives was issued in July 2012. Mr Singh (a Gupta associate) was appointed as GCFO in July 2012 and Mr Sharma (another Gupta associate) was appointed chairperson of the BADC in August 2012. The BADC's authority was increased to R2 billion at the same time. The board in August 2012 also

approved the use of a loan facility from the China Development Bank ("the CDB") to fund the 1064 acquisition.

87. In October 2012, McKinsey agreed to appoint Regiments as its SDP subject to Regiments agreeing to share with Mr Essa (or one of his companies) 30% (later increased to 50%) and Mr Moodley (or one of his companies) 5% of all income received from Transnet. Neither Mr Essa nor Mr Moodley (or any of their companies) rendered any services of any kind to McKinsey or Transnet beyond the introduction of Regiments to McKinsey.

88. In December 2012, Mr Essa facilitated a meeting between Mr Singh and Mr Pillay of Regiments, after which Regiments replaced Letsema in the McKinsey consortium in terms of the LOI. Regiments thus became a member of the consortium without having tendered as part of it.

89. The board approved the business case for the 1064 locomotive acquisition on 25 April 2013. The closing date for the bids was 30 April 2013 and the evaluation commenced in May 2013. During March 2013 to May 2013, prior to the submission of the bids for the 1064 locomotive procurement, Transnet engaged in direct negotiations with CSR and the CDB with a view to concluding a tripartite agreement, the original draft of which explicitly provided for cooperation on the procurement of the locomotives. This is again an indication that the senior executives of Transnet were favourably disposed to CSR and CNR. The final version of the agreement merely provided for Transnet and the CDB to identify opportunities for CDB to participate in funding. Even then, given the relationship between the CDB and CSR, the perception that Transnet was favourably disposed to the Chinese OEMs is inescapable. Mr Gigaba, the Minister of Public Enterprises, approved the business case for the 1064 locomotive procurement in August 2013.

90. The modus operandi of the Gupta enterprise was revealed in another transaction involving Transnet at this time. During July and August 2013, Mr Singh and Mr Essa engaged with Hatch, a bidder for work on Transnet's Manganese Expansion Project ("the MEP") in an attempt to strong arm it into agreeing to their preferred companies, DEC and PMA, being included as SDPs in the successful consortium that bid for the tender. The evidence in relation to these incidents provides reasonable grounds to suspect corruption in that Mr Essa and Mr Singh attempted to make the award of the tender conditional on Hatch's appointment of their preferred SDPs, which were to be paid an inflated fee of R80 million (later to be increased to R350 million) that would be laundered onto the Gupta enterprise. Hatch resisted these efforts to involve it in the corrupt scheme.

91. Besides the evident corruption in relation to the MEP tender, the proven association of Mr Singh and Mr Essa with the Gupta enterprise at this time, the manipulation of the supplier development component in the transaction by Mr Singh, Mr Essa's disclosure at a meeting with Hatch of the modus operandi of inflating the price of Transnet tenders for illegal purposes and a claim by him that he and his associates would have influence in the subsequent appointment of Mr Molefe as CEO of Eskom, all point to state capture and a pattern of racketeering activity involving the Gupta enterprise.

92. In late 2013 Mr Singh agreed to an increased scope of work for Regiments on the financial services contract in relation to the 1064 locomotive procurement by replacing Nedbank with Regiments in the McKinsey consortium. This increased the scope of work of Regiments on the contract to 30% and thus the fee paid to it, 55% of which was intended to be laundered onto the Gupta enterprise. Around the same time, Regiments presented the so-called "R5 billion proposal" proposing a R5 billion loan facility to be funded by Nedbank through an "in-between structure" which had the potential to cause Transnet a R750 million loss and from which only Regiments would have benefitted in

fees. Although the proposal was not implemented, it again evidences a pattern of conduct consistent with the scheme of state capture.

93. In October 2013, the board approved the business case for the second significant locomotive transaction, being the procurement of 100 additional locomotives for use on the coal export line aimed also at the release of older locomotives from the coal export line for use in general freight business. The original intention was to acquire the locomotives by confinement on grounds of urgency and standardization from Mitsui which had supplied similar locomotives in the recent past. The evidence reveals that Mr Molefe, Mr Singh, Mr Pita and Mr Sharma all played a role in altering the confinement memorandum to award the contract to CSR which undermined the rationale of urgency and standardization as CSR had not produced similar locomotives.

94. The alleged wrongdoing in relation to the procurement of the 100 locomotives during the course of 2014 included: i) management misled the BADC and the board in early 2014 by misstating the rationale by confinement and not disclosing the concerns of the technical staff about CSR's inability to deliver the 100 locomotives in accordance with the required specifications; ii) non-compliance with the urgent delivery requirement; iii) non-compliance with the local content requirement; iv) the payment of excessive advance payments (60%) prior to the delivery of any locomotives; v) the payment of the advance payments without CSR furnishing the requisite security (advance payment guarantee); vi) the unjustifiable increase in the price of the procurement by R740 million without prior authorization of the board; and vii) the unjustifiable inflation of the base price of the locomotives and the reliance on incorrect assumptions in relation to cost factors and escalations. CSR (or CRRC) paid a kickback of R925 million on this contract to one of Mr Essa's companies, JJ Trading FZE.

95. The most significant locomotive transaction was the procurement of the 1064 locomotives at a cost of R54.5 billion. As mentioned, the board approved the business case for the 1064 locomotives on 25 April 2013. The evaluation process and best and final offer ("BAFO") stage of the procurement process for the 1064 locomotives endured from May 2013 to January 2014. On 24 January 2014, the BADC and the board resolved to split the procurement into four contracts and appointed four OEMs as preferred bidders. Post tender negotiations took place in February 2014 and the locomotive supply agreements ("the LSAs") were concluded on 17 March 2014.

96. While the post tender negotiations in relation to the 1064 procurement were under way, on 5 February 2014, McKinsey purported to cede its rights under the contract for the provision of advisory services to Regiments and informed Transnet that all the work related to the mandate had in fact been performed by Regiments – all of which was for the benefit of the Gupta enterprise, through the money laundering fee share agreement with Mr Essa and Mr Moodley's companies.

97. During the evaluation process, CSR's bid was favoured through the irregular adjustment of its price to account for its use of Transnet Engineering ("TE") as a subcontractor and CNR was favoured by the exclusion of key costs from its BAFO that normally would have been included. There are thus reasonable grounds to believe that but for these irregular adjustments, CSR and CNR would not have succeeded as bidders.

98. During the post tender negotiations in relation to the 1064 locomotives, the price of the procurement increased substantially to the detriment of Transnet's interests, partly as a result of an improper agreement by Mr Singh and Mr Jiyane (overriding Mr Laher) to include batch pricing at a cost of R2.7 billion in the agreed price. In addition, the negotiations team, led by Mr Singh and Mr Wood of Regiments, imprudently agreed to excessive advance payments particularly to favour CSR and CNR which negatively

impacted Transnet's cash flow going forward. Furthermore, the negotiations team agreed to terms of the contract contrary to the local content requirement of the RFPs that should have disqualified the bidders at that stage.

99. As stated, the LSAs were concluded on 17 March 2014 at an increased price of R54.5 billion, being R15.9 billion more than the ETC stipulated in the business case. On 28 May 2014, the board accepted the recommendation of Mr Molefe and Mr Singh to increase the ETC from R38.6 billion to R54.5 billion on the premise that the original ETC stipulated in the business case had excluded forex and escalation costs. This was a false premise, following a misrepresentation by Mr Molefe and Mr Singh in a memorandum dated 18 April 2013, in that the ETC had in fact included forex and escalation costs in an amount of R5.9 billion. Mr Singh repeated the misrepresentation in correspondence to Mr Gigaba the Minister of Public Enterprises on 31 March 2014. Mr Singh and Mr Molefe furthermore failed to obtain the approval and authorization from the Minister for the price increase in contravention of section 54 of the PFMA with the result that the legality of the LSA is brought into question.

100. Mr Molefe and Mr Singh, in their memorandum to the board dated 23 May 2014 justifying the price increase of the procurement of the 1064 locomotives, also misrepresented the profitability of the procurement. The business case provided for a positive net present value ("NPV") of R2.7 billion based on the original ETC using a hurdle rate of 18.56%. The increase in price to R54.5 billion produced a negative NPV. Mr Molefe and Mr Singh however informed the board that the NPV remained positive using a changed hurdle rate of 15.2%. Mr Singh, in his capacity as GCFO, had changed the rate from 18.56% to 16.24% on 20 May 2014, but rather than use that reduced rate, he used an even lesser rate of 15.2% in his submission to the board. There are reasonable grounds to believe that Mr Singh used this lower hurdle rate to ensure a positive NPV, in the context of the 41% increase in the price of the procurement, in order to persuade the board that

the NPV remained positive when in fact there were doubts about the profitability of the project overall.

101. The actuarial evidence presented to the Commission provides a reasonable basis to conclude that the increase in the ETC by R15.9 billion included amounts totalling R9.124 billion that were unjustifiable expenditure. The unjustifiable amounts related to inflated provision for backward and forward forex and escalation costs, batch pricing and an excessive provision for contingencies. The evidence further indicates that Regiments, led by Mr Wood, played a key role in finalising and agreeing the unjustifiable forex and escalation costs during the post tender negotiations. The memorandum of 23 May 2014 submitted by Mr Molefe to the board justifying the increase specifically stated that the escalations had been verified by Regiments "using their intellectual property methodology and techniques".

102. CSR paid a R3.81 billion kickback in respect of the 359 electric locomotives awarded to it as part of the 1064 locomotive transaction (of which 85% was laundered further onto companies associated with the Gupta enterprise). It is also reasonable to conclude that the unjustifiable expenditure of R9.124 billion which increased the price paid to CSR probably facilitated the ability of CSR to make the kickback payment. The kickback in this instance was made in terms of a BDSA concluded in May 2015 by Mr Essa acting on behalf of Tequesta and CSR (Hong Kong) and in terms of an earlier agreement between CSR Zhuzhou Electric Locomotive Co Ltd and JJ Trading FZE.

103. A kickback of R2.088 billion was paid by CNR to Mr Essa's company Tequesta in terms of an exclusive agency agreement (which superseded an earlier agreement of 8 July 2013 between CNR and CGT). This kickback was in respect of the 232 diesel locomotives awarded to CNR as part of the 1064 locomotive procurement.

104. Thus, CSR and CNR (later amalgamated as CRRC) paid approximately R5.9 billion in kickbacks in relation to the 1064 locomotive procurement. This amount fell within the R9.124 billion margin of unjustifiable expenditure in respect of all the 1064 locomotives.

105. In March 2014, shortly before the conclusion of the LSA in relation to the 1064 locomotives, a decision was taken to locate the manufacturing and assembly of the CNR and Bombardier locomotives in Durban. The initial costing of the relocation of CNR was estimated to be R9.8 million. Transnet eventually agreed to pay approximately R647 million to CNR (CNRRSSA) and approximately R618 million to Bombardier, a total of R1.261 billion of which R617.6 million was actually paid. Further investigation is required to definitively determine the justifiability of these costs. However, the available evidence establishes strong grounds to believe that CNRRSSA made a corrupt payment of approximately R77 million to BEX (a company associated with the Gupta enterprise) which was laundered onto other shell companies including Integrated Capital Management of which Mr Shane (a director of Transnet who succeeded Mr Sharma as chairperson of the BADC) was a director. The payment to BEX was ostensibly for services rendered in relation to the relocation. However, the BDSA with BEX resembled the other kickback BDSAs facilitated by Mr Essa in relation to the locomotive transactions with the services rendered being of dubious value. The inclusion of BEX in the arrangement was consistent with the methodology of the Gupta enterprise of inflating the value of tenders to enable payments to the enterprise via chosen SDPs that were typically shell companies.

106. The LSA concluded between CSR and Transnet in relation to the 359 locomotives as part of the 1064 locomotive transaction envisaged the parties concluding a maintenance services agreement for the locomotives supplied. In June 2015, CSR concluded a BDSA with Mr Essa's company, Regiments Asia, in relation to a proposed 12-year maintenance plan in terms of which Regiments Asia would supposedly provide advisory

consulting services in exchange for a fee of 21% of the contract price of the maintenance services amounting potentially to R1.3 billion. The Transnet board approved the conclusion of a 12-year maintenance plan for an amount of R6.18 billion on 28 July 2016. Transnet paid CSR an advance payment of approximately R705 million in terms of this agreement in October 2016. The evidence indicates that R9.4 million of this was paid to Tequesta (another company associated with Mr Essa). Amidst allegations of corruption, Transnet terminated this agreement in October 2017 and sought repayment of the monies that had been advanced. In December 2018, CSR refunded Transnet R618 million. It is unclear whether CSR has repaid to Transnet the VAT and interest in the amount of R223 million in respect of the R705 million advanced.

107. The wrongdoing in relation to the 1064 locomotive procurement comprised, inter alia: i) the misrepresentation to the board of the components of the ETC; ii) non-compliance with the preferential points system; iii) the unfair favouring of CSR through the TE adjustment; iv) the factoring of a R2.01 million discount for TE back into the price of CSR's locomotives; v) the irregular understating of CNR's BAFO price by approximately R13 million per locomotive; vi) the marginalizing of Transnet's treasury by unnecessarily outsourcing tasks to Regiments; vii) the inflation of the price through the inappropriate use of batch pricing; viii) the inappropriate calculation of escalation costs, forex and contingencies; ix) the manipulation of the delivery schedule; x) the payment of excessive advance payments favouring CSR and CNR; xi) non-compliance with the local content requirements; xii) the failure to obtain the approval of the Minister for the substantial increase; xiii) the misrepresentation to the board of the NPV by using the wrong hurdle rate; xiv) the dubious maintenance services agreement and the failure to recoup the excessive advance payment timeously and the VAT and interest on it; and xv) the BDSA kickbacks.

108. Regiments began to assume a greater role at Transnet in the immediate period leading up to the conclusion of the LSA's in respect of the procurement of the 1064 locomotives and the 100 locomotives confined to CSR on 17 March 2014 and in the subsequent period in which the financing of the 1064 transaction was finalised. On 23 January 2014, Mr Singh, without appropriate authority concluded a contract with Regiments in relation to the 1064 locomotive procurement. This was followed on 4 February 2014 by Mr Singh concluding with Regiments a third addendum to the LOI with McKinsey. McKinsey then purported to cede its rights to Regiments on 5 February 2014 in terms of an invalid cession. Regiments was then paid R36.77 million between 18 February 2014 and 7 April 2014 in terms of the purported invalid third amendment to the LOI concluded on 4 February 2014. An additional payment of R79.23 million without any legal basis was paid by Transnet to Regiments on 30 April 2014.

109. During 2014-2015, McKinsey and Regiments were awarded contracts valued at R2.2 billion by way of confinement rather than by open public tender. Half of the revenue received by Regiments under these contracts was directed to Homix, a Gupta associated company, in terms of the money laundering agreement with Mr Essa and Mr Moodley. The evidence establishes that McKinsey and Regiments were irregularly in possession of the confinement memoranda prior to making the bids on their contracts. Four of the confinements were approved by Mr Molefe over a period of four days between 31 March 2014 and 3 April 2014. These contracts all appointed Homix and Albatime (Gupta linked laundry vehicles) as SDPs. Fee payments (in an unknown amount) were irregularly made to McKinsey and Regiments in July 2014 in terms of these contracts prior to the conclusion of the tender process. Correspondence of 13 June 2014 confirms that provision for fee payments to Homix and Albatime in excess of R100 million were to be made in terms of these contracts. Mr Fine of McKinsey confirmed in a statement to Parliament that neither Homix nor Albatime were involved in providing any services on any project in which McKinsey was involved.

110. In April 2014, shortly after the conclusion of the LSAs in respect of the 1064 locomotives, negotiations began in earnest with the CDB for the financing of the procurement of the locomotives from the Chinese companies. Regiments assumed a lead role in the negotiations while the Group Treasurer and treasury team of Transnet were side-lined. The Group Treasurer, Ms Makgatho, valiantly challenged the relegation of the Transnet treasury team. She repeatedly raised her concerns about her marginalisation and the unsatisfactory proposed terms of the CDB facility with Mr Molefe and Mr Singh, but to no avail. Ms Makgatho resigned from Transnet in November 2014 as she feared for her safety and wellbeing. She was replaced by Mr Ramosebudi who had links with the Gupta enterprise.

111. During August 2014, Mr Singh, with the assistance of Regiments, presented misleading information to the board which committed Transnet to a loan of USD1.5 billion from the CDB on relatively unfavourable terms.

112. During this period, on 4 August 2014, Mr Molefe signed a deed of settlement agreeing that Transnet would pay the costs of GNS/Abalozi and its directors (including General Nyanda, a member of President Zuma's cabinet) on a punitive scale in litigation about the termination of a services contract with GNS /Abalozi, which had led to the dismissal of Mr Gama in 2010. The deed was apparently signed on behalf of GNS/Abalozi by General Nyanda, who was a friendly acquaintance of Mr Gama. The agreement to pay these costs was unjustifiable in a number of respects and should not have been concluded. Moreover, properly taxed the costs envisaged in the questionable settlement agreement would not have exceeded R200 000 at that particular stage of the litigation between Transnet and GNS/Abalozi. Yet, on 16 January 2016, Mr Molefe agreed to pay GNS/Abalozi R20 million to settle all legal claims against Transnet. The amount paid was an excessively inflated assessment of the legal costs payable and was paid to settle

claims that had already been settled or had prescribed. This expenditure was wholly unjustifiable.

113. On 17 April 2015, consistent with what Mr Essa had told Mr Bester of Hatch during the course of 2014, Mr Molefe was seconded from Transnet and became acting CEO of Eskom. On 20 April 2015, the board of Transnet appointed Mr Gama as acting GCEO of Transnet. Four days earlier, on 16 April 2015, Transnet paid Mr Gama's attorneys R1.4 million in relation to his dismissal and reinstatement in 2010/2011 (four years previously). This payment was without any legal basis as it was probably a duplication of a costs payment made to Mr Gama's attorneys earlier which itself should never have been paid for various reasons, including the fact that it related in part to costs that had been awarded to Transnet in Mr Gama's failed High Court application and moreover was in any event not due in terms of the indefensible settlement agreement to reinstate Mr Gama.

114. A week after Mr Gama's appointment as acting GCEO, Mr Ramosebudi who had succeeded Ms Makgatho as Group Treasurer of Transnet, compiled a memorandum seeking inter alia approval from the BADC for the payment to Regiments of R189.24 million as a "success fee" in relation to the USD1.5 billion facility with CDB (concluded eventually on 4 June 2015). The proposal was supported by Mr Gama, Mr Singh and Mr Pita. The BADC approved the request on 29 April 2015. Mr Gama approved the additional fee on 16 July 2015. Before the conclusion of the CDB loan, Regiments submitted an invoice for R189.24 million on 3 June 2015. The evidence discloses that the work performed in respect of this fee fell within the scope of an earlier agreed fee of R15 million. Additionally, the expert evidence of Dr Bloom confirms that the fee of R189.24 million was 10-15 times greater than the market norm for the work supposedly performed by Regiments, and was probably inflated by an amount of between R90 million and R140 million. The fee was paid to Regiments on 11 June 2015 and the record

shows that R147.6 million of it was paid to Albatime (the Gupta linked laundry vehicle) of which R122 million was laundered further to Sahara Computers, another company in the Gupta enterprise.

115. As discussed earlier in this report, USD1 billion of the USD2.5 billion CDB loan facility was shelved and Regiments advised and arranged for Transnet to conclude a ZAR12 billion club loan instead. Regiments originally replaced JP Morgan as the lead arranger on this loan. However, when Mr Wood moved from Regiments to Trillian Capital (Pty) Ltd (a company which Mr Wood helped to establish and in which Mr Essa was a controlling shareholder), Mr Gama submitted a memorandum to the BADC on 22 September 2015 recommending that the BADC approve the appointment of Trillian to replace JP Morgan as the lead arranger on the ZAR club loan.

116. The proposal to appoint Trillian was supported by Mr Ramosebudi, Mr Pita and Mr Thomas. It was initially intended to pay Regiments a success fee of R50.2 million. However, Trillian was eventually paid a success fee of R93.48 million. Mr Thomas in an email to Mr Ramosebudi and Mr Pita challenged the propriety of the proposal on the grounds that prior payments to Regiments had covered the services supposedly performed by Trillian and expressed doubt that the newly incorporated Trillian had the capacity to underwrite the loan. Trillian was not a bank with significant assets but a company recently conceptualized by Mr Wood.

117. On 14 September 2015, a few days before Mr Gama submitted the proposal to the BADC, Mr Ramosebudi forwarded an email to Mr Wood to which he attached an order to Land Rover Waterford (a dealership partly owned by Mr Wood's partner, Mr Nyhonyha) for a Range Rover Sport valued at R1.23 million in the corrupt hope that Mr Wood could "do something for him".

118. On 18 November 2015, Mr Gama and Mr Pita concluded a mandate with Mr Roy of Trillian engaging it as the lead arranger for the ZAR12 billion club loan. On the same day Trillian issued an invoice for R93.48 million. The next day, 19 November 2015, Mr Gama and Mr Pita signed a payment advice. Four days later on 23 November 2015, the ZAR club loan was concluded. The next day, 24 November 2015, Mr Ramosebudi compiled a memorandum requesting Mr Gama and Mr Singh to sign off on the Trillian invoice which they did in early December 2015. The money was paid into Trillian's account on 4 December 2015, a mere 16 days after the mandate was concluded. Four days later on 8 December 2015, R74.8 million of that fee was transferred by Trillian to the Gupta money laundering vehicle Albatime.

119. The evidence convincingly confirms that Trillian had not in fact performed any services in relation to the ZAR club loan and that the lead arranging work had been performed earlier by JP Morgan and Regiments. In addition, Trillian could not have practically done the work in the limited time available to it as it would have needed to be done in the months leading up to the conclusion of the ZAR club loan.

120. Shortly after Mr Gama approved the wholly unjustifiable payment of R93.48 million to Trillian, he met with Mr Essa at the Oberoi Hotel in Dubai on 23 January 2016. Evidence before the Commission confirms that Mr Gama's hotel bill in Dubai was either paid or was intended to be paid by Sahara Computers or Mr Essa, both associates of the Gupta enterprise. A few weeks later, on 24 February 2016, Ms Mabaso, the chairperson of the Transnet board recommended the appointment of Mr Gama as GCEO to replace Mr Molefe (who had resigned in September 2015 to assume the position of CEO at Eskom). Ms Mabaso recommended the appointment of Mr Gama without any formal, competitive recruitment process. Ms Brown, the then Minister of Public Enterprises (appointed by President Zuma) appointed Mr Gama as GCEO on 12 March 2016, despite the fact that

Mr Gama had on two prior occasions been found unsuitable for the post by the Transnet board.

121. On the same day that Mr Gama authorized the unjustifiable payment of R93.48 million to Trillian – and just 10 days after the conclusion of the ZAR12 billion club loan, at a floating interest rate – Mr Ramosebudi submitted a memorandum to Mr Pita, the then acting GCFO, seeking approval for hedging the interest rate exposure from a floating rate to a fixed rate and permission to instruct Regiments to execute the hedges with approved counterparties. Mr Gama approved the proposal and two tranches of interest rate swaps were executed by Regiments on the ZAR club loan. R4.5 billion was swapped to a fixed rate of 11.83% for 15 years on 4 December 2015. Seven months later, on 7 March 2016, R7.5 billion was swapped to a fixed rate of 12.27% for 15 years.

122. These interest rate swaps were highly imprudent for various reasons, caused substantial losses to Transnet, and should never have been concluded. The realised total negative cash flow for Transnet on these interest rate swaps was R850.5 million by 2019. This amount would not have been payable had Transnet not effected the interest rate swaps. As at 14 May 2019, the amount of the cost of exit (an unrealised negative cash flow) would have been an additional R918.48 million, giving a total negative cash flow of R1.83 billion at that date.

123. Other interest rate swaps executed by Regiments on Transnet debt in the amount of R11.3 billion, not directly related to financing the 1064 locomotive transaction, and unusually using the Transnet Second Defined Benefit Fund as a counterparty, resulted in an additional realised cash flow loss of R720.8 million and an unrealised loss of R815.7 million, totalling R1.5 billion, for Transnet. Regiments received a fee of R229 million in respect of these transactions.

124. Other transactions in relation to Transnet's IT and data network were tainted with corruption and irregularity. In October 2013, the acting GCEO of Transnet awarded the tender for Transnet's network services to Neotel when Mr Molefe, the GCEO, was absent on business elsewhere. On his return, and most likely in contravention of the PFMA, Mr Molefe revised the award and granted the tender to T-Systems which had bid for the contract in conjunction with BBI, the SOE to which Mr Essa had been appointed as a director by Mr Gigaba. T-Systems was linked to the Gupta enterprise via Sechaba Computer Systems, its SDP, which made various payments to Gupta laundry vehicles (including Homix and Albatime) and which during 2015 and 2016 paid Zestilor (a company owned by Mr Essa's wife) a monthly retainer of R228 000.

125. Mr Molefe's decision was subsequently reversed and the award to Neotel was reinstated after Transnet received a negative opinion from its auditors and legal advice that Mr Molefe's decision was irregular.

126. The evidence establishes convincingly that during 2014-2015, Neotel made two corrupt payments to Homix (a Gupta enterprise laundry vehicle), in the amount of approximately R75 million. The first payment of R34.5 million was in respect of the acquisition of equipment from Cisco for use in the Transnet IT network and another payment of R41 million supposedly for services rendered over two days in concluding the Master Services Agreement for the network services between Neotel and Transnet. Neotel also agreed to pay R25 million to Homix for services it supposedly rendered (over the same two-day period) in relation to an asset buy back agreement between Transnet and Neotel. The amounts paid to Homix by Neotel were then laundered onto the Gupta enterprises in contravention to the exchange control regulations.

127. A further unsuccessful attempt to favour T-Systems was made in 2017. On that occasion, the BADC chaired by Mr Shane (seemingly supported by Mr Gama) refused

on dubious grounds to award the tender to the first placed bidder, Gijima, and instead awarded it to T-Systems, the lowest scoring bidder whose bid was R1 billion more expensive. The decision was eventually reversed and the tender was awarded to Gijima, but the conduct of the members of the BADC, particularly Mr Shane and Mr Nagdee (both with links to the Gupta enterprise) evinced a clear intention to favour T-Systems. There are reasonable grounds to believe that their conduct contravened section 50 of the PFMA and is evidence establishing their links to the Gupta racketeering enterprise.

128. Transnet ultimately was the primary site of state capture in financial terms. Transnet contracts to the value of approximately R41.204 billion were irregularly awarded for the benefit of entities linked to the Gupta enterprise or Mr Essa. This amount represents 72.21% of the total state payments in respect of contracts tainted by state capture. The overall impact on Transnet was to burden it with the huge financial losses that resulted from the excesses, fraud and corruption.

129. Much of looting of Transnet by the Gupta enterprise took place during Mr Gigaba's tenure as the Minister of Public Enterprises (November 2010 to May 2014) in President Zuma's cabinet. The fact that both President Zuma and Mr Gigaba had strong ties to the Guptas underpins the conclusion that Transnet was a site of state capture.

130. The Bosasa evidence[60] overwhelmingly establishes that Bosasa, its leadership, employees and associates were able to gain illicit control over the procurement processes of departments and organs of state, through the systematic and aggressive targeting of public officials with offers of gratification in the form of bribes and a range of other material benefits. As part of its strategy, it sought out officials across different levels of seniority within the state, ranging from the former President Zuma at one end of the spectrum, to municipal officials and employees of SOEs at the other end of the

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[60] Report of the Judicial Commission of Inquiry into State Capture: Part III: Vol. 1 – 4: Bosasa.

spectrum. It also sought to identify and influence individuals that wielded the greatest influence within the ruling party.

131. Mr Angelo Agrizzi (Mr Agrizzi), former Bosasa chief operating officer, testified that Bosasa relied heavily on government contracts worth approximately R2.5 billion per annum,[61] particularly from the Departments of Correctional Services (DCS), Justice and Constitutional Development (DoJ&CD), and Transport. Bosasa set up a system whereby gratification was provided on an ongoing basis through regular payments of cash bribes to numerous officials within a department or entity. Mr Agrizzi estimated that bribes to the scale of around R75 million per annum were paid out.[62]

132. Although the primary mechanism for attempting to influence public office bearers was the payment of these cash bribes, Bosasa also provided benefits in the form of building houses, providing various furnishings for homes, installing several home security systems, purchasing and hiring of motor vehicles, buying gifts (from premium luxury gifts to food and grocery items) and paying for travel and accommodation. By spreading benefits widely in this manner, Bosasa was able to maintain an advantage in fresh tender and contract extension processes, eliminate the risk of whistleblowing and ensure the early provision of confidential information that would enable it to have an advantage in any tender process.

133. The evidence demonstrates that Bosasa and the Watson family established a reasonably well-organised network of well-placed, well-connected and powerful people whose loyalty was secured with financial and other material incentives and bribes. It was through this network that they were able to promote and protect the private interests

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61 Amount calculated from the testimonies on Bosasa to the Commission.

62 Estimate given by Angelo Agrizzi in his testimony to the Commission, Agrizzi, Exhibit GG(b), p 655-656 para 38 and p 777-798 paras 11- 132. Agrizzi estimates that Bosasa paid money to 38 officials on average from 2000 to 2016 to ensure that Bosasa would be awarded or retain contracts.

of Bosasa by irregular procurement practices to extract money from the state in very substantial amounts. In addition, there was a very close relationship between the company's main shareholder and chief executive, the late Mr Gavin Watson, and Mr Zuma. They met frequently.[63]

134. Bosasa and the entities falling within the Bosasa group were the primary beneficiaries of the facilitation of the unlawful award of tenders, as a corporate entity doing business with government and organs of state. Senior Bosasa employees (such as Mr Agrizzi), Mr Gavin Watson and the Watson family also benefitted.

135. The clearest example of Bosasa's organised project to redirect state resources into private or individual hands and to protect the actors and beneficiaries from any accountability or consequence is its contracts with the DCS.

135.1. The evidence shows that Bosasa was awarded numerous contracts with the DCS that were later renewed or expanded. These contracts were secured through Bosasa's relationship with, and bribes to, various key officials at the DCS, including the former National Commissioner, Mr Linda Mti, and the former Chief Financial Officer, Mr Patrick Gillingham. These relationships were frequently initiated through Mr Gavin Watson. The extent of the influence was such that Bosasa was able to gain substantial control over the drafting of tender specifications so as to ensure that it would be awarded the contracts.[64]

135.2. In addition, Bosasa was able to limit the level of scrutiny on the various contracts awarded to it by offering and paying gratification in the form of bribes to members of parliament and by making threats against members of

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63 Agrizzi, GG Bundle (b), p 659 para 41.10.

64 See for example, Mr Agrizzi's Initial affidavit, p AA 282, 285; transcript, day 39, p13, transcript, day 38, 175.

parliament who did not toe the line.[65] As a result, attempts by some Members of the Parliamentary Portfolio Committee on correctional services to interrogate the award of further contracts and extensions to Bosasa gained little traction.

135.3. In line with its modus operandi outlined above, Bosasa secured influence in the DCS in a systematic manner and to a substantial degree through the unlawful and use of bribes or other gratification to influence decision-making on tenders and contracts. The evidence revealed provision of gratification in the form of monthly cash payments; the purchase of motor vehicles; travel and vehicle hire; building houses; fittings, furnishings and the installation of security systems; and paying for the studies of children of officials and members of parliament.

136. Various contracts between the DCS and Bosasa or Bosasa-related companies were subject to an investigation by the Special Investigating Unit ("SIU"). The SIU investigation made significant findings of a corrupt relationship between Bosasa and the DCS, concluded that the award of the contracts was irregular and that there was no lawful basis for benefits that were provided to senior DCS officials, Mr Mti and Mr Gillingham. The SIU provided the report as well as all of the evidence in their possession to the National Prosecuting Authority ("NPA").[66] Despite the nature of the findings made by the SIU, none of its recommendations were implemented by the DCS apart from the disciplinary proceedings eventually instituted against Mr Gillingham. Instead, the contracts between Bosasa and the DCS continued.[67]

137. There was a concerted effort by Bosasa to avoid prosecution by the NPA for its corrupt relationship with the DCS.

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65 Transcript, day 45, pp 45 to 47; pp 61 to 66; p 69; pp 71 to 77.

66 Transcript, day 77, p 24.

67 Transcript, day 77, pp 12 to 12.

137.1. Mr Agrizzi testified that he and Mr Gavin Watson made monthly payments to Mr Mti that were intended for officials at the NPA in return for which Bosasa was provided with documents and information regarding ongoing investigations into Bosasa, which allowed interference in the investigation and possible future prosecutions.[68]

137.2. Various confidential NPA documents relating to the investigation and prosecution of persons linked to the Bosasa-DCS contracts were in Mr Agrizzi's possession and had been leaked in an attempt to interfere with the investigations and to harm the prosecution.[69] Mr Agrizzi also alleged that Ms Myeni obtained confidential documents from the NPA on the progress of the investigation, including the docket, and allowed Bosasa to view them.[70]

138. Overall, the evidence shows wrongful attempts to close down the Bosasa investigation and prosecutions and a substantial degree of control over the decision-making of the law enforcement and oversight bodies. For example, Mr Agrizzi alleged that Mr Zuma arranged for a meeting between a senior Hawks official and Bosasa Director Mr Joe Gumede, which Mr Gumede claimed did take place.[71] Furthermore the NPA did not act against Bosasa for over ten years, despite clear evidence of extensive corruption uncovered by the SIU in its report.

139. The DCS was not the only state department in respect of which Bosasa sought to gain illicit control over procurement processes. The evidence considered shows that contracts awarded to Bosasa and its affiliates by the DoJ&CD, the Airports Company of

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68 Transcript, day 40, pp 39 to 57.

69 Transcript, day 77, pp 52, 62, 86; day 78, p 190.

70 Agrizzi, Exhibit GG(b), pp 660-661 para 41.11-41.15

71 Agrizzi, Exhibit GG(b), pp 659-660, para 41.9-41.10

South Africa ("ACSA") and the South African Post Office ("SAPO") were similarly irregular and that certain officials received bribes.[72]

139.1. Around 2013, Sondolo IT was awarded the contract with the DoJ&CD at an approximate value of R601 million to install a security access control system for close on 110 courts nationally. The Commission heard evidence that Sondolo IT paid 2.5% of all money received to certain individuals in the DoJ&CD as bribes in the form of car repairs, furniture and the payment of cash amounts; further, that certain officials received cash payments to overlook the problems with the infrastructure provided by Sondolo IT and sign off on the monthly maintenance fee that was charged by it. The 2.5% was paid over and above other monies that were being paid to officials in the DoJ&CD.

139.2. Bosasa (Sondolo IT) also paid Mr Seopela R1.9 million as a fee for corruptly arranging the DoJ&CD security upgrades contract at the SALU building.

139.3. Mr Agrizzi testified that he was advised that Bosasa would be awarded a five-year, renewable contract by ACSA for carpark protection and guarding services at OR Tambo International Airport when the tender bid was drafted. Further, he testified that security bags filled with money were regularly taken to the airport for "certain people", including the procurement officer. Various irregularities were exposed by the Auditor-General in departments contracting with Bosasa.

139.4. Mr Agrizzi testified that Mr Watson had informed him to start the logistical preparations for the SAPO security contract before the tender was submitted. Mr Watson was alleged to have known that Bosasa would be the successful

[72] Transcript, day 41, p 44; day 34, pp 103, 110 to 122.

bidder months before the contract was awarded. The contract operated for a three-year period with a further extension of two years. The evidence was that cash payments were made to the then CEO of SAPO, Mr Maanda Manyatshe, as well as the head of security, Mr Siviwe Mapisa. Premium gifts were also purchased for these individuals in exchange for the security contract.

140. The scope of corrupt influence Bosasa sought to maintain was not limited to officials within state departments. Its efforts to secure substantial, corrupt influence over administrative decision-making targeted the executive at the levels of the presidency, the cabinet and deputy-ministers. It also sought corruptly to exercise influence through gratification provided in various forms to high-ranking members of the ruling party, the ANC as an entity itself and persons within law enforcement agencies. It also targeted certain SOE's.

140.1. The Commission heard evidence that Bosasa provided corrupt gratification in various forms to Mr Zuma, the ANC and at least one minister[73] and deputy minister.[74] Bosasa also catered for one of Mr Zuma's birthdays.[75] Mr Agrizzi alleged that Mr Watson paid R300,000 cash per month to the Jacob Zuma Foundation, usually through the Chair, Ms Myeni, but once directly to Mr Zuma.[76] The payment directly to Mr Zuma was made at a meeting where Mr Watson requested Mr Zuma's intervention in potential prosecution facing Bosasa.[77]

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73 Ms Mokonyane.

74 Mr Makwetla.

75 Dube, Statement of Bongiwe Dube dated 4 February 2020, p 3 para 5.4

76 Agrizzi, GG Bundle (b), p 658-9 paras 41.1-41.4 & 41.9

77 Agrizzi, Exhibit GG(b), pp 659-660, para 41.9-41.10

140.2. Bosasa provided free catering for certain ANC events as well as large donations to the party.[78]

140.3. Bosasa provided and operated sophisticated war rooms to assist the ANC in the running of elections, clearly aimed at assisting the ANC in retaining its position as majority party. The ANC furthermore accepted donations from Bosasa without investigating the source of the funds, this despite Bosasa being heavily reliant on government contracts and despite there being information in the public domain about Bosasa which raised serious concerns regarding its business dealings.[79]

140.4. Ms Nomvula Mokonyane, a senior ANC politician who became Minister of Water Affairs and Sanitation in 2014, was given very substantial food and drinks deliveries annually, monthly cash payments, paid-for social events, security systems and maintenance and even car hire on occasion for her daughter – all because she "had a lot of clout".[80]

140.5. Ms Dudu Myeni, Mr Gwede Mantashe, Mr Vincent Smith and Deputy Minister of Correctional Services, Mr Thabang Makwetla, all received free security system installations or upgrades and, in some instances, maintenance services for their private homes. The evidence shows the influence that Ms Myeni was able to exert over Mr Zuma and the closeness of her association with him.

141. The evidence before the Commission in relation to Bosasa directly implicates members or former members of the executive, the legislature and heads of SOEs in corruptly

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78 Agrizzi, GG Bundle (b), p 785 para 15.14

79 Transcript of Day 385, 106–7.

80 Agrizzi, Day 37, pp 9-16, 143

providing direct or indirect assistance to Bosasa in relation to the award to, or retention by, Bosasa of state tenders. This includes, amongst others –

141.1. Members of the executive who were found to have breached their constitutional, statutory and ethical duties. For example, the evidence established a *prima facie* case of corruption against Mr Makwetla in relation to his conduct in agreeing to Mr Watson's request to discuss increasing the payment rates under the Bosasa catering contract with the accounting office of the DCS.

141.2. Ms Myeni who was involved in corrupt activities pertaining to facilitating access to and influence over Mr Zuma, co-ordinating Bosasa's arrangement of high-end functions for Mr Zuma, including a birthday party, arranging a meeting with the then acting CEO of South African Airways, Mr Bezuidenhout, with a view to Bosasa taking over a security contract and a catering contract with SAA (although nothing came of it) and providing confidential information pertaining to the NPA's investigation into Bosasa's dealings with the DCS. All of these constituted corrupt activities intended to benefit Bosasa in doing business with the state and retaining existing and securing new tenders. Ms Myeni corruptly received benefits in return.

141.3. Members of the parliamentary portfolio committee responsible for oversight of the DCS, who were found to have participated in the facilitation of the unlawful award or tenders in return for corrupt payment, *inter alia* by protecting Bosasa from proper scrutiny when the portfolio was considering the affairs of the DCS.

142. In other instances, while there is less evidence (and in the case of Mr Mantashe, no evidence) of the provision of a corrupt *quid pro quo*, there is clear evidence that Bosasa

corruptly sought to influence decision-making structures of the state to favour it, to the knowledge of the person targeted.

142.1. Although there is no evidence to suggest direct facilitation by the then President Zuma of the unlawful award of any tenders to Bosasa, there is evidence of interference directly by Mr Zuma in the investigation of Bosasa by the Hawks. On a conspectus of the evidence there are reasonable grounds to suspect that Mr Zuma corruptly provided the facilitation in order to benefit Bosasa and to benefit himself and his Foundation as the recipients of Bosasa's material and monetary largesse.

142.2. On the evidence, there is a reasonable suspicion that Mr Mantashe received the free security installations, knowing that Mr Leshabane sought through him to influence unspecified or unnamed office bearers in the lead departments that Bosasa did, or sought to do, business with.

142.3. There were, on a balance of probabilities, extensive efforts by Bosasa and its leaders, through a range of generous and lavish inducements and gratification, corruptly to influence and benefit Ms Mokonyane in her position as a member of, at various times, the national executive, the provincial executive and office bearer in organs of state. It is significant that Ms Mokonyane was dishonest in her evidence pertaining to the birthday function organised by Bosasa for her. There is evidence of the incomplete facilitation provided by Ms Mokonyane in relation to a possible tender for security for dams, when she was Minister of Water Affairs, a tender that did not materialise. The answer to the question in relation to facilitation by her is likely to be found in Mr Watson's explanation that "she has a lot of clout" and that "we needed her support for the protection from

the SIU investigation, the Hawks and the NPA".[81] Clearly, Ms Mokonyane did benefit herself in that she continued to receive benefits from Bosasa on a lavish scale over an extended period, and would have been well aware of their corrupt purpose.

143. The foregoing represents a brief summary of some of the main aspects of the Bosasa evidence. The authoritative and binding source of the Commission's analysis and reasoning in relation to the Bosasa evidence is to be found in Part III of the Report.

Was there state capture?

144. From the evidence, it can be concluded that Bosasa and its leadership, employees and associates were indeed involved in the systematic attainment of unlawful and corrupt influence, to a substantial degree, over the decision-making of certain organs of state, for their own private purposes and gain, in conflict with the constitutional duty of the state and its organs to operate exclusively in the best socio-economic interests of its people and the sustainable management of its natural resources, for the benefit of current and future generations, consistent with the rights in the Bill of Rights and the values underlying it.

145. The corrupt activities of Bosasa thus brought about state capture, with its own defining features and modus operandi. The "captors" included –

145.1. Mr Gavin Watson, Mr Angelo Agrizzi and a number of individuals associated with the Bosasa network, mostly employees and directors of Bosasa and affiliated companies.

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81 Transcript day 37, pp 29-44.

145.2. The Watson family, who were the main beneficiaries through Bosasa and related companies from the corrupt relationships established with various public officials and who exerted various forms of pressure or influence on others, to their and Bosasa's benefit.

146. Those who were targeted or "captured" within the state, and who facilitated the process, included -

146.1. Members of the National Executive and Provincial Executives, such as Mr Jacob Zuma, Mr Thabang Makwetla and Ms Nomvulo Mokonyane, to whom Bosasa provided inducements aimed at gaining substantial influence. The evidence shows that these officials accepted gratification from Bosasa which held and sought to obtain and retain contracts with government.

146.2. Senior board members and executives in SOEs, such as Ms Dudu Myeni, who had a relationship with Mr Gavin Watson and used her position to facilitate various procurements which would benefit Bosasa, and potentially SAA. Ms Myeni also benefitted in her personal capacity. There were also senior persons in the SAPO and ACSA who were successfully targeted.

146.3. Members of Parliament who received regular monthly cash payments from Bosasa in return for adopting a favourable attitude towards Bosasa in the portfolio committee on correctional services.

146.4. The ANC and some of its senior leadership who received benefits from Bosasa which were aimed at ensuring that the ANC would remain the majority party and be in a position to appoint to positions of public office, persons whom Bosasa was able to influence or would seek to influence, and members of the ANC deployed to senior positions in state institutions, organs of state and SOEs

whom Bosasa sought to ensure would remain well-disposed towards Bosasa in its business dealings.

147. The modus operandi of Bosasa in gaining substantial influence over the decision-making processes of the relevant organs of state, is apparent from the foregoing summary and Part III of the report. It had as a distinguishing feature the regular payment of cash bribes and other forms of gratification, to a wide range of officials on a substantial scale, thus ensuing ongoing, corrupt influence over decision-making processes to favour Bosasa and to avoid detection and prosecution.

148. Those targeted were all in a position to have prevented Bosasa's corrupt activities, by declining to accept the bribes and other gratification provided, reporting the offers of gratification to the police and prosecuting authorities, and ensuring that those authorities followed up on their reports. The members of Parliament targeted had available to them the wide range of mechanisms for holding both the private and public sector actors involved to account. Yet the MPs involved did not use the mechanisms available to them. Instead they worked to ensure that the portfolio committee did not expose the corruption.

149. The NPA and SIU were also in a position to put a stop to the corrupt activities by investigating and prosecuting the strong cases they had against the perpetrators. Bosasa used its corrupt influence over members of the executive, amongst others, to intervene with the investigating and prosecuting authorities in order to ensure that prosecutions never took place.

150. One may ask what features of the South African situation allowed Bosasa's state capture to take hold.

150.1. A particular component of the system of corruption-based business developed by Bosasa, and in particular the late Mr Gavin Watson and Mr Agrizzi, is that they traded on the Watson family's "struggle credentials". There can be no doubt that the Watson family were a beacon of hope during the apartheid era. They bravely crossed the racial divide to play non-racial sport in a society aggressively focused on building impenetrable and oppressive legislative, social and economic barriers between the race groups in every walk of life. For their stance, the Watson family gained justifiable admiration.

150.2. Sadly, however, it has become clear from all of the evidence, that the late Mr Gavin Watson and Mr Agrizzi perceived the potential for illicit economic gain to be derived from the influence the family had come to wield in the post-apartheid era. The evidence of Mr Vincent Smith is revealing in this regard. It demonstrated how a relationship forged in the struggle for democracy, could be manipulated and transformed into an instrument for corrupt gain. The influence derived from the family's role in the struggle also meant that they enjoyed a competitive advantage in knowing who within the ruling party wielded the greatest levels of influence and where optimal opportunities for corrupt gain were to be found.

150.3. Other features of the South African situation that rendered the state vulnerable to capture of the kind exploited by Bosasa include –

150.3.1. The absence of a culture of ethical dealing in the private business sector;

150.3.2. Problematic social trends in South African society today that tend to place a higher value on individual, material gain and the conspicuous accumulation of wealth, than the value placed on the pursuit of

communitarian, developmental, charitable and egalitarian goals, that characterised the struggle for freedom;

150.3.3. The failure of the state fully and effectively to implement section 195 of the Constitution, which provides –

"195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

STATE CAPTURE: SARS

151. The ultimate question for the Commission to answer is whether there was an organised project of State Capture in respect of the various institutions which it investigated.

152. In order to establish whether a particular institution fell victim to State capture the Commission directed its attention to a number of core themes summarised below.

153. First, the Commission was mindful of the fact that the strategic positioning of key individuals in positions of responsibility is central to the repurposing of State institutions. It was thus important for the Commission to focus on the relationships upon which the alleged State Capture networks were forged and to examine how the repurposing of SOEs was co-ordinated. It was also important to establish who it was who nominated the various individuals to their positions of power and what process was followed which culminated in their appointment to senior positions in the affected SOEs.

154. Many of the individuals who were implicated before the Commission share some or other connection to the Gupta and/or Zuma families. It was thus clear that these relationships were important for understanding what role a broader network of implicated persons may have played in the project of State Capture. Significant in this regards is that Mr Zuma appears to have been determined to see particular individuals fill CEO positions at various SOEs, regardless of whether other candidates had been nominated or even proposed by the Minister of Public Enterprises.

155. Secondly, it was important for the Commission to examine the circumstances which led to the irregular suspension of apparently well-performing senior executives at SOEs, either so as to remove them as stumbling blocks to State Capture, or for allegedly resisting inappropriate agendas and instructions. The Commission looked at any patterns which might be indicative of the potential collusion between Board members and officials within a SOE in effecting these changes. In this regard, the similarities between several significant departures of senior people at various SOEs were obvious.

156. Thirdly, the Commission examined whether SOE governance structures were deliberately changed to facilitate irregular procurement or other decisions for the benefit of particular individuals and entities.

157. Fourthly, the Commission took account of evidence from several witnesses claiming that they were unfairly smeared in public statements, in the press, and on social media after resisting what they understood to be a project of State Capture. These individuals contended that smear campaigns were used as a tactic to silence and discredit those who opposed or threatened to expose State Capture. In particular, the Commission heard evidence that false or misleading information was leaked to certain journalists at the *Sunday Times* in order to discredit specific individuals. It was alleged that these stories put false allegations in the public domain in order to justify suspending these individuals and investigating the false allegations.

158. In pursuing all these lines of inquiry, the Commission paid particular attention to the impact of private sector consultancy arrangements on the effectiveness of internal controls in SOEs and the role which external consultants played in facilitating State Capture. It became clear that the increasing reliance on consulting and advisory services was accompanied by the side-lining or weakening of internal controls, either by diluting their role in key transactions or operational matters or by entirely outsourcing their functions to third parties.

159. All of these over-arching considerations featured in the evidence lead as part of the SARS Workstream and the findings ultimately made by the Commission. These themes and findings as they relate to SARS are highlighted below. The Commission finds that, cumulatively, they demonstrate a very clear case of State Capture at the Revenue Service.

The role played by Bain

160. When Mr Moyane took over as Commissioner of SARS it was internationally recognised as one of the best and most efficient tax administration services in the world. Despite this, the consulting firm, Bain, was contracted to perform consulting services at SARS and ultimately recommended and implemented what it called a "*profound strategy refresh*" and complete organisational restructure in the organisation. Objectively speaking, there was no need for this invasive intervention. Instead, it is apparent there was a plan conceived between Bain and the Executive, particularly Mr Moyane and former President Zuma, to seize SARS for other purposes. The Bain contract with Ambrobrite makes plain that the SOE sector was seen as a strategic priority and would be the subject of leadership and strategic changes for illegitimate purposes. That is precisely what happened at SARS.

161. The high number of meetings between August 2012 in July 2014 between Bain and Mr Zuma demonstrates the level of collaboration between them. Over the period 2012 to 2015, Bain created a series of documents containing far-reaching plans not only to restructure certain State agencies but also to restructure entire sectors of the South African of economy.

162. SARS was a central part of this scheme. Bain developed a restructuring plan with Mr Moyane, which he presented to President Zuma. All of this happened before Mr Moyane had even been appointed as Commissioner.

163. The reality is that there was no need for consultancy services since SARS was a well-functioning, highly effective organisation. The appointment of Bain was a convenient pretext to facilitate the repurposing of SARS.

The appointment of Mr Tom Moyane as SARS Commissioner

164. SARS was a clear example of where former President Zuma was himself directly and personally involved in the plans to take over an SOE.

165. Mr Zuma obviously earmarked Mr Moyane for the position of Commissioner at the outset of the selection process and paid only lip-service to the statutorily mandated appointment procedure. Mr Moyane conceded that President Zuma had informed him at a very early stage that he intended to appoint him to the position of SARS Commissioner. This happened well in advance of the actual appointment, despite the process then underway to select the appropriate person from amongst a large number of candidates.

166. It was Mr Moyane who would do former President Zuma's bidding at SARS.

The axing of key, long serving individuals

167. In the "*First 100 Days*" document created by Bain and Mr Moyane, one of the "*key immediate actions for discussion*" was to take *control* of SARS. Amongst the identified ways to achieve this was to "*build a healthy sponsorship spine to accelerate change and identify individuals to neutralise*".

168. One of Mr Moyane's first actions, only two weeks after taking over at SARS in September 2014, was to disband SARS's entire executive committee on the basis of the apparent expose in the Sunday Times about the existence of a so-called "*rogue unit*". The repeated contention over a period of years that an illegitimate unit existed was eventually definitively debunked by the High Court.

169. Mr Moyane also side-lined senior officials. In August 2015 when a new model for SARS (designed by Bain) was presented to its senior management, this was done as a fait accompli and they were never even consulted about it.

170. Mr Moyane also systematically removed key individuals from SARS who he regarded as potential obstacles to his plans and who therefore needed to be "neutralised". Dramatically, he removed Mr Barry Hore, then chief operating officer, who was key to SARS's proper functioning. Mr Hore had been specifically named in the 100 Days document as a target. After only a few months in his position as Commissioner, Mr Moyane had engineered the resignation of one of SARS's most vital employees.

171. By the end of his first year at SARS, Mr Moyane succeeded in working out of the system at least six other key officials who were crucial to the proper functioning of SARS but who were obstacles to Mr Moyane and his plans.

The appointment of compliant individuals

172. In the place of these long-serving, loyal officials, Mr Moyane appointed people who were happy to go along with his "*restructuring*" plans and who provided no obstacle to his repurposing objective.

The disassembling of SARS' compliance units

173. At the time when Mr Moyane took over at SARS there were a large number of dedicated, specialist units within the organisation which were mandated to assist law-enforcement agencies to control organised crime from a revenue and customs and excise perspective. They had proved to be highly effective and were well functioning enforcement units. However, Mr Moyane's "restructuring" plans involved the dismantlement of enforcement capabilities of a number of these key units.

174. By 2015 the PEMTS subdivision of SARS was at the forefront of investigating organised-crime and was running at least 87 projects. These included investigations into smuggling activities with specific emphasis on tobacco and alcohol related products.

175. Under Mr Moyane's leadership, PEMTS was dismantled and its projects were brought to a close in a very short space of time. The net effect of this was that pending investigations were negatively affected and, in some cases, stopped altogether. The beneficiaries of this where in the vast majority of cases persons who had connections to high-ranking politicians.

176. Project Honey Badger is a good example. It focused on the illicit tobacco trade. The project was making good progress at the time of Mr Moyane's appointment. However, it came to a halt under Mr Moyane's tenure. There is no rational explanation for this other than that it was done in an attempt to protect wrongdoers.

Conclusion

177. Having considered the evidence lead before it, the Commission has concluded that it gives a very clear picture of State Capture along the lines of the principles set out in paragraphs 2182 – 2188 above.

Judicial Commission

of

Inquiry into Allegations

of

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

Report: Part VI

Vol. 2: President Ramaphosa's evidence as President of South Africa

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

PRESIDENT MATAMELA CYRIL RAMAPHOSA'S EVIDENCE

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PRESIDENT MATAMELA CYRIL RAMAPHOSA'S EVIDENCE AS PRESIDENT OF SA

Introduction

178. President Matamela Cyril Ramaphosa ("President Ramaphosa") is the President of the Republic of South Africa. He has held this position since 15 February 2018 after the resignation of President Jacob Zuma on 14 February 2018. Previously, he served as the Deputy President of South Africa during the second term of former President Zuma, from 26 May 2014. Many of the events investigated by this Commission took place during this period.

179. President Ramaphosa is also the President of the African National Congress (ANC). He has held this position since his election at the ANC's 54th National Conference at NASREC in December 2017. He was the Deputy President of the ANC from December 2012. He was previously the Secretary-General of the ANC from 1991 to 1997. Between 1997 and 2012, he held no official political position, although he remained a member of the ANC's National Executive Committee (NEC).

180. President Ramaphosa testified at the Commission in his capacity as the President of the ANC, and former Deputy President of the ANC. President Ramaphosa also deposed to an affidavit dated 22 April 2021. This affidavit was admitted as Exhibit BBB1[82]. Additional documents compiled by the Commission were admitted as Exhibit BBB2[83].

[82] Exhibit BBB1.

[83] Exhibit BBB2.

President Ramaphosa had also previously deposed to an affidavit on 2 July 2019. This was included in Exhibit BBB2.

181. President Ramaphosa also testified at the Commission in his capacity as the President of South Africa, and former Deputy President of South Africa. He deposed to an affidavit dated 24 May 2021.[84]

182. Part 'A' of this document summarises the testimony given by President Ramaphosa in his capacity as President (and former Deputy President) of the of South Africa. Part 'B' of this document summarises the testimony given by President Ramaphosa in his capacity as President (and former Deputy President) of the ANC. There are, however, some overlaps which are unavoidable.

183. He is referred to as 'President Ramaphosa' throughout this text, but it must be borne in mind that his testimony includes events which occurred before his election to this office.

A: President Ramaphosa's evidence given as President of South Africa

184. President Ramaphosa summarised the central questions posed to him by the Commission as "what I knew, when I knew, what I did in response."[85] As the Deputy President and a member of Cabinet between May 2014 and February 2018, President Ramaphosa was at the heart of the National Executive and was privy to various events the Commission has been mandated to investigate. In this capacity he worked with certain individuals who have been directly implicated in corruption and State Capture. Those three questions are critical to the work of the Commission.

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[84] This affidavit was admitted as Exhibit BBB3. Additional documents compiled by the Commission were admitted as Exhibit BBB4.

[85] BBB3-MCR-RSA-008

President Ramaphosa's understanding of state capture

185. President Ramaphosa spoke at length about his understanding of state capture.[86] He confirmed that he believed that state capture exists and emphasised the importance of the Commission's work in bringing it to light. He said:

> "**PRESIDENT RAMAPHOSA:** This commission is the instrument through which we seek as a nation to understand the nature and extent of state capture to confront it. To hold those responsible to account and to take the necessary measures and steps to ensure that such events do not occur ever again in our country."[87]

186. He provided an explanation of his understanding of the phenomenon:

> "**PRESIDENT RAMAPHOSA**: Yes, my own understanding, as well as what I believe has ensued in this Commission, testifies to the existence of state capture, because state capture in the end is a systemic process and it is organised.
>
> And as we have seen it, the way it has happened or manifested itself, it is pursued in a very organised way in the creation of the network of a number of people and in this case it was so well organised that those people had protection so they could proceed with all they needed to do in the form of diverting allocated, say, funds. At last we dealt with that.
>
> But also began to touch on some policy processes, where policies were touched on and even the legal processes were even changed, and it then led to transactions that had to be entered into and some of them, you know, were repetitive type of transactions.
>
> And all of this happened for private gain to advance the interests of a few people and it was all a process of collusion. Those people who were part of the network, colluded with each other in the way they were appointed to these institutions.
>
> It was known that if this one is well-placed here they will have this type of influence. They will then be able to channel certain transactions in that way and that way and then they will rent seek in the process and kickbacks would happen a lot easily. (sic)

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[86] See BBB3-MCR-RSA-008 to BBB3-MCR-RSA-015

[87] Transcript of Day 384, 13.

> And it became – they became emboldened lastly because of the protection that they had. The protection gave them cover and they could proceed with all the acts that they went on with.
>
> So it really centred around filling certain positions with certain people and getting them to act together, collude towards a stated objective which is syphon as much money as you possibly can out of the system so that a few people can then gain. That is how I have understood the evidence that has been put here.
>
> But in the processes, weaken as many institutions as you possibly can and place people who are pliable, who will be able to do our bidding at all times. And that is why they were bold enough to say yes if you do not do this you will be removed. And indeed it ended up with people being removed and people being appointed and all that.
>
> So that is, you know, how I think it manifested itself.[88]

187. In summary, President Ramaphosa's understanding is that state capture:

187.1. is one of many forms of corruption;[89]

187.2. is an organised, systemic process or project;[90]

187.3. is conducted by a network of actors within and outside the state, acting in concert;[91]

187.4. involves the redirection of public resources away from the public good and towards private financial gain;[92]

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[88] Transcript of Day 428, 100–102.

[89] BBB3-MCR-RSA-011 para 22

[90] Transcript of Day 428, 101.

[91] Transcript of Day 428, 99.

[92] Transcript of Day 428, 102–3.

187.5. involves the shaping of the 'basic rules of the game' (laws, rules, regulations, policy-making processes etc.) of government; [93]

187.6. involves the repurposing of governance through the appointments of agents of State Capture to governance structures, so they are positioned to disperse government benefits to selected groups;[94]

187.7. does not include interest groups' influence over policy decisions where no illicit benefits are accrued;[95]

187.8. involves the use of ideological arguments in order to question legitimate institutions and conceal state capture under the guise of transformation;[96]

187.9. is facilitated by the deliberate weakening and exploitation of law enforcement agencies, which fail to hold the perpetrators accountable and are used to persecute the opponents of the state capture project;[97]

187.10. has become entrenched or embedded in the state;[98]

187.11. results in benefits to small vested interests at the expense of the country, and her citizens, as a whole;[99]

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[93] BBB3-MCR-RSA-009 ff. paras 18 and 22

[94] BBB3-MCR-RSA-011 para 25 and BBB1-MCR-ANC-939; Transcript of Day 428, 101–8.

[95] BBB3-MCR-RSA-011, para 23.

[96] BBB3-MCR-RSA-013, para 26.

[97] Transcript of Day 428, 104–6.

[98] Transcript of Day 428, 107.

[99] BBB3-MCR-RSA-014, para 29.

187.12. is an assault on the democratic process and undermines the democratic constitutional order.[100]

188. A letter written by President Ramaphosa in August 2020 to members of the ANC summarises his approach to the concept well:

> "On a hugely different scale, but with the same effect, is the capture of state institutions by public interests facilitated by politicians and officials at the highest level. This 'state capture' is being laid bare through evidence being heard by the Zondo Commission of Inquiry. It reveals a disturbing level of grand corruption, where individuals were placed in various institutions to manipulate procurement and other processes to siphon off massive amounts of funds for a network of politicians, public servants and business people. … Not only has money been stolen, but many of these institutions have been left deeply dysfunctional and some virtually destroyed. It has caused huge damage to the economy and to the capacity of the state.[101]

President Ramaphosa's knowledge of, and response to, state capture

<u>The 'sign posts'</u>

189. President Ramaphosa stated that many of the incidents of corruption or state capture, became known to him as they did to the general public, through: investigative journalism/reporting; Chapter 9 institutions; court cases and disciplinary proceedings; the Gupta leaks; and whistle-blowers. There is no mention of the security establishment or law enforcement agencies.[102]

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[100] BBB3-MCR-RSA-015, paras 30 and 34.

[101] BBB1-MCR-ANC-939

[102] BBB3-MCR-RSA-028 f. paras 60-65

190. He was asked to detail the 'sign posts along the way' which alerted him to the existence of state capture. Although he had previously made certain statements which suggested that he, and the party, were in the dark, he conceded as follows:

> "**PRESIDENT RAMAPHOSA**: I mean there were a number of sign posts and you are absolutely right and if the impression was ever put forward that we really did not know that would be the wrong impression, because there were signs."[103]

191. Three events were dealt with in detail: the removal of Mr Nene[104], the removal of Mr Gordhan[105] and the attempt to set up a commission of inquiry into the banks[106].

192. President Ramaphosa also cited the admission made by Mr Fikile Mbalula in an NEC meeting in 2011 that he had heard about his appointment to Cabinet from the Gupta family as one of these sign posts. This sign, he stated, was not heeded, although it "startled many of us".[107] President Ramaphosa said that this incident did not raise concern at the time and that they should have been more alert to such warning signs. He did not offer an explanation as to why such a serious allegation did not raise concern.[108]

193. He also cited the Waterkloof landing as a sign of state capture, but was unable to offer any more examples. He said that, although they saw these signs ("certain anonymous actions which did not really link up to what was reasonable") the full picture of state

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[103] Transcript of Day 428, 121–22.

[104] Exhibit BBB3, paras 83-4.

[105] Exhibit BBB3, paras 87-90.

[106] Exhibit BBB3, paras 93-106.

[107] Transcript of Day 428, 123.

[108] Transcript of Day 384, 17–18.

capture was not yet apparent. He stressed that those involved in state capture "hid their machinations" and that therefore "one could not immediately join the dots".[109]

The 'five options'

194. President Ramaphosa sought to explain his response to state capture revelations during his Deputy Presidency. He explained that he saw five options: resign, speak out, acquiesce and abet, remain and keep silent, or remain and resist. He said that he was morally opposed to acquiescing or keeping silent. He said that, if he and others had resigned, "there would have been even fewer impediments to the unfettered expansion of the state capture project". He said that, if he had been confrontational, he would have been removed and therefore would have been unable to prevent state capture. He chose, therefore, to 'remain and resist' as he believed it to be the only way he could contribute to ending state capture and corruption in government.[110]

195. I put to President Ramaphosa that, although he could have been fired from the National Executive (i.e. Cabinet), he would have remained in his position as Deputy President of the ruling party, which is a powerful position. He did not respond except to say that the Deputy President is still "part of the collective".[111] 'Speaking out' or being more confrontational during his deputy presidency would not have entirely curtailed his ability to effect change.

196. President Ramaphosa did not state outright who would have removed him from his position had he opted to be more 'confrontational', but only one person had the power to dismiss him: former President Zuma.

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[109] Transcript of Day 428, 123–24.

[110] BBB3-MCR-RSA-029 ff. paras 66-75. Transcript of Day 428, 92–95.

[111] Transcript of Day 428, 95–96.

197. President Ramaphosa was asked to be more specific, but he remained somewhat circumspect. Although he previously stated that he would have been dismissed had he spoken out, President Ramaphosa would only state that former President Zuma could have fired him, as the President can fire any member of Cabinet:

> "**ADV PRETORIUS SC:** Yes. Well, implication of that and it arises elsewhere in your statement as well, Mr President, is that when you say you would have been fired, the implication is clear, there is only one person who could have fired you in that time.
>
> **PRESIDENT RAMAPHOSA:** That is right.
>
> **ADV PRETORIUS SC:** That was President Zuma.
>
> **PRESIDENT RAMAPHOSA:** Indeed.
>
> **ADV PRETORIUS SC:** You have been cautious and in naming names but that is clear he was part of the State Capture Project.
>
> **PRESIDENT RAMAPHOSA:** Well, yes, I mean I could have been fired and…
>
> **ADV PRETORIUS SC:** Who would have fired you?
>
> **PRESIDENT RAMAPHOSA:** Who would have fired me? The president often acts also. I mean, I guess he would have fired me.
>
> **ADV PRETORIUS SC:** Yes.
>
> **PRESIDENT RAMAPHOSA:** It is a given. He could have. Could have fired me, I should say. I guess he never got close to that but he could have. Like now I can fire others. So, ja, that was the case."[112]

198. He did not state that former President Zuma had given him any reason to believe that he would dismiss him. This may mean that President Ramaphosa believed that the former President was complicit in the State Capture project and would abuse his power to further it. A further implication is that he could not count on the ruling party to defend him in such a scenario.

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[112] Transcript of Day 428, 96–97.

199. President Ramaphosa stressed that he did not wish to hold on to his position at all costs, but that he felt he had to remain in office in order to bring about change.[113] He explained that his ability to 'resist' was curtailed by the political reality of the time. His decision to remain as Deputy President – and subsequently to run for President of the ANC – was based on his desire to "shift the balance of forces". It is worth quoting from his statement in full:

> "It needs to be remembered that governance is not merely a technical function. It is an inherently political function, which is influenced by the dynamics and the exercise of political power. My ability and the ability of others to resist and ultimately to bring about changes that would end state capture relied to a large measure on the political balance of forces within the Executive, within the governing party and within society more broadly. That was among the reasons why I chose to remain in the position of Deputy President, why I worked with others through the democratic process to shift the balance of forces, and why, ultimately, I agreed to make myself available for the position of President of the African National Congress at its 54th National Conference in December 2017."[114]

200. The implications of President Ramaphosa's remarks are profound. They imply that State Capture involved a *political project* and not isolated, opportunistic acts of corruption. They also imply that that project enjoyed powerful support in the state and in the party, as President Ramaphosa was forced to 'resist' within government, choosing his battles, and could not challenge state capture outright. President Ramaphosa had to tread carefully because he was in the minority, or at least did not have enough power to prevail. The natural conclusion is that, during this period, the most dominant political faction – the ANC under President Zuma – permitted, supported and enabled corruption and State Capture.

201. This can all be inferred from his testimony. For example:

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[113] Transcript of Day 428, 98.

[114] BBB3-MCR-RSA-032 para 76

> "**ADV PRETORIUS SC**: … It is overwhelmingly probable that because you were forced with others into a strategic response, there was a large proportion, perhaps even the majority of the governing party that was complicit. That did follow the path by those who led the State Capture project.
>
> **PRESIDENT RAMAPHOSA:** Yes. Yes, indeed. I mean there were those who were really actively involved and there were those who were acquiescent and there were those who chartered a different path.
>
> **ADV PRETORIUS SC:** And those who were acquiescent in the sense that they must have known what was going on but were content to let it run its course.
>
> **PRESIDENT RAMAPHOSA:** Indeed."

202. Although he agreed that certain members of the governing party were complicit in state capture, he did not name any individuals he believed to have been complicit, nor did he provide evidence of their complicity.

203. President Ramaphosa was asked to elaborate on what actions he took to resist state capture as part of his strategy to 'remain and resist'. He cited his actions after the removal of Mr Nene, his actions after the removal of Mr Gordhan and the attempt to set up a commission of inquiry into the banks. He also testified that there were many 'silent' battles fought behind the scenes, but did not name any further examples.[115]

204. President Ramaphosa was asked why, if a substantial part of the executive were not complicit in state capture, the opposition to State Capture was not more vocal and more frequent. President Ramaphosa's response was that those who were opposed to State Capture chose be strategic by working within the system and 'chose their battles' carefully.[116]

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[115] Transcript of Day 428, 138–39, 143.

[116] Transcript of Day 428, 144–45.

205. It was again put to President Ramaphosa that this explanation only makes sense if "the former President was firmly in control":

> "**ADV PRETORIUS SC:** They were compelled to be strategic in their responses because they knew if they spoke out and were any more vocal than they were, they would be removed or dismissed or however dealt with. The implication of that is that the ruling party under Mr Zuma was he is governing effective, well majority may be the wrong word, but it was in control. It was not in aberrance or a mistake. It was actually what was running the country.
>
> **PRESIDENT RAMAPHOSA:** That is certainly true. The ANC was in control. It was the governing party which means it was in control."[117]

206. President Ramaphosa went on to say that many of his colleagues chose to be strategic and that their apparent silence should not be construed as complicity, as they had to be careful to choose when to act so as to make the largest impact.[118] He did not dispute the contention that this proves that the ruling party and the Executive were firmly controlled by those complicit in State Capture. These 'resisters' would not have been forced to operate carefully and strategically if this were not the case.

President Ramaphosa's interactions with the Guptas

207. In response to a request from the Commission, President Ramaphosa deposed to an affidavit on 2 July 2019[119], which details his interactions with the Gupta family.[120] This was also discussed during his testimony.[121]

208. President Ramaphosa met the Gupta brothers on three or four occasions:

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[117] Transcript of Day 428, 145–46.

[118] Transcript of Day 428, 146–47.

[119] Exhibit BBB2.

[120] BBB2-MCR-ANC-ADDITIONAL-001

[121] Transcript of Day 427, 107–8; and Transcript of Day 428, 166–69. See also Transcript of Day 428, 89–90.

208.1. During a media briefing held by the ANC Officials after the 53rd Conference of the ANC, on or about 12 December 2012. Nothing of any consequence was discussed.

208.2. At a similar event after the 2014 national elections. Nothing of any consequence was discussed.

208.3. At a meeting with the ANC officials in April 2016, at which Tony Gupta was present. The Guptas had requested this meeting to discuss the closure of their bank accounts. President Ramaphosa stated that he raised the issue of the Waterkloof landing at this meeting and told Mr Gupta that they had "placed the former President in an invidious position". Mr Gupta's reaction was that permission for the plane to land had been obtained and given by the Indian High Commissioner.

President Ramaphosa's interactions with Bosasa

209. In the same affidavit, President Ramaphosa detailed his interactions with individuals associated with Bosasa. This was not discussed during his testimony. However, Bosasa's funding of the ANC and his internal campaign for the position of President of the ANC was discussed.

210. In summary:[122]

210.1. Mr Angelo Agrizzi previously worked for a subsidiary of a group of companies of which President Ramaphosa was Chairperson. He did not recall ever interacting with him.

[122] BBB2-MCR-ANC-ADDITIONAL-001

210.2. Mr Gavin Watson and Mr Trevor Mathenjwa attended a fundraising event hosted by President Ramaphosa as guests of Dahau Technology. Dahau Technology had made a donation to the Adopt-A-School Foundation (a partner NGO of the Cyril Ramaphosa Foundation) by buying a table at the event on 14 October 2017.

210.3. Mr Watson and Mr Mathenjwa attended the wedding of President Ramaphosa's son Mr Andile Ramaphosa on 4 August 2018 in Uganda. He did not recall interacting with them at this event.

210.4. Mr Watson and his family were involved in the United Democratic Front in his home town of Port Elizabeth, so he may have interacted with them, but did not recall ever doing so.

210.5. In August 2016, President Ramaphosa toured a call centre at which volunteers were assisting the ANC in its campaign in the local government elections. The call centre was situated at the Bosasa headquarters, although he stated that he had no knowledge of the source of funding for the centre at the time.

Appointments and dismissals

211. President Ramaphosa was also asked to address Cabinet appointments and removals relevant to the Commissions Terms of Reference.

<u>The removal of Mr Nene</u>

212. Mr Nhlanhla Nene testified at the Commission that he was removed from his position as Minister of Finance by former President Zuma because of his opposition to certain corrupt deals, including the nuclear deal, the Denel Asia deal, and the SAA Airbus swap

transaction.[123] He provided substantial evidence of the circumstances in the period leading up to his removal which – being corroborated by documentary and other evidence – drove the Commission to the same conclusion.

213. His testimony aligns with that of Mr Mcebisi Jonas, who testified that he was offered the position of Finance Minister, along with a substantial bribe, by the Guptas in exchange for his co-operation with the Guptas. Mr Nene was considered to be too obstructive. Mr Gordhan also testified that he believed Mr Nene was removed to enable the capture of the National Treasury.

214. Mr Nene testified that, when the former President met with him to advise him of his imminent removal as Finance Minister and redeployment to the BRICS Bank, he said, "we discussed this matter with the Top 6 and we agreed that we should put you there."[124] Indeed in a communique to the media on Friday 11 December 2015, former President Zuma explained his decision in the following terms:

> "the urgency of the changes in the leadership of the National Treasury was because nominations needed to be sent to Shanghai in terms of the Head of the African Regional Centre of the New Development/BRICS Bank which will be based in Johannesburg."[125]

215. President Ramaphosa stated that he was not consulted by the former President regarding Mr Nene's removal, nor was he involved in any discussion, and this was not a decision taken by the Top Six. He was merely informed prior to the public announcement by the former President.[126] This corresponds with affidavits provided to the Commission by other ANC national officials at the time, Ms Yasmin Duarte, Dr

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[123] Nene, Exhibit K1, 3, para. 7.

[124] Nene, 47, para. 138.

[125] Duarte, Exhibit GG(f)16, FP-JGZ-2014, para. 19.

[126] BBB3-MCR-RSA-036 f. para 84.6 and 84.8-84.10

Zwelini Mkhize and Mr Gwede Mantashe, who confirmed that no such thing was discussed by the Top Six.[127]

216. President Ramaphosa stated that he believed that Mr Nene's resistance to the nuclear deal may have informed the former President's decision to replace him.[128] The removal of Mr Nene signalled to President Ramaphosa that "the process of state capture had now succeeded to an extent that the most strategic organ of the state, Treasury had now been captured."[129] President Ramaphosa did not initially indicate who he believed to be doing the 'capturing', although he made a concession during his testimony:

> **"ADV PRETORIUS SC:** Well, the question if I may then is that when such an institution of state is captured, as you say, had now been captured, is a significant, to put it mildly, step in the execution of the State Capture project, correct?
>
> **PRESIDENT RAMAPHOSA:** It is.
>
> **ADV PRETORIUS SC:** That happened, that step was taken by whom? Who dismissed? It is an obvious question, but there has to be a name.
>
> **PRESIDENT RAMAPHOSA:** No, it is former President Jacob Zuma who did dismiss the minister.
>
> **ADV PRETORIUS SC:** Took that very important step.
>
> **PRESIDENT RAMAPHOSA:** Indeed."[130]

217. President Ramaphosa was also asked about 'Operation Spiderweb', a purported intelligence report which claimed that National Treasury had been captured by Apartheid-era intelligence operatives as well as 'white monopoly capital' in order to control the country's finances. Mr Nene discussed this during his testimony. Although he did not know its origin, President Ramaphosa stated that the report was false and

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[127] Duarte, Exhibit GG(f)16, FP-JGZ-2013 ff, paras 15, 25; Mantashe, Exhibit GG(f)17, FP-JGZ-2020 f, paras 14, 23; Mkhize, Exhibit GG(f)18, FP-JGZ-2023, para. 5.

[128] Para 84.8

[129] BBB3-MCR-RSA-039 para 86.3

[130] Transcript of Day 428, 128.

was used to discredit those who were resisting the capture of the National Treasury. He said: "it is quite clear that it was part of the machinations of State Capture to damn Treasury."[131]

The appointment of Mr Des van Rooyen as Minister of Finance

218. President Ramaphosa stated that he was never consulted by former President Zuma on the appointment of Mr van Rooyen, and was notified as a matter of courtesy on 9 December 2015 shortly before the appointment was announced.[132] This again corresponds with the affidavits of Ms Duarte, Mr Mantashe and Mr Mkhize.[133]

The appointment of Mr Pravin Gordhan as Minister of Finance

219. Shortly after the appointment of Mr Des van Rooyen as Minister of Finance, Mr Lungisa Fuzile, then Director-General of National Treasury, asked to meet with President Ramaphosa urgently. They discussed Mr Fuzile's interactions with the newly appointed Minister and the advisers Mr van Rooyen had arrived with. Mr Fuzile expressed concern about the future of National Treasury, with regard to the impact this development would have on the future ability of National Treasury to properly exercise its functions.[134] Mr Fuzile testified at the Commission about these matters in great detail.[135] Mr Fuzile also deposed to a confirmatory affidavit, which was included as an annexure to President Ramaphosa's affidavit.[136] President Ramaphosa was concerned about what Mr Fuzile

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[131] Transcript of Day 428, 128–30.

[132] BBB3-MCR-RSA-038 para 85

[133] Duarte, Exhibit GG(f)16, FP-JGZ-2013 f., paras 15–17; Mantashe, Exhibit GG(f)17, FP-JGZ-2021, paras 16–17; Mkhize, Exhibit GG(f)18, FP-JGZ-2023, para. 5.

[134] BBB3-MCR-RSA-038 para 86.1

[135] See Lungisa Fuzile, Exhibit P(a); Exhibit P2; Transcript of Day 27 (21 November 2018); Transcript of Day 28 (22 November 2018); Transcript of Day 50 (18 February 2019). Mr van Rooyen has contested certain elements of Mr Fuzile's evidence, but that is not strictly relevant here. See Transcript of Day 248 (11 August 2020).

[136] MCR7.

told him. This, along with the negative impact the announcement had on the markets, prompted him to act.[137]

220. President Ramaphosa then met with Ms Yasmin Duarte, the Deputy Secretary-General of the ANC, and informed her that he would resign his position as Deputy President of the Republic as he believed that "the process of state capture had now succeeded to an extent that the most strategic organ of the state, Treasury had now been captured." Ms Duarte conveyed this message to former President Zuma.[138]

221. President Ramaphosa stated that there was then a "flurry of consultations" that involved some of the officials of the ANC expressing disquiet at the appointment of Mr van Rooyen. This is again consistent with the affidavits of Ms Duarte, Mr Mantashe and Dr Mkhize.

222. President Ramaphosa, according to his statement, went with Ms Duarte and Mr Mantashe to suggest to President Zuma that he should appoint Mr Gordhan as Minister of Finance instead. He argued that Mr Gordhan's appointment would be in the best interests of the country and would help to calm the financial markets.[139] Ms Duarte stated in her affidavit that she went with President Ramaphosa to see former President Zuma to "express [their] apprehension", though she did not mention Mr Mantashe and Mr Mantashe did not mention the meeting in his affidavit.[140]

223. President Ramaphosa was asked why Mr Nene was not reinstated to the position of Minister of Finance when it was decided that Mr van Rooyen ought not to remain as Minister of Finance. President Ramaphosa believed that President Zuma would no

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[137] BBB3-MCR-RSA-038 para 86.2.

[138] BBB3-MCR-RSA-039 para 86.3.

[139] BBB3-MCR-RSA-039 para 86.4.

[140] Duarte, Exhibit GG(f)16, FP-JGZ-2014, para. 23; Mantashe, Exhibit GG(f)17.

longer be able to work with Mr Nene and that President Zuma "would no longer be able to have a relationship of trust with Mr Nene."[141] I noted that this was inconsistent with a public statement issued by former President Zuma at the time, in which he spoke very highly of Mr Nene. The Chairperson remarked:

> "**CHAIRPERSON:** the reason why you were asked to deal with the question was because if he had performed so well as the Minister of Finance, one would have thought that firstly he would not be released easily but if he was released and the markets reacted the way they did, it would be very logical for the President to bring him back. But that was important because it is important to analyse that, because when Mr Nene gave evidence before this Commission, he said that story was a fabrication. Effectively he was saying there was nothing like I was really being released to go to that position."[142]

224. President Ramaphosa responded that the former President's statement at the time was "political speak."[143]

225. It is notable that President Ramaphosa believed that the removal of Mr Nene signified that "the process of state capture had now succeeded to an extent that the most strategic organ of the state, Treasury had now been captured."[144] In his Opening Statement, President Ramaphosa elaborated:

> "**PRESIDENT RAMAPHOSA:** To me, the capture of National Treasury was almost the final culmination of state **capture**, because you capture National Treasury, then you have basically captured the entire state because that is where the money is, that is where it is controlled."[145]

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[141] BBB3-MCR-RSA-039 para 86.5

[142] Transcript of Day 428, 113.

[143] Transcript of Day 428, 113.

[144] BBB3-MCR-RSA-039 para 86.3

[145] Transcript of Day 427, 54.

226. President Ramaphosa "surmised from the circumstances of Mr Nene's departure" that his opposition to the nuclear deal proceeding without government being certain of its affordability "may have" informed the former President's decision.[146]

227. President Ramaphosa cited his intervention in this case as one example of his 'resistance' to State Capture while Deputy President, and believes that it was successful:[147]

> I believe the decision by President Zuma to replace Mr van Rooyen with Mr Gordhan was critical in preventing further damage to the economy and safeguarding the integrity of National Treasury.[148]

<u>The removal of Mr Gordhan and Mr Jonas</u>

228. President Ramaphosa stated that he knew no more about the alleged targeting of Minister Gordhan by law enforcement agencies than anyone else, and that it was not within his power to do anything about the decisions of those agencies.[149] Yet in August 2016, when Mr Gordhan was being pursued by the Hawks, President Ramaphosa spoke at the funeral of Mr Makhenkesi Stofile in the Eastern Cape, where he reportedly said that "Gordhan's integrity was unquestionable." He was quoted as saying:

> "The Minister of Finance is today facing what could be an arrest. It should concern us. When the government works well, it should **not** be a government that wages a war against itself … I am here to pledge my total confidence to the Minister of Finance."[150]

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[146] BBB3-MCR-RSA-037 para 84.8

[147] Transcript of Day 427, 53; Transcript of Day 428, 138.

[148] Transcript of Day 427, 55.

[149] BBB3-MCR-RSA-041 para 88

[150] BBB4-MCR-REF-BUNDLE-1318

229. President Ramaphosa testified that he was not consulted about, but merely informed of, the Cabinet reshuffle announced by former President Zuma on 30 March 2017, in which Mr Gordhan and Mr Jonas were removed from the Ministry of Finance.[151]

230. President Ramaphosa detailed his recollection of the events leading up to and including that reshuffle as follows:

230.1. According to Ms Duarte, Mr Mantashe and Dr Mkhize, in the months leading up to the reshuffle, former President Zuma had indicated to the ANC Officials that his relationship with Mr Gordhan was deteriorating. He related a number of incidents when Mr Gordhan allegedly showed disrespect towards him and undermined his authority in Cabinet meetings.[152] (Mr Gordhan, however, did not have the same impression of the relationship.[153)] President Ramaphosa testified that he had observed some deterioration of the relationship between the two and that "it did not just suddenly happen".[154]

230.2. Before effecting the Cabinet reshuffle, the former President met with the ANC officials, including President Ramaphosa.[155]

230.3. In this meeting, former President Zuma referred to what he described as an intelligence report, in which it was asserted that Minister Gordhan and Mr Jonas were plotting to undermine the government. Their removal was purportedly as

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[151] BBB3-MCR-RSA-041 para 89

[152] Duarte, Exhibit GG(f)16, FP-JGZ-2011, paras 9–11; Mantashe, Exhibit GG(f)17, FP-JGZ-2017, paras 9–11; Mkhize, Exhibit GG33, FP-JGZ-3317, para. 4.

[153] Gordhan, Exhibit N1, 60, para. 161.2.

[154] Transcript of Day 428, 116 f.

[155] BBB3-MCR-RSA-041 para 89.1

a result of the allegations contained in this report.[156] This is consistent with the accounts of Ms Duarte, Mr Mantashe and Dr Mkhize.[157]

230.4. President Ramaphosa described the report as a "photographed piece of paper" which was "3 pages in very large font" and "very badly drafted".[158] The document is known as 'Operation Checkmate'.

230.5. President Ramaphosa raised his concerns – that the Minister and Deputy Minister were being removed based on an unsubstantiated and spurious intelligence report – directly with former President Zuma during this meeting:

230.6. He said: "I not only told the former President that he disagreed with him on his reasoning to remove the Minister and Deputy Minister of Finance, but I told him that when asked, particularly by the media, I would articulate my objection publicly – which I did".[159]

230.7. He said that some ANC Officials also publicly objected.[160]

230.8. At this meeting, former President Zuma proposed appointing Mr Brian Molefe to the position of Minister of Finance. The Officials objected as Mr Molefe did not have the right "profile" and had left Eskom under a cloud.[161] President

[156] BBB3-MCR-RSA-042 para 89.5

[157] Duarte, Exhibit GG(f)16, FP-JGZ-2011, paras 10–12; Mantashe, Exhibit GG(f)17, FP-JGZ-2017, paras 10–12.

[158] BBB3-MCR-RSA-042 para 89.5, Transcript of Day 428, 135.

[159] BBB3-MCR-RSA-042 f. para 89.7, Transcript of Day 428, 136.

[160] BBB3-MCR-RSA-043 para 89.8

[161] BBB3-MCR-RSA-044 para 92

Ramaphosa's account is consistent with that of Ms Duarte, Mr Mantashe and Dr Mkhize.[162]

231. President Ramaphosa considered this case to be one example of his resistance to state capture from within the state and party. He said that he felt it necessary to speak out, "especially because of the serious consequences this decision had on our economy and our country".[163] However, President Ramaphosa did not explain why he considered the removal of Mr Gordhan and Mr Jonas to be a part of state capture, nor did he theorise about the former President's motivations.

232. On 31 March 2017, President Ramaphosa stated publicly that he did not support President Zuma's decision to fire Minister Gordhan. One newspaper quoted him as saying: "I think it is totally unacceptable that he fired someone like Gordhan, who has served the country excellently, *for his own gain and survival*."[164] In another interview, when asked whether he would resign, President Ramaphosa responded: "No, I will not. I am staying to serve our people in government. I've made my views known and there are quite a number of other colleagues and comrades who are unhappy about this situation."[165]

Cabinet

233. President Ramaphosa outlined those "aspects of the [cabinet] system contained in the Constitution that are relevant to [his] statement."[166] The details of how the Cabinet works and the role of Cabinet structures were set out in an affidavit by Dr Cassius Lubisi, who

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[162] Duarte, Exhibit GG(f)16, FP-JGZ-2011, para. 12; Mantashe, Exhibit GG(f)17, FP-JGZ-2017, para. 12; Mkhize, Exhibit GG33, FP-JGZ-3317, para. 5.

[163] BBB3-MCR-RSA-043 para 89.8, Transcript of Day 427 p. 55

[164] BBB4-MCR-REF-BUNDLE-1340, emphasis mine.

[165] BBB3-MCR-RSA-042 f. para 89.7

[166] BBB3-MCR-RSA-019 to BBB3-MCR-RSA-027

was Cabinet Secretary for a decade ending in August 2020, which was attached to President Ramaphosa's affidavit.[167]

234. The evidence of Mr Ismail Momoniat concerning the functioning of Cabinet was put to President Ramaphosa. Mr Momoniat stated that on certain important occasions – the nuclear deal, the appointment of the SARS Commissioner, the Gupta bank accounts matter and others – the disciplined and lengthy procedures ordinarily followed by Cabinet by way of preparation were not followed.

> "**ADV PRETORIUS SC:** These were three what are referred to as walk-in matters. So without the benefit of two weeks of preparation, proper documentation, proper research, proper information, cabinet was presented with a decision to go ahead with the nuclear deal. At least issue a request for proposals subject to certain conditions. For an amount that was in the trillions, three times our gross domestic project product. The decision to intervene, to protect the interest of a private family, the closure of the bank accounts matter and an important issue, the appointment of the Commissioner of SARS which in the context of your evidence in 2014 was a very important step. What is your comment on what quite frankly Mr Momoniat describes as an abuse of cabinet process in order to get very important decisions by?"[168]

235. President Ramaphosa's evidence confirmed that the nuclear deal and the bank accounts matter were dealt with as described by Mr Momoniat. He agreed that Cabinet processes had been manipulated:

> "**PRESIDENT RAMAPHOSA:** Yes, there was a process where cabinet processes were both abused and misused. They resulted in very important matters arriving, if I can use that word, colloquially arriving in cabinet and being presented to be more precise to cabinet without proper processing, without the normal gestation period that various matters go through where matters are properly discussed and properly canvassed after having been researched properly, the cabinet member being properly drafted with all the attachments that bear testimony or evidence to what

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[167] Annexure MCR4,

[168] Transcript of Day 428, 152–55.

> needs to be put before cabinet and then cabinet committee discusses and thereafter, it then gets into the cabinet system.
>
> So the ones that Mr Pretorius has alluded to went under the fence. Under that fence and that could have led to various real difficulties and challenges for the country."[169]

236. Dr Lubisi explained the principles of collective responsibility, cabinet solidarity and cabinet confidentiality in his affidavit. When Cabinet decisions are taken in situations where, for example, vital members of the executive are not in attendance (as in the bank accounts matter) and important issues are discussed on a walk-in basis and without the required preparatory materials and discussions in sub-committees (as in the bank accounts and nuclear matters), these decisions must still be defended and protected by all members of the Cabinet. The public would have no way of knowing that these processes had been manipulated, had the Commission not investigated.

237. This evidence is important. It shows that under former President Zuma, decision making processes at the highest level were abused in order to facilitate a certain agenda.

238. Ultimately, the President was empowered to:

238.1. appoint all members of the Cabinet at his discretion;

238.2. approve agendas for all Cabinet meetings;

238.3. chair the Cabinet and enforce, or allow the contravention of, its rules and procedures at his discretion;

238.4. rely on the principles of Cabinet confidentiality and solidarity to obscure his involvement in certain decisions;

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[169] Transcript of Day 428, 152–55.

238.5. rely on the principle of collective responsibility to avoid accountability for certain decisions.

239. The way the Cabinet was run under President Zuma's administration, therefore, provides an important insight into how state capture could have occurred.

240. President Ramaphosa stated that this has been improved under his Presidency:

> "**PRESIDENT RAMAPHOSA:** We now have a cabinet process and system that will prevent that from happening. Matters that have to be presented to Cabinet have to be properly canvassed."[170]

Matters concerning National Treasury

241. Ministerial appointments and dismissals are covered above.

<u>The nuclear build programme</u>

242. President Ramaphosa detailed his knowledge of the nuclear build programme in his affidavit. Unfortunately, there was no time for this issue to be discussed during his appearances. According to him:

242.1. During the Cabinet meeting held on 10 June 2015 the then Minister of Energy, Ms Tina Joemat-Pettersson, briefed the Cabinet on the nuclear procurement process. It was decided that Ms Joemat-Pettersson should, in consultation with the Minister of Finance (Mr Nene) and the National Nuclear Energy Executive Coordination Committee (NNEECC), submit a plan dealing with the financial implications, the proposed funding model and the risks and mitigation strategies applicable to the nuclear build programme. Furthermore, it was agreed that the

[170] Transcript of Day 428, 154.

Minister of Energy would commence the actual procurement process in the Second Quarter of 2015, in consultation with the NNEECC.171

242.2. During the Cabinet meeting held on 9 December 2015, a 'walk-in' (a matter which was not on the initial agenda or in the Chairperson's notes which are distributed by the Secretariat to the President and Deputy President) was raised by Ms Joemat-Pettersson. The presentation made by the Minister of Energy included recommendations on the Nuclear New Build Programme's financial implications, its proposed funding model, the risks identified, and mitigation strategies. President Ramaphosa understood that National Treasury considered the proposal to be unaffordable. At this meeting, the Cabinet decided that the Department of Energy should issue a Request for Proposals for a Nuclear New Build Programme of 9.6GW of nuclear power, with the final funding model to be informed by the response of the market to the Request For Proposals and thereafter submitted to the Cabinet for final consideration.[172]

243. President Ramaphosa remarked: "In essence, the decision made by Cabinet at the time was that the project would not go ahead until and unless we were sure of its affordability."[173] President Ramaphosa's characterisation of the situation is somewhat problematic, however. The problems with his account are detailed here, although unfortunately time constraints did not permit the questioning of President Ramaphosa on these matters.

243.1. The decision to proceed with the procurement process cannot reasonably be described as decision to "not go ahead".

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[171] BBB3-MCR-RSA-035 para 84.2 f.

[172] BBB3-MCR-RSA-035 f. para 84.4

[173] BBB3-MCR-RSA-036 para 84.5

243.2. Treasury had already determined that the procurement could not be affordable when this decision was made. Treasury therefore objected to the procurement of 9.6GW of nuclear energy and proposed a “phased” or “scaled” approach. President Ramaphosa did not explain why Cabinet decided to proceed when Treasury had already strongly contested the viability of the 9.6GW procurement, and had provided feasibility, affordability and sustainability studies advising against procuring 9.6GW.

243.3. The Cabinet minute cited by President Ramaphosa reflects that the exchange rates cited in the Cabinet memorandum needed to be updated to reflect “current” values at that time. However, the gross underestimation of the exchange rates led to the cost implications in the memorandum being understated by about 40%. This would necessarily have had a material impact on the conclusions and the recommendations in that memorandum.

243.4. Documents provided to Parliament as well as the testimony of Mr Nene and Mr Fuzile show that the Department of Energy deliberately misled the Cabinet about the costs and risks of nuclear and misrepresented the findings of various cost analysis and feasibility studies. Nobody appears to have been held accountable for this.

243.5. As demonstrated in the judgment of the Court in *Earthlife Africa v Minister of Energy*, the determination that 9.6GW of nuclear energy needed to be procured was unlawful and unconstitutional, as no public consultation had taken place.[174] Cabinet did not ensure that adequate consultation had occurred.

[174] *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017)

243.6. The public statement released after the Cabinet meeting made no mention of the decision on the nuclear procurement.[175] When confronted, the Cabinet spokesperson was not aware of the decision.[176]

244. President Ramaphosa did agree with the evidence of Mr Ismail Momoniat that Cabinet processes were abused in the lead-up to the nuclear deal and other important matters.

245. There are certain topics that were not dealt with. Notably, President Ramaphosa did not comment on whether the former President was personally driving the process forward with reckless urgency, which has been testified to by Mr Nene, Mr Fuzile and Mr Gordhan.

246. President Ramaphosa did not overtly state whether he considered the nuclear deal to be (either partly or wholly) corrupt or a part of State Capture. President Ramaphosa did state, however, that he believed that Mr Nene's resistance to the nuclear deal may have informed the former President's decision to replace him, and that he believed Mr Nene's removal to signify the capture of the state.[177] This, along with this passage from President Ramaphosa's statement, implies that he did indeed believe the deal to be tainted in some way, and that the deal would have proceeded if Mr Nene had not resisted:

> "Significantly the Commission will take note of the fact that the nuclear deal as was proposed at the time was not approved nor implemented. I believe Mr Nene's efforts and the inputs made during discussions in Cabinet meetings at the time, specifically in relation to the cost of the project, contributed to the project not proceeding. The consistent insistence by National Treasury, including Mr Nene, that the financial viability of the project be factored into decisions going forward delayed what could well have been a fait accompli."[178]

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[175] BBB4-MCR-REF-BUNDLE-1329

[176] BBB4-MCR-REF-BUNDLE-1346

[177] Para 84.8

[178] BBB3-MCR-RSA-036 para 84.6, emphasis mine

The Oakbay bank accounts matter

247. The Commission has heard extensive evidence on the closure by banks of bank accounts of Gupta owned entities, which is the subject of Term of Reference 1.7.

248. President Ramaphosa's evidence, Mr Gordhan's evidence, as well as the affidavit provided to the Commission by Mr Momoniat to which President Ramaphosa refers, provide the most comprehensive account of Cabinet's intervention in the matter.

249. President Ramaphosa's recollection of events is that:

249.1. The issue was raised during a discussion on Current Affairs at the 13 April 2016 Cabinet meeting by Mr Mosebenzi Zwane and Mr van Rooyen. The Ministers conveyed their "dismay" in relation to what they considered to be the unequal treatment by banks and auditing firms of clients, and advocated for the urgent reform of the banking system. Current Affairs is a standing agenda item intended to address matters of public interest and immediate national importance. President Ramaphosa considered it highly unusual for a matter relating to a private company to be raised and decided on by the Cabinet.[179]

249.2. Cabinet decided that Mr Zwane, Ms Mildred Oliphant and Mr Gordhan would prepare a briefing memorandum on the implications of the decision of certain banks and auditing firms to close or withdraw services to Oakbay Investments. Notably Mr Gordhan was not present at this meeting.[180]

[179] BBB3-MCR-RSA-045 f. para 94- 96

[180] BBB3-MCR-RSA-045 para 95

249.3. The matter was discussed at a meeting held between the ANC national officials (Top Six) and the Gupta brothers after the Cabinet meeting. This meeting was discussed in detail by Mr Mantashe during his testimony.

249.4. On 22 June 2016 President Ramaphosa was requested to chair the Cabinet meeting, despite President Zuma being in attendance. According to President Ramaphosa, this happens "on occasion", for example, when the chairperson has an urgent matter that may require him to step out of the meeting. Mr Zwane submitted a memorandum during the meeting which suggested that a commission of inquiry be established to inquire into the conduct of the banks. President Ramaphosa objected to this proposal as "it would be wholly inappropriate for a Commission of Inquiry to be established for the purpose of addressing unique challenges faced by one private company in the banking sector".[181]

249.5. The memorandum was withdrawn by the Minister before it could be discussed. The reasons given were that the memorandum required further refinement and consultation. The Cabinet agreed that the memorandum should focus on the conduct of the banking/financial sector companies in relation to the closure of the accounts, especially as it related to client confidentiality. The Cabinet also approved that the relevant Ministers brief the President and the Deputy President prior to the memorandum being brought back to Cabinet for discussion. This briefing however never took place.[182]

249.6. At the following Cabinet meeting on 6 July 2016 the same agenda item was tabled and a reformulated memorandum submitted. Mr Zwane briefed the

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[181] BBB3-MCR-RSA-046 f. para 98-99. Mr Zwane's statement appears later herein.

[182] BBB3-MCR-RSA-046 f. para 98-99

Cabinet on the memorandum. Mr Zwane referred to his team as an IMC, but it was in fact a Task Team. Mr Zwane indicated that the Minister of Finance, Mr Gordhan, had not attended the meetings with the stakeholders. The Cabinet noted the progress made and that the memorandum required more work to be done. It was also agreed that several further memoranda be prepared by Mr Gordhan relating to the banking and finance sector.[183]

249.7. President Ramaphosa chaired the Cabinet meeting on 31 August 2016 in his capacity as Acting President. The Cabinet noted that the memorandum tabled at the previous meeting had been leaked and published in the media that morning. It was agreed that the Secretary to Cabinet would, in collaboration with the State Security Agency, investigate the security breach and report back to the Cabinet. Dr Lubisi indicates in his affidavit that he met with the Director-General of State Security at the time, Mr Arthur Fraser, and requested that the matter be investigated, but no report was ever forthcoming despite multiple reminders sent to the Director-General.[184] (An email on HDDH indicates that Bell Pottinger and the Gupta family were involved in this leak.)

249.8. On 2 September 2016 Mr Zwane issued a statement with several "inaccuracies", which Dr Lubisi details in his statement.[185] Later that day the Presidency issued a statement clarifying that Mr Zwane's statement did not reflect government's position and that the statement was issued in his personal capacity and not on behalf of the Task Team or Cabinet.[186]

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[183] BBB3-MCR-RSA-047 f. para 100-103

[184] BBB3-MCR-RSA-048 para 104

[185] See BBB3-MCR-RSA-166 f. Mr Zwane's statement appears is quoted later herein.

[186] BBB3-MCR-RSA-048 f. para 105

249.9. Mr Gordhan took several steps to prevent government intervention in this case, including making a court application in October 2016 for a declarator that he could not interfere in the banks' decisions on account facilities. Before taking this step, Mr Gordhan sought the advice of President Ramaphosa, who agreed and gave him his full support.[187]

250. In his testimony, President Ramaphosa stated that there was a very strong push to establish a Commission of Inquiry into the banks, which was resisted by himself and other members of Cabinet:

> "**PRESIDENT RAMAPHOSA:** The view was [to] set up a commission of inquiry because there was collusion in the way they [the banks] acted, without actually really proving it, and it was supposed to be a judicial commission of enquiry, and some of us said that will be the wrong thing to do, because immediately one of the strongest institutions that we have in our country, in our economy, is one of the best banking systems in the world. … So it looked like a sledgehammer was going to be used to kill a mosquito. So there was a very strong push, a strong thrust to help this commission, and we resisted that, and a number of others, and there were quite a number of instances where like this quotation says that it is those battles that we know nothing about, but there were battles."

251. President Ramaphosa describes the intervention sought as "as an attempt to abuse state power in favour of a private company and in furtherance of its interests".[188] He also considers his opposition to Cabinet's intervention in the matter to be an example of his resistance to State Capture.[189] However it must be noted that Cabinet has no power to appoint a judicial inquiry in the first place, as this power resides solely with the President.[190]

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[187] BBB3-MCR-RSA-049 para 106

[188] BBB3-MCR-RSA-049 para 106

[189] Transcript of Day 428, 138–39.

[190] BBB4-MCR-REF-BUNDLE-1144 para 168. Of course what is true is that the President would seek Cabinet support for such a decision.

252. President Ramaphosa and others, resisted by insisting that "we should instead just find out exactly why these accounts are being closed."[191] It is not clear why President Ramaphosa thought it was acceptable for Cabinet to make such inquiries of the banks, nor did he explain what he thought would result from this process. As was made clear in the testimonies of Mr Ian Sinton and others, this process was used to intimidate the banks' representatives and legitimise a narrative being used by the Gupta family. The involvement of Cabinet was highly questionable.

253. President Ramaphosa did not say why he believed there was such a strong push to establish a commission of inquiry into the conduct of the banks. It is therefore illuminating to view Mr Zwane's proposals in full.

254. The Cabinet minute of 22 June 2016, provided by President Ramaphosa, states that Cabinet approved the development of measures aimed at ensuring the "effective transformation of the financial and banking sectors." In view of this, Cabinet mandated the Minister of Finance to submit memoranda concerning:[192]

> "
>
> (i) The possible establishment of an independent Banking Tribunal to assist aggrieved customers or alternatively to expand the mandate of the Banking Ombudsman with a view to addressing actions referred to in the memorandum;
>
> (ii) Consider reviewing the Financial Intelligence Centre Act (FICA) with a view to strengthening, reporting and addressing the concerns raised in the memorandum as well as possible unreasonable practices against "Politically Exposed Persons" (PEPs);
>
> (iii) Consider the existing provisions for clearing banks with a view to allowing more banks to participate; and
>
> (iv) Further investigation into the generic nature of the existence of similar decisions the banks and auditing firms undertook, adversely affecting companies or individuals as well as possible collusion in the banking and financial sector."

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[191] Transcript of Day 428, 140.

[192] BBB3-MCR-RSA-203 f.

255. Unfortunately, President Ramaphosa did not include Mr Zwane's memorandum in his statement. Mr Momoniat notes in his affidavit that neither Mr Gordhan nor the Treasury have ever actually seen this memorandum.[193] However, Mr Zwane did release a statement on 2 September 2016, which states that Cabinet had resolved:[194]

> "To recommend to the President that given the nature of the allegations and the responses received, that the President consider establishing a Judicial Enquiry in terms of section 84(2) (f) of the Constitution.
>
> To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. Evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements, and as a South African company, Oakbay had very little recourse to the law. Looking into these mandates and strengthening them would go a long way in ensuring that should any other South African company find itself in a similar situation, it could enjoy equal protection of the law, through urgent and immediate processes being available to it as it required by the Constitution;
>
> To consider the current Financial Intelligence Centre Act and the Prevention of Combatting of Corrupt Activities Act regarding the relevant reporting structures set out therein as evidence presented to the IMC was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury complied with these and other pieces of legislation. The IMC was also briefly ceased [sic] with the implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy. This was not something that fell within the mandate of the IMC and should therefore be considered by the Judicial Enquiry;
>
> To re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and in so doing, to create a free market economy. The IMC was presented with evidence suggesting that the South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transactions cleared, thereby creating an oligopoly. Evidence was also presented that these institutions may have placed undue pressure on banks that sought to assist the company by subjecting them to unwarranted auditing processes. It is unclear why the Reserve Bank will not

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[193] Momoniat, Affidavit (Exhibit BBB4), BBB4-MCR-REF-BUNDLE-1141, para. 162.

[194] BBB4-MCR-REF-BUNDLE-1339

> issue new banking licences to other banks and this would need to be given careful attention by the Judicial Enquiry as it did not fall within the purview of the IMC."

256. Although this statement was repudiated by Mr Zuma, its contents were never actually disputed, and are somewhat similar to the Cabinet minute. Mr Zwane's statement provides insight as to the motivations behind the proposals which were adopted by Cabinet, and what the proposed commission of inquiry would be mandated to cover.

257. Mr Momoniat's affidavit, to which President Ramaphosa refers and does not dispute[195], notes that not only were the Guptas in dire need of banking services at the time, but they were simultaneously attempting to purchase a bank, a process which is controlled by National Treasury and the Reserve Bank. In fact, the Guptas had submitted an application to purchase a bank (Vardospan) to the Reserve Bank the day before Mr Zwane's statement was released.[196] Mr Momoniat poses the possibility that "Mr Zwane wanted to weaken our financial regulatory laws and have a judicial inquiry against the SA Reserve Bank and National Treasury to enable Gupta associates to buy a small bank so that they could continue with their suspicious transactions:"[197]

> "Buying a small and privately-held bank (that is not listed on any stock exchange) was a good solution for the Gupta-businesses. Their only problem was to get the approval of the Registrar of Banks at the SA Reserve Bank and Minister of Finance. They had failed to seize control of the Ministry of Finance, so needed Mr Zwane and this task team to do so, by getting Cabinet to adopt their recommendations."[198]

258. Elaborating on the leak during his testimony, President Ramaphosa said:

> "**PRESIDENT RAMAPHOSA:** It was one of those furious events where a cabinet memo was leaked, and we have never really had such in our cabinet system, that

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[195] See BBB3-MCR-RSA-049 para 106 and BBB3-MCR-RSA-051 para 112

[196] HDDH contains many emails concerning the attempt to set up Vardospan bank by the Guptas and Salim Essa, as well as their frustrations with the process.

[197] BBB4-MCR-REF-BUNDLE-1202 para 317

[198] BBB4-MCR-REF-BUNDLE-1203 para 320

> all of a sudden this one was leaked and it was leaked to achieve a particular end and a particular narrative which was being directed from somewhere."[199]

259. While he did not specify who he believed to be directing this particular narrative, the natural inference is that the memo was leaked by the Gupta family, with the assistance of one of more members of Cabinet, possibly Mr Zwane and/or Mr van Rooyen.

260. Mr Momoniat further argued:

> "The sequence of events leading to this Cabinet decision suggests to me that the decision to "engage" the banks was a highly orchestrated attempt by the then President and Mr Zwane to protect the looting activities of the Gupta family."[200]

261. Furthermore, the ANC in this case was acting knowingly in concert with Cabinet in this unlawful intervention into the affairs of the banks. The Top Six which directed the ANC to engage with the banks at the behest of Oakbay included President Zuma and Deputy President Ramaphosa, who were party to the actions of Cabinet and the Inter-Ministerial Committee.[201] Mr Mantashe testified that the ANC knew it was being dealt with by government but decided that "We cannot deal with this issue from one angle."[202] It is difficult to believe that the ANC Officials acted completely independently of the Cabinet 'task team'.

262. President Ramaphosa did not give any evidence about the involvement of the former President in these events. He also did not testify about the motivations behind the actions of Mr Zwane and the others involved. He did, however, characterise the saga as an example of State Capture, and an example of successful push-back against State Capture. We can infer that he considered Mr Zwane and the other Ministers, and

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[199] Transcript of Day 428, 156.

[200] Momoniat, Affidavit (Exhibit BBB4), BBB4-MCR-REF-BUNDLE-1115, para. 109.

[201] Pg 64

[202] Gwede Mantashe, Transcript of Day 31 (27 November 2018), 91.

possibly the former President, to be abusing their power to benefit the Gupta family, and to be complicit in State Capture.

Law enforcement

263. President Ramaphosa described in strong terms the role of law enforcement agencies in State Capture:

> "Law enforcement agencies were at the vital to the success of state capture. Their weakened state crippled them in their obligation to root out and punish those guilty of corruption and state capture. Evidence that has previously been provided to this Commission makes this plain. The weakening of law enforcement agencies allowed corruption to go unpunished, perpetrators to be protected and the public purse to be looted without consequence. It also led to experienced personnel leaving the ranks of these agencies, thus denuding them of the experience needed to investigate and successfully prosecute the sometimes complex schemes of those involved in state capture."[203]

264. During his testimony, he added an explanation of how these entities were repurposed:

> "**PRESIDENT RAMAPHOSA:** And those who were upright and good, either left of they were booted out and that weakened those institutions. And maybe less experienced people then came in and some were compromised and some maybe not compromised but the weakening then happened and it all cascades downwards."[204]

265. He stated that he had no knowledge of the reasons for the delays or failures of the Anti-Corruption Task Team and National Anti-Corruption Forum.[205]

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[203] BBB3-MCR-RSA-077 para 169

[204] Transcript of Day 428, 106.

[205] BBB3-MCR-RSA-102 para 214

266. President Ramaphosa detailed a number of steps he had taken as President to address this situation, including: [206]

266.1. Governance and leadership changes at the NPA, SARS[207] and other law enforcement institutions.

266.2. The development of a more transparent appointment process for the NDPP.[208]

266.3. The establishment of the Investigative Directorate within the NPA to investigate and prosecute complex corruption cases.

266.4. The establishment of the Nugent Commission of Inquiry to investigate governance failures at SARS.

266.5. The establishment of the Fusion Centre, which allows law enforcement entities to share information and cooperate.

266.6. Other institutional changes.

Intelligence

The High Level Review Panel

267. President Ramaphosa gave evidence about the appointment of the High Level Review Panel (HLRP), chaired by Dr Sydney Mufamadi. He said that he appointed the HLRP because:

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[206] BBB3-MCR-RSA-078 ff. paras 170-175. Transcript of Day 427, 57–58.

[207] South African Revenue Services.

[208] National Director of Public Prosecutions.

> "the centrality of law enforcement agencies to the state capture project required that care be taken in identifying the faults, fissures and vulnerabilities that allowed for our intelligence services to be used to further state capture before any decision could validly be made on how to fix these."[209]

268. President Ramaphosa claimed that the implementation of the HLRP recommendations are "at an advanced stage."[210] In this regard, his testimony was that:

268.1. Investigations were under way into the allegations made to the Panel[211];

268.2. A Ministerial Implementation Task Team (MITT) was established in July 2020 and mandated to "unpack the recommendations of the Panel into a concrete plan of action and coordinate the implementation of the recommendations"[212];

268.3. Illegal operations identified both in the HLRP Report and the investigations conducted by the SSA leadership were being identified and terminated, and investigations continued;[213]

268.4. The remit of the Auditor-General had been expanded so that covert activities are now subject to scrutiny by the Auditor-General;[214]

268.5. Deliberations continued on the Panel's recommendation to split up the SSA into distinct domestic and foreign intelligence services.[215]

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[209] BBB3-MCR-RSA-082 para 177.2

[210] BBB3-MCR-RSA-082 para 177.1

[211] BBB3-MCR-RSA-083 para 177.3

[212] BBB3-MCR-RSA-083 para 177.4

[213] BBB3-MCR-RSA-084 para 177.5

[214] BBB3-MCR-RSA-084 para 177.5

[215] BBB3-MCR-RSA-084 para 177.6

269. President Ramaphosa was asked why it was necessary for the HLRP to be established as, surely, the government should have known what was going on at the SSA. President Ramaphosa responded that many state institutions were debilitated by State Capture, and that the SSA was "compromised and operating under the milieu of state capture".[216]

270. President Ramaphosa was also asked about the hampering of the Veza investigation into the SSA, including how essential evidence and documentation were put under lock and key and not made available to investigators. In response, President Ramaphosa said that "some arrangements had to be made about the safekeeping of those documents":

> "To my knowledge those documents are in safekeeping and they are going to form part of this process of intensive investigation going forward. So it might seem like the process has been stopped or has been scuttled but it will not – all these things will come to light."[217]

271. President Ramaphosa was also asked about the removal of Ms K and Mr Y from the investigations, as well as the fact that Mr Jafta's contract as Acting Director-General was allowed to expire after he gave evidence at the Commission. President Ramaphosa said that Mr Jafta's removal was not motivated by any agenda but was done in terms of regulatory processes concerning the renewal of acting appointments.[218]

272. It was put to President Ramaphosa that the claim made in his statement – that the implementation of HLRP recommendations is at an advanced stage – was not a fair description, as the investigations have been halted, the documents have been put under

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[216] Transcript of Day 428, 31–33.

[217] Transcript of Day 428, 43.

[218] Transcript of Day 428, 44–45.

lock and key, and the investigations have to start again. President Ramaphosa agreed.[219]

273. Certain statements made by former Minister of State Security, Ms Ayanda Dlodlo, and the current Deputy Minister in the Presidency in charge of state security, Mr Zizi Kodwa, were also put to President Ramaphosa. Ms Dlodlo and Mr Kodwa claimed that the problems in the SSA were caused by external forces. It was put to President Ramaphosa that the state of the SSA was in fact a direct result of those in charge of State Security, which President Ramaphosa conceded.[220]

274. President Ramaphosa testified that he did not know anything about allegations made by Ms K that there was an attempt to prevent evidence on Project Justice to the JSCI.[221]

275. President Ramaphosa was asked about the SSA's refusal to cooperate with law enforcement agencies, and attempts to withhold evidence from them. He characterised the issue as a problem of implementation and coordination between government entities, which occurred because each law enforcement agency has a "sense of proprietorship" over what they control. He confirmed that the documents were safe and that "the various processes that need to unfold will unfold."[222]

276. It was put to President Ramaphosa that, far from there being cooperation with law enforcement agencies and far from the HLRP recommendations being at an advanced stage of completion, the whole process basically needs to start again. In response, President Ramaphosa stated:

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[219] Transcript of Day 428, 45–46.

[220] Transcript of Day 428, 47–48.

[221] Transcript of Day 428, 48.

[222] Transcript of Day 428, 50–51.

> "We do indeed have to basically start again but it will also be a continuation of work that has been done including those who have been taken off the job who know these matters intimately."[223]

277. President Ramaphosa added that the removal of Veza investigators would be followed up.[224]

278. President Ramaphosa was asked if the unrest which occurred in July 2021 could be linked to operatives trained and armed by the SSA Presidential Security Project. President Ramaphosa felt that this proposition was "not unreasonable" and that there was a need to investigate the "lapse" of the SSA and how it "manifested itself from a certain beginning right up till what happened in July."[225]

279. It was put to President Ramaphosa that the events of the state security saga over a period from 2007 to now could hardly be termed a lapse. President Ramaphosa did not disagree. He stated:

> "All these things are a consequence of either deliberate incapability of the state or state capture itself. So an accumulation of all this has resulted in the challenges that we face now."[226]

280. Ultimately, far from being at an "advanced stage of completion", this evidence shows that HLRP recommendations regarding internal investigations have come to a halt. The reason seems to be interference from the highest powers in the SSA and the Ministry. There appear to have been no consequences for this interference.

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[223] Transcript of Day 428, 52–53.

[224] Transcript of Day 428, 53.

[225] Transcript of Day 428, 53–54.

[226] Transcript of Day 428, 55.

Mr Mahlobo and Mr Fraser

281. Despite very serious findings made by the HLRP, not only of a general nature but against Mr Mahlobo in particular, Mr Mahlobo was appointed by President Ramaphosa as Deputy Minister of Water, Sanitation and Housing in May 2019. President Ramaphosa was asked to explain this appointment. President Ramaphosa explained that he was waiting for the outcome of the Commission's work.[227] It was put to him that the question was not whether Mr Mahlobo was guilty of the allegations, but whether he was suitable for appointment in the first place. President Ramaphosa only repeated that he was waiting for the Commission's report.[228]

282. The HLRP cited as a key finding that Minister Mahlobo had presided over the SSA at a time when it showed "an almost complete disregard for the Constitution, policy, legislation and other prescripts" and that "there was more than enough information before the Panel that then Minister Mahlobo, in particular, involved himself directly in operations." It is unclear why President Ramaphosa would await further investigation.

283. Very serious findings were made against Mr Fraser over his co-ordination of the PAN programme and later during his tenure as Director-General. Yet in April 2018, he was redeployed by President Ramaphosa to be the Director-General of Correctional Services. President Ramaphosa was asked to explain this appointment. He confirmed that he knew of some of the allegations against Mr Fraser at the time, but would only say that he was waiting for the Commission's report.[229]

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[227] BBB3-MCR-RSA-069 para 160; Transcript of Day 428, 57.

[228] Transcript of Day 428, 57.

[229] Transcript of Day 428, 61–62.

284. I stated that the release of the Commission's report was in no way a final end point, and that there is a high risk that nothing will be done for a long time while legal processes were ongoing:

> "**CHAIRPERSON**: I think it has almost certain that when this Commission has completed its work and handed its report over to you and the report has become public, as I take it, it will be at some stage that there will be review proceedings and I would not be surprised if even before it finishes its work, papers are being drawn to take some of the findings that it will make on review. At that stage people might say but, Mr President, you cannot do anything, you must wait until the outcome of the review process, so will you wait for that as well? … You ought to be alive to a situation which could end up with no action being taken for a quite a number of years because some people will be believing that well, nothing should be done until those processes of reviews, court processes and appeals have been exhausted and I think that some of the challenges that we have had in our country are challenges where people have – people who are supposed to make decisions have unnecessarily waited for court processes which decide different issues to issues that they have to decide, you know? A court process will take six years, will take ten years and in the meantime nothing is done when something should be done.[230]
>
> The President acknowledged this but merely asserted that "we are going to take your findings very seriously."[231]
>
> The President's position, then, is that it is acceptable for him not only to retain but to actively appoint persons against whom serious allegations have been made, and who have been implicated in more than one official investigation in serious misconduct and criminality:
>
> **"ADV PRETORIUS SC:** Well, it does not seem unfair, Mr President, to draw the conclusion that not only cabinet, which is under your control, but appointments to high office within government continued to include those against whom serious and known allegations have been made, Mr Mahlobo and Mr Fraser, at the very least, is that correct?
>
> **PRESIDENT RAMAPHOSA:** Yes, they are on that radar screen and in a way, whether my judgment on this is found to be flawed or not, I decided that I want to

[230] Transcript of Day 428, 58–59.

[231] Transcript of Day 428, 58–59.

> wait for this process to complete and fortunately, it is coming to an end and I shall soon have a report in my hand."[232]

285. This is a concerning statement, particularly given his admission that the SSA, under the leadership of Mr Mahlobo and Mr Fraser, "was compromised and operating under the milieu of state capture."[233] Even if Mr Mahlobo and Mr Fraser have not been found guilty of criminal offences, the state of the SSA under their leadership – which President Ramaphosa freely acknowledged was both dire and dangerous – was surely a reflection on their competence and integrity. It is therefore difficult to understand how they could reasonably be considered suitable for appointment to senior positions in the state.

The relocation of state security to the Presidency

286. President Ramaphosa was asked why he decided to take the SSA under his direct control within the Presidency. President Ramaphosa explained that he was seeking to "realign" state security, to protect, professionalise and "disinfect it of any partisanship".[234]

The IGI

287. President Ramaphosa was asked to respond to allegations made by the Inspector-General of Intelligence, Dr Dintwe, concerning the consultation process that took place before Dr Dintwe gave evidence at the Commission. He did so in his statement, although there was not enough time to discuss this during the hearings.

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[232] Transcript of Day 428, 61–62.

[233] Transcript of Day 428, 32.

[234] Transcript of Day 428, 63–65.

288. Section 7(8) of the Intelligence Services Oversight Act 40 of 1994 regulates the Inspector-General of Intelligence's access to, and disclosure of, intelligence and information related to the performance of his functions.

288.1. It is self-evident that the IG may disclose any unrestricted intelligence or information without notifying any Service or the President. However, section 7(8)(b)[235] sets three constraints on the IG's power to disclose restricted intelligence or information. Applied to the present context, the IG had a duty to consult the President and the Ministers before disclosing any restricted intelligence or information. This required that he engage in good faith and demonstrate a receptiveness to any concerns they may raise about the disclosure of classified intelligence or information to the Commission.

288.2. This duty to consult requires more than mere written notice, but it does not require approval for the intended disclosure. The duty to consult does not impose agreement as a requirement for the decision or action. Consultation does not preclude disclosure if there is disagreement between the IG, on the one hand, and the President and Ministers, on the other hand. Rather, the IG retains the discretion to disclose the relevant intelligence or information after consultation notwithstanding any disagreement that may arise.

289. Prior to any consultation with the Ministers, Dr Dintwe was approached by the Commission, and began to engage with the Commission's investigators and, the Commission's legal team.

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[235] Section 7(8) Notwithstanding anything to the contrary contained in this or any other law or the common law, the Inspector-General- (b) may, if the intelligence or information received by him or her in terms of paragraph (a) is subject to any restriction in terms of any law, disclose it only- (i) after consultation with the President and the Minister responsible for the Service in question; and (ii) subject to appropriate restrictions placed on such intelligence or information by the Inspector-General, if necessary; and (iii) to the extent that such disclosure is not detrimental to the national interest.

290. On 22 July 2020 the IGI sent a letter to the relevant Ministers and to the President. In it, he said that the letter "serves to discharge the onus of consultation with the relevant persons as provided for in section 7(8)(b)(i) of the Oversight Act".[236]

291. As part of his cooperation with the Commission's investigations, the IGI handed over three lever arch files to the Commission on 28 July 2021. He subsequently retrieved these files from the Commission on 8 August 2020. The consultation process which ensued with the President and Ministers was lengthy and not without difficulty.

292. Dr Dintwe in his evidence said that "an accusation" was made that he had disclosed information to the Commission prior to the consultative process. This was, amongst other issues, allegedly used by the three Ministers to lodge a complaint against him with the President and to recommend that he should be suspended. He then received a letter from the President informing him that this complaint had been referred to the JSCI. This, in Dr Dintwe's view, was done in order to intimidate him and prevent him from testifying at the Commission.

293. President Ramaphosa disagreed with the IGI's version, and was of the opinion that the IGI was not blameless, because the IGI was himself in breach of the governing legislation by handing over files to the Commission "in blatant disregard of the legislative prescripts."[237] He also said that it was "uniquely unfortunate that the IGI chose in his statement to this Commission to insinuate improper conduct on my part" and denied that he had taken any steps to intimidate Dr Dintwe or prevent him from testifying. His intention had always been to protect national security.[238]

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[236] BBB3-MCR-RSA-128 para 242.1

[237] BBB3-MCR-RSA-130 para 242.5

[238] BBB3-MCR-RSA-128 para 240 f.

294. President Ramaphosa set out detailed evidence of the consultation process and the subsequent events involving Dr Dintwe. The facts presented by President Ramaphosa are not disputed.

295. On the facts, the IGI did in fact disclose information to the Commission prior to the consultation process. The letter which he sent to the relevant Ministers on 22 July 2020 did not discharge his statutory obligation of consultation. In this respect, the IGI was at fault, which means that the "accusation" that he had disclosed information prematurely was not baseless.

296. The following should be borne in mind:

296.1. The Commission has a fact finding mandate, and relies on the cooperation of witnesses, especially public functionaries. The IGI's co-operation with the Commission was consistent with his duty to act within the constraints of the law and his duty to report criminal activity. It further reflects the openness and accountability that is characteristic of our new constitutional order based on a culture of justification rather than a culture of authority.

296.2. The Commission's mandate is similarly focused on inquiring into and reporting on criminal activity albeit of a particular kind, namely allegations of state capture, corruption and fraud. The SSA evidence, including that of the IGI, is critical to the Commission's work as allegations of State Capture concern the kinds of activity that would pose a threat to national security and thus fall within the SSA's mandate. The IGI had a duty to cooperate with the Commission.

296.3. In addition, the Constitution and the law do not afford protection to criminal activity in the security services. Criminal activity cannot be shielded from public scrutiny through continued classification under the guise of national security.

On the contrary, the Constitution requires the security services to act in compliance with the law and, where it falls short, to be held to account.

296.4. This has historically not been followed. There has historically been an overreliance on secrecy in the SSA. This has often been to conceal criminality. One of the HLRP's five high-level findings was "the disproportionate application of secrecy in the SSA stifling effective accountability".

296.5. It was only "restricted" information on which the IGI had to consult. However, some of the evidence which the IGI shared with the Commission revealed criminality and, as such, the classification thereof should not have been used as a reason for it not to be shared by the IGI with the Commission.

296.6. Furthermore, on 7 October 2020, the Commission received a letter from the Presidency which stated, inter alia, that "declassification of the information they [the Commission] refer to or seek to make use of in fulfilling their terms of reference is not a prerequisite to them having access to or making use of the information at issue."[239]

297. Dr Dintwe had a specific oversight mandate, as well as a duty to assist the Commission. In ensuring that the information did not reveal trade craft of the SSA or the names of any operatives, Dr Dintwe took into account national security concerns. The material provided by Dr Dintwe to the Commission was damning, and some of it revealed outright criminality. Dr Dintwe has testified to the effect that he had attempted to expose corruption at SSA by reports to the JSCI, to the Minister, and to the Security Cluster of the Government but that these were never acted upon. The corruption and criminality, he claimed, continued unabated. The response by the Ministers and the President

[239] CR-REF-BUNDLE-046.2

therefore appears to be disproportionate, and the evidence suggests that the conduct of the Ministers amounted to intimidation and obstruction of the investigations.

298. The President stated that "the seriousness of the allegations that had been made by the three Ministers were such that I could not wait until a more appropriate or convenient time to refer these to the body responsible for overseeing the work of his office. My actions were informed by the seriousness of the conduct that I had witnessed, the seriousness of the allegations made, the constitutional obligation to ensure national security, and the need to ensure that this is done promptly."[240]

The public discourse

299. In detailing his understanding of state capture, President Ramaphosa highlighted

> "the use of ideological impetus to transform society where socio-economic inequalities exist (in developing countries in particular) to question legitimate institutions and conceal state capture under the guise of reformation or transformation."[241]

300. He was asked to comment on the role of disinformation and misinformation in the context of state capture. A 2017 statement made by President Ramaphosa concerning the terms 'Radical Economic Transformation' and 'White Monopoly Capital' was put to him.

301. President Ramaphosa stated that Radical Economic Transformation is a legitimate term describing a program fostered by the governing party, but that it had been bastardised and mutated by 'people doing wrong things'. This narrative was spread by media entities outside South Africa in order to achieve certain political objectives and advance State Capture. President Ramaphosa referred to Bell Pottinger, a UK-based firm which had

[240] BBB3-MCR-RSA-135 para 250

[241] BBB3-MCR-RSA-013 para 26

been implicated in driving the spread of these narratives on behalf of the Gupta family. He added that these narratives had been used to destroy certain people, particularly through the spread of rumours on social media and media leaks.[242]

Addressing State Capture

302. President Ramaphosa detailed a number of steps taken to address both the causes and consequences of corruption and State Capture.

303. In his estimation, the primary means of preventing corruption is through the appointment of 'fit for purpose' persons, strengthening of procurement systems, and systematic implementation of the legislation controlling public funds, such as the PFMA and MFMA.[243]

304. The National Anti-Corruption Strategy was approved by Cabinet in November 2020. It has six pillars:[244]

304.1. Promote and encourage active citizenry, whistleblowing, integrity and transparency in all spheres of society;

304.2. Advance the professionalisation of employees;

304.3. Enhance governance, oversight and consequence management in organisations;

304.4. Improve the integrity and credibility of the public procurement system;

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[242] Transcript of Day 428, 119–21.

[243] BBB3-MCR-RSA-097 para 208

[244] BBB3-MCR-RSA-099 para 211. Transcript of Day 428, 163 f.

304.5. Strengthen anti-corruption agencies;

304.6. Protect vulnerable sectors with effective risk management.

Institutional changes

305. President Ramaphosa stressed the "critical need to strengthen the capacity of the state, at all its levels".[245] The steps already taken to this end include:

305.1. Efforts to improve transparency and coordination between Ministries and Departments in all spheres of government.[246] (No date given.)

305.2. The conclusion of performance agreements with Ministers.[247] (No date given.)

305.3. The draft national implementation framework towards the professionalization of the public service was approved by Cabinet for public consultation. This policy aims to ensure that "the public service is shorn of political partisanship and that the most qualified individuals enter its ranks."[248] (Late 2020.)

305.4. Ongoing work to implement the National Development Plan to improve performance of government structures.[249]

305.5. Re-establishment of the Policy and Research Services branch in the Presidency, which had previously been dismantled.[250] (No date given.)

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[245] BBB3-MCR-RSA-073 para 168

[246] BBB3-MCR-RSA-073 para 168.1

[247] BBB3-MCR-RSA-073 para 168.2

[248] BBB3-MCR-RSA-074 f. para 168.3, 168.6 f. Transcript of Day 428, 159 f.

[249] BBB3-MCR-RSA-074 f. para 168.4 f.

[250] BBB3-MCR-RSA-077 para 168.8. Transcript of Day 428, 160 f.

305.6. Various steps to re-capacitate and strengthen law enforcement institutions.

305.7. Steps taken to implement the recommendations of the High Level Review Panel concerning the SSA and intelligence.

305.8. Changes made to the school of government to improve training of civil servants and members of the Executive.[251]

305.9. The institutionalisation of the District Development Model, which would address the 'silo mentality' problem in government.[252]

305.10. The reform and reclaiming of SARS "from the capture it has been subjected to."[253]

305.11. The May 2018: Establishment of the Presidential State-Owned Enterprises Council (para 194)

<u>As Deputy President</u>

306. In terms of SOE reforms, he detailed the following in his statement:

307. In December 2014 he was tasked to oversee the turnaround of SAA, SAPO and Eskom.

308. In February 2015, Cabinet approved twelve reforms drawn from the report of the Presidential Review Committee (PRCs) on SOEs, and established an IMC led by the

[251] Transcript of Day 428, 158 f.

[252] Transcript of Day 428, 160.

[253] Transcript of Day 428, 161.

President to build on the work done in respect of SAA, SAPO and Eskom. The SOE IMC was to report back to Cabinet in June 2015.[254]

309. By the Cabinet *lekgotla* of August 2016, the following had been done[255]:

309.1. A draft shareholder policy

309.2. A draft handbook for SOE board appointments

309.3. A draft policy to address the empowerment of SOE boards

309.4. The Committee of DGs and a Technical Committee to support the IMC had been established and were operational.

309.5. A draft framework for private-public partnerships for infrastructure projects

309.6. The establishment of an SOE Council

Conclusion: What did he know, when did he know it, and what did he do about it?

310. President Ramaphosa aptly summarised the central questions posed to him by the Commission as: "what I knew, when I knew [it], what I did in response."[256] His answers go some way towards answering those questions, but unfortunately leave some important gaps.

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[254] Para 188/189.

[255] Para 191.

[256] BBB3-MCR-RSA-008

311. The President readily acknowledged the existence of State Capture as a coordinated project and he said he had taken certain steps to right the wrongs of State Capture.

312. However, the question of what he knew is still somewhat opaque. President Ramaphosa stated that State Capture became known to him as it did to the general public, through: investigative journalism/reporting; Chapter 9 institutions; court cases and disciplinary proceedings; the Gupta leaks; and whistle-blowers.[257] He mentioned very little in the way of personal, first-hand evidence, and stressed that those involved in State Capture conducted their business in secret.

313. His version was that he saw nothing during this time – except for the removal of Mr Nene, the removal of Mr Gordhan, and the attempt by some Ministers to intervene in the bank accounts matter – that raised alarm bells. He attributed this, in part, to a 'silo' style of work within the Executive, which meant that as Deputy President he had no real insight into the workings of government.

314. President Ramaphosa said that it was only after the release of the Gupta leaks that he and others realised that there was state capture. He said that before that, there were indications.

315. It must be noted that serious and credible allegations of corruption against the Gupta family and several powerful individuals, including former President Zuma, were consistently raised by journalists and civil society from as early as 2010. A timeline of media articles compiled by the Commission shows this very clearly,[258] and President Ramaphosa himself credits journalists for playing a key role in uncovering corruption and State Capture.[259] For a long stretch of time, these allegations went unanswered. It

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[257] BBB3-MCR-RSA-028 f. paras 60-65

[258] BBB2-MCR-ANC-ADDITIONAL-616

[259] Transcript of Day 385, 194.

is not clear when President Ramaphosa concluded that these concerns were valid and needed to be acted upon, and what was the tipping point in reaching that conclusion.

316. The question what did he know must be accompanied by another question: ought he to have known? The wealth of evidence before this Commission suggests that the answer is yes. There was surely enough credible information in the public domain, long before December 2015, to at least prompt him to inquire and perhaps act on a number of serious allegations. As the Deputy President, he surely had the responsibility to do so.

317. The next question is: what did he do about it? President Ramaphosa's 'five options' have been analysed above. He testified that he chose to remain within government in order to resist State Capture. He gave three examples of this resistance. This explanation – that he was working from within to resist State Capture – suffers from his inability to provide any further examples of resistance.

318. He testified that he would have been dismissed if he had been more confrontational. This contention was analysed above. He must have believed that former President Zuma was complicit in State Capture and was prepared to dismiss his Deputy President in order to protect the State Capture project. Yet he did not give any evidence as to why he believed this was the case. How did he arrive at his fifth option? Had he tried to act in some way against corruption and State Capture, and been rebuked? Had he seen others face these consequences from the former President?[260]

319. He must have believed that the ruling party would not defend him in such a case and that the ANC would have protected a President who fired his Deputy President for the crime of confronting corruption. This aligns with President Ramaphosa's broader contention that his ability to act was curtailed by the political reality of the time – the

[260] Of course, he testified about the dismissal of Mr Nhlanhla Nene which he said he associated with the project of state capture.

'balance of forces' in power in the ruling party and in the National Executive. This is an indictment on the party and its leadership.

320. However, his intervention in preventing the permanent appointment of Mr Des van Rooyen as Finance Minister was effective. It worked, despite the balance of power. He was not dismissed and did not face any consequences for his action. It is difficult, then, to understand why other allegations in the public domain – in some cases made by loyal ANC members themselves – continued to go unaddressed for so long.

321. President Ramaphosa asserted that those who pushed back from within were able to curb some of the excesses of State Capture. Was this enough? It is indisputable that State Capture continued during the years that President Ramaphosa was 'resisting', and that the consequences (to the economy, to government, to our society) have been severe. Money continued to be moved through illicit channels to private beneficiaries. Corruption continued to entrench itself within the institutions of the state. Considering the dire straits we find ourselves in, the effectiveness of President Ramaphosa's decision to remain within the state and party is not a given.

322. While no counterfactual can be proven, we must ask whether these processes could have been arrested sooner had more powerful figures, like President Ramaphosa, been willing to act with more urgency. They instead chose to work 'strategically' from within. The crux of President Ramaphosa's 'balance of forces' explanation is that any other approach would not have been allowed by the ruling party, and he and others were unwilling to damage the ANC by publicly going against it.

Evidence given as President of the ANC

323. Understanding the role of the ANC is vital to understanding State Capture in South Africa. It has been the only governing party since the advent of democracy, and

specifically during the years under review. It has been responsible for deploying persons to the highest positions in the state. It has a significant majority in Parliament, allowing it effectively to control oversight of the Executive. State Capture has happened under its watch.

324. In addition, various ANC leaders have been implicated by witness testimony at the Commission. There has also been substantial evidence that the party itself was a beneficiary of State Capture, as it received payments from third parties who are alleged to have corruptly acquired government contracts.

325. It is necessary therefore to interrogate the role of the party in:

325.1. Actively engaging in corrupt activities for its own gain;

325.2. Allowing corrupt activities to continue under its watch and failing to intervene to prevent or arrest such activities;

325.3. Creating the framework for corruption and State Capture to flourish.

326. This report refers to the following ANC structures:

326.1. The National Executive Committee (NEC) is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of its Constitution.

327. The President, Deputy President, National Chairperson, Secretary-General, Deputy Secretary-General and Treasurer-General of the ANC are known collectively as the National Officials or, informally, the ‘Top Six’.

328. The National Working Committee (NWC) is elected by the NEC and is expected to conduct the day-to-day work of the ANC and to ensure ANC structures carry out the decisions of the party. It is composed of the Top Six, up to 20 directly elected NEC members, and one representative from each ANC League (the Women's League and the Youth League). The NWC meets every two weeks.

Corruption and the ANC

329. In his own affidavits, President Ramaphosa has conceded the existence of corruption, the existence of state capture, and the role of the ANC therein. He has conceded not only that there has been corruption, but that it is both continuing and pervasive, in government and in the party.

330. A particularly clear example of this is in a letter written by President Ramaphosa to ANC members in August 2020, titled 'Let this be a turning point in our fight against corruption.'[261] The letter discusses the corruption problem at length and says that the ANC "needs to take responsibility":

> "We must acknowledge that our movement, the African National Congress, has been and remains deeply implicated in South Africa's corruption problem. … Today the ANC and its leaders stand accused of corruption. The ANC may not stand alone in the dock, but it does stand as Accused No.1. This is the stark reality that we must now confront."

331. President Ramaphosa repeatedly emphasised that the party has "drawn a line in the sand" and is committed to renewal and change.

332. However, these statements – acknowledging corruption within the party and promising to fight it – are not new. In fact, similar statements have been made by ANC leaders

[261] BBB1-MCR-ANC-936

since 1994. Some examples are detailed in President Ramaphosa's statement and in the additional bundle. As he put it, the ANC has long recognised the existence of corruption within the democratic state, that some members of the ANC are complicit in this corruption, and that such corruption undermines our democracy and the integrity of the ANC.[262]

333. It was put to President Ramaphosa that the ANC had been promising to fight corruption within the party for over twenty years – so what would be different now? The 'line in the sand' had in fact been drawn many times over the last twenty years.

334. He responded that "the time is now" and that change needed to happen:

> "**PRESIDENT RAMAPHOSA:** Going forward, our conferences have dealt with these, and what is different now, is that if you like the eye of the needle, much as it identified those problems was articulating the theory if you like and the ideology that needs to be fostered and ensued in the ANC. What is different now arising from the 54th conference, is that we are moving from theory, what we have been talking about now has to be attend to the tyre hitting the tar. Where we now say this must now happen. It must be practice. … The time has now arrived for us to grasp the metal and then restore the image of the African National Congress. I would say ke nako, this is it."[263]

335. Unfortunately, despite an invitation to do so from the Chair in a hearing of the Commission, President Ramaphosa offered no real analysis or explanation of why the party's previous attempts to deal with these problems had failed, and why any such attempts might now succeed. He only stated that it is better late than never:

> "**PRESIDENT RAMAPHOSA:** You may well say: Well, why did you not do so over a period of so many years? But it is better late than never and in this case we are serious about what we are saying."[264]

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[262] BBB1-MCR-ANC-027 ff. para 68-74

[263] Transcript of Day 384, 135–36.

[264] Transcript of Day 427, 44.

The ANC's response to State Capture:

336. President Ramaphosa admitted that the ANC had made some 'mistakes' in relation to State Capture. In his Opening Statement to the Commission, he said the following:

> "**PRESIDENT RAMAPHOSA:** State capture took place under our watch as the governing party. It involves some members and leaders of our organisation and had fertile ground in the divisions and weaknesses and the tendencies that have developed in our organisation since 1994…We all acknowledge that the organisation could and should have done more to prevent the abuse of power and the misappropriation of resources that defined the era of state capture.
>
> Particularly the period under review by this Commission, the ANC does admit that it made mistakes as we have admitted in our various conferences. We made mistakes as it sought to execute the mandate that it was given by the voters. It had shortcomings and living up to the expectations of the people of South Africa in relation to enforcing accountability and in generating a culture of effective of consequence management."[265]

337. In short, he conceded that the party needed to have done more to prevent or arrest State Capture, and that weaknesses in the ANC enabled State Capture to take hold.

What did the ANC do internally?

338. The party's failure to act against State Capture for an extensive period of time was discussed in depth during President Ramaphosa's testimony. President Ramaphosa remarked in his statement that the ANC did not have direct evidence of State Capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged. [266]

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[265] Transcript of Day 427, 32.

[266] Transcript of Day 385, 18–19.

339. Various newspaper articles were put to President Ramaphosa which demonstrate that credible allegations that the Gupta family were engaged in corruption were publicly known since at least 2011. It was put to President Ramaphosa that hundreds of such articles were published, and that the ANC failed to act on these claims in any way over a span of at least five years. He conceded that "there was a dropping of the ball" but did not offer any explanation for the failure to act.[267]

340. It was also put to President Ramaphosa that Mr Fikile Mbalula had reported to the ANC NEC in 2011 that the Guptas knew of his appointment to Cabinet in advance. President Ramaphosa said that this incident did not raise concern at the time and that it was not taken further. He conceded that, in hindsight, they should have been more alert to such warning signs. He did not offer an explanation as to why such a serious allegation did not raise concern.[268]

341. President Ramaphosa was asked about the 2013 Waterkloof landing. He had the ANC's response in his statement. At the time, the ANC had issued a public statement demanding an explanation and stating that "those who cannot account must be brought to book". He noted that the JCPS investigation had found the exercise of undue influence and a serious dereliction of duty on the part of Mr Bruce Koloane.[269] It was put to him that the subsequent deployment of Mr Koloane as an ambassador should have caused outrage within the party. President Ramaphosa only stated that "It raised a few eyebrows but it happened as it did, and that is how it happened."[270] He offered no comment on whether the ANC's response to this incident was appropriate or sufficient. He was Deputy President of the party at that time.

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[267] Transcript of Day 385, 50.

[268] Transcript of Day 384, 17–18. BBB1-MCR-ANC-037 para 93.

[269] BBB1-MCR-ANC-037 paras 94-97

[270] Transcript of Day 385, 167.

342. In December 2015, former President Zuma dismissed the Finance Minister, Mr Nene, and replaced him with Mr Des van Rooyen. A section above summarises the evidence of President Ramaphosa concerning his intervention. He, with other senior ANC officials, managed to convince the former President to appoint Mr Gordhan in the position instead. Despite President Ramaphosa's conviction that this was a clear sign of State Capture, the party took no action, and their apparent success in resisting it, the party did not act further in relation to other matters.

343. In March 2016, Mr Mcebisi Jonas reported that the Guptas had attempted to bribe him. President Ramaphosa testified that he did not doubt the credibility of these allegations "personally". The party, through the office of the Secretary-General, engaged in a process with Mr Jonas to get to the bottom of it, but it could have been done better.[271] Mr Jonas's revelation was swiftly followed by others, including reports made by Ms Barbara Hogan, Ms Vytjie Mentor and Mr Themba Maseko.

344. The ANC NEC published a media statement in March in which it condemned corruption but reaffirmed its "full confidence" in former President Zuma. The NEC simultaneously mandated the Officials to gather information about the allegations to "enable the ANC to take appropriate action on this matter." A number of people came forward but only one was willing to make a written submission. The NEC subsequently closed the inquiry and advised the complainants to approach formal institutions with their allegations instead.[272]

345. President Ramaphosa told the Commission that they had realised the problem was much bigger than they could deal with. He also stated that the complainants had wanted a more formal process so that a thorough investigation could be conducted, and so that

[271] Transcript of Day 385, 57.

[272] BBB1-MCR-ANC-039 f. para 99-102

they could be shielded.[273] The statement which announced the NEC's inquiry simultaneously affirmed the NEC's confidence in the former President. This was not an independent or neutral space. It was put to him that the complainants may have distrusted party structures. President Ramaphosa said that they did not distrust the ANC and were in fact grateful for the opportunity. They simply preferred a more formal process.[274]

346. It should be noted that President Ramaphosa had, at the time, publicly promised that the ANC would conduct a methodical and rigorous investigation. This clearly did not occur.[275] There is no evidence provided by either President Ramaphosa or Mr Mantashe that the ANC ever proactively sought to make even basic inquiries. The NEC collected complaints from members and did not do anything with them. That was the process in its entirety.

347. However, the ANC did in fact have more formal means at its disposal. With its majority in Parliament, the ANC had the ability – and one might argue the responsibility – to initiate investigations and conduct oversight exercises. Its failure to do so, at least until 2017, is discussed below. It is notable in particular that in March 2016, when the ANC publicly announced its internal probe, the ANC in fact refused a request from the opposition in Parliament to investigate the involvement of the Guptas in various SOEs.[276]

348. It should also be noted that many were well aware at the time that law enforcement institutions were either weak and slow at best, or complicit in State Capture at worst. It

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[273] Transcript of Day 385, 169–169.

[274] Transcript of Day 385, 170.

[275] BBB2-MCR-ANC-ADDITIONAL-475 ff.

[276] Transcript of Day 385, 60 f.

is difficult to understand why the ANC would not attempt to conduct its own processes to ensure the integrity of the party, given the risks posed by State Capture.

349. The ANC also heard from the following people during this period:

349.1. In March 2016, veterans Ambassador Mzuvukile Jeff Maqetuka, Mr Riaz "Mo" Shaik, Gen Siphiwe Nyanda and Mr Jabu Moleketi met with Mr Gwede Mantashe, Ms Jessie Duarte, Dr Zweli Mkhize and Mr Jackson Mthembu at Luthuli House. They spoke of comrades who had been marginalised because they wanted to investigate the Guptas.[277]

349.2. In March 2016, the Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation and the Ahmed Kathrada Foundation wrote jointly to the NEC, calling for "urgent corrective action."[278]

349.3. In March 2016, a memorandum was sent by 101 former members of uMkhonto we Sizwe to the Top Six of the ANC expressing their concerns about developments in the country and the ANC, in particular with regard to the Guptas.[279]

349.4. In April 2016, a group of former Directors-General with histories in the liberation movement, wrote a letter to members of Cabinet (including then-Deputy President Ramaphosa) calling for various interventions to address State Capture;[280]

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[277] BBB2-MCR-ANC-ADDITIONAL-128 para 10 ff

[278] BBB2-MCR-ANC-ADDITIONAL-484

[279] Mzuvukile Maqetuka, Transcript of Day 231 (10 July 2020), 261–262.

[280] BBB2-MCR-ANC-ADDITIONAL-478

349.5. In May 2016, the Top Six met with Mr Anwa Dramat, Mr Robert McBride, Mr Ivan Pillay and others, all of whom held senior positions in government (law enforcement). They "provided details of efforts to isolate them and drive them out of their positions in the State."[281]

349.6. Further meetings were held by ANC Officials Ms Jessie Duarte, Mr Gwede Mantashe and Dr Zweli Mkhize with representatives of Business Leadership South Africa, with ANC veterans, the South African Council of Churches and senior ANC comrades where it appears all groups highlighted serious concerns about corruption and State Capture.[282]

350. The ANC does not seem to have done anything about these complaints from its own members, nor does it seem to have done anything to protect them in their positions.

351. In November 2016 the Public Protector's *State of Capture* report was released. When the report was discussed by the NEC, the structure resolved not to support the call for the former President to step down. The NEC felt that "it was more urgent to direct the energies of the ANC in its entirety to working towards the unity of the movement".[283] The implication of this statement is that the NEC decided to prioritise the survival and success of the party over acting on the allegations of State Capture.

352. In May 2017 the NEC again decided not to act against President Zuma. It did, however, endorse the proposal for a judicial commission of inquiry.[284]

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[281] BBB2-MCR-ANC-ADDITIONAL-133 para 43 f.

[282] Exhibit GG (additional bundle 32.1), Affidavit of Yasmin Duarte dated 7 July 2020, pp.FP-JGZ-3287 paras.30-36.

[283] BBB1-MCR-ANC-041 para 105

[284] BBB1-MCR-ANC-042 f. para 106-107

353. President Ramaphosa also cited a number of other actions taken by those within the Alliance, including:[285]

353.1. Concerns about patronage and corporate capture raised by the Alliance Summit in 2015;

353.2. The South African Council of Churches 'Unburdening Panel' created in April 2016, which collated evidence and testimony about State Capture;

353.3. A firm statement against State Capture by the SACP in June 2016;

353.4. A statement made by more than 100 stalwarts of the liberation movement in October 2016, calling on the ANC to act;

353.5. A report by the SACP in July 2017 condemning State Capture and calling for the establishment of the inquiry;

353.6. A COSATU strike against State Capture in August 2017.

354. President Ramaphosa stated that, while the impact of these interventions may not have been readily apparent, they "played an important role in influencing the direction of discussions within the ANC."[286] This chronology illuminated just how long the ANC waited to do anything, despite repeated calls to action from its own members and political allies.

[285] BBB1-MCR-ANC-050 ff. para 128

[286] BBB1-MCR-ANC-053 para 129

355. The ANC's 54th National Conference in December 2017, at which President Ramaphosa was elected, was a "watershed moment" in the party's response to State Capture.[287]

356. A Diagnostic Report prepared by Mr Mantashe outlined the need for the ANC to take action against corruption and State Capture.[288]

357. The Conference adopted a resolution noting the following:[289]

> "an increase in corruption, factionalism, dishonesty and other negative practices that seriously threaten the goals and support of the ANC;
>
> that the lack of integrity perceived by the public has seriously damaged the ANC's image, the people's trust in the ANC, its ability to occupy the moral high ground, and its position as leader of society;
>
> that current leadership structures seem helpless to arrest these practices, either because they lack the means or the will, or are themselves held hostage by them;
>
> that the state investigative and prosecutorial authorities appear to be weakened and affected by factional battles, and unable to perform their functions."

358. The Conference resolved that:[290]

358.1. ANC members accused of corruption must account to the Integrity Commission or face disciplinary processes;

358.2. Those who fail to give an acceptable explanation must voluntarily step down while they face disciplinary, investigative or prosecutorial procedures, or must be suspended;

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[287] BBB1-MCR-ANC-053 para 130

[288] BBB1-MCR-ANC-054 para 131 f.

[289] BBB1-MCR-ANC-055 para 133

[290] BBB1-MCR-ANC-056 para 134

358.3. The party should publicly disassociate itself from anyone accused of corruption;

358.4. Party members and structures must cooperate with law enforcement agencies;

358.5. ANC deployees to Cabinet must strengthen state capacity to successfully prosecute corruption and account for any failure to do so.

358.6. In February 2018, the ANC NEC decided to recall former President Zuma.[291]

358.7. This chronology illuminates just how long the ANC waited to do anything, despite repeated calls to act from its own members and political allies.

What did the ANC do in Parliament?

359. The ANC Political Committee, a sub-committee of the NEC, is chaired by the Deputy President of the party. The Political Committee provides guidance to the parliamentary caucus. The Deputy President of the country is also the Leader of Government Business in Parliament. It was therefore essential for President Ramaphosa to testify about the role of the ANC in Parliament concerning State Capture.

360. President Ramaphosa remarked in his statement that the ANC did not have direct evidence of State Capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged. [292] It was put to him in evidence that Parliament *would* have this investigative capacity, which he conceded.[293]

361. In late 2017, President Ramaphosa addressed the ANC parliamentary caucus to reinforce the importance of parliamentary committees to conduct inquiries and

[291] BBB1-MCR-ANC-043 para 109

[292] Transcript of Day 385, 18–19.

[293] Transcript of Day 385, 18–19.

investigations. He testified that this was the continuation of a process that had begun at the ANC 53rd Conference in 2012, when the party resolved that its parliamentary structures should be more "activist" in terms of exercising its oversight over the Executive. This particular address was prompted by the emerging allegations regarding State Capture.[294]

361.1. Various newspaper articles were put to President Ramaphosa which demonstrate that credible allegations that the Gupta family were engaged in corruption were publicly known since at least 2011. For example, in 2011 it was reported in major newspapers that:

361.2. The Guptas influenced appointments to SOEs;

361.3. Senior government officials, including Ministers, were regularly "summoned" to the Guptas' Saxonwold home;

361.4. The Guptas knew of Cabinet appointments in advance;

361.5. The Guptas pressured government officials to support The New Age;

361.6. The Guptas were known to be "the President's people".

362. President Ramaphosa agreed that if these allegations were true, they would reveal a subversion of the constitutional order.[295] It was put to him that Parliament should have begun to investigate the veracity of these allegations at the time. President Ramaphosa

[294] Transcript of Day 385, 22–35.

[295] Transcript of Day 385, 44–49.

contended that Parliamentary investigations would have to be based on more substantive information than newspaper articles.[296]

363. It was put to President Ramaphosa that hundreds of such articles were published (many of which were based on credible and verifiable information), and that Parliament failed to investigate these claims in any way over a span of at least five years. He conceded that "there was a dropping of the ball" but did not offer any explanation for Parliament's failure to act during this time.[297]

364. It was also put to President Ramaphosa that Mr Fikile Mbalula had reported to the ANC NEC in 2011 that the Guptas knew of his appointment to Cabinet in advance. President Ramaphosa said that this incident did not raise concern at the time and that they should have been more alert to such warning signs. He did not offer an explanation as to why such a serious allegation did not raise concern.

365. In March 2016, Mr Mcebisi Jonas reported that the Guptas had attempted to bribe him. President Ramaphosa testified that he did not doubt the credibility of these allegations "personally". The party, through the office of the Secretary-General, engaged in a process with Mr Jonas to get to the bottom of it. It was put to him that, although the party was entitled to investigate these allegations internally, it was incumbent on the ANC (through the Political Committee, which was chaired at the time by President Ramaphosa) to ensure that these allegations were probed in Parliament. President Ramaphosa did not disagree. He said that the party did eventually realise it could not sufficiently investigate and referred the matter to its Parliamentary structures.[298]

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[296] Transcript of Day 385, 49–50.

[297] Transcript of Day 385, 49–50.

[298] Transcript of Day 385, 57–59.

366. President Ramaphosa agreed that the ANC's opposition to a proposed Parliamentary investigation into allegations of State Capture in March 2016 was "ill-advised". This error, he claimed, was later corrected. He did not explain why the ANC opposed the proposal, except that there was contestation between the political parties.[299]

367. The ANC's counter motion in Parliament was to direct all allegations of State Capture to law enforcement authorities or Chapter Nine institutions, which was in line with the stance of the NEC (see para 344 ff. above).[300]

368. It was put to President Ramaphosa that

> "**ADV FREUND SC:** …there was a very determined resistance and unwillingness that Parliament should exercise what you have said this morning was its duty, in the face of these sorts of accusations, a complete unwillingness to enable Parliament to investigate and exercise oversight."[301]

369. President Ramaphosa disagreed. He said that, at the time, they believed these structures would be more effective than Parliament, although in hindsight the two processes did not need to be mutually exclusive. Although there was initially inertia, he stated that the ANC was determined to probe the allegations. [302]

370. President Ramaphosa was questioned on the issue of party discipline and the oaths of office taken by Members of Parliament (MPs). Do MPs have a responsibility to vote according to their consciences and according to their own understanding of their constitutional obligations, even when that might contradict the party line? President Ramaphosa made it clear that MPs represent the party and "do not put themselves

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[299] Transcript of Day 385, 60–64.

[300] Transcript of Day 385, 65–66.

[301] Transcript of Day 385, 67.

[302] Transcript of Day 385, 67–69.

there", and are thus bound to the party's collective decisions.[303] He also stressed that opposition parties also vote as a collective and force their MPs to follow the party line.[304]

371. Specifically, on the issue of a vote of no confidence in the President, President Ramaphosa was somewhat equivocal. He did not say whether he believed MPs should vote according to their consciences or according to the party decision. What he did say was that "you need to analyse the situation carefully" given the serious consequences of removing a President.[305]

372. He was pressed further on this issue by the Chairperson. He put it to President Ramaphosa that it was the constitutional obligation of each MP to ask themselves the question "Do I still have confidence in the President?" The constitutional framework – including MPs oaths of office – does not allow MPs to vote according to the party's wishes if they believe that to be against the interest of the people of South Africa. President Ramaphosa (somewhat reluctantly) agreed that in certain exceptional circumstances, deviation from the party line could be "discussed", but that party discipline was still his paramount concern.[306]

373. The Chairperson posited that the imposition of a party decision on MPs in a vote of no confidence would render this mechanism of accountability ineffective. Given that the President would enjoy majority support in the party and therefore in Parliament:

> "**CHAIRPERSON:** … the mechanism of accountability of the vote of no confidence which is meant to keep the President on his or her toes will be rendered ineffective if the President will know that there is no way Parliament can pass a vote of no confidence in me because my party will never allow that."[307]

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[303] Transcript of Day 385, 75–76.

[304] Transcript of Day 385, 90.

[305] Transcript of Day 385, 77–78.

[306] Transcript of Day 385, 80–84.

[307] Transcript of Day 385, 85.

374. President Ramaphosa stressed that MPs are representative of the party itself, and that the party would have to decide collectively that they have lost confidence in the President. As noted by the Chairperson, this means in effect that a President of the country can only be removed by Parliament through a motion of no confidence if the majority party has lost confidence in them already. In that case, however, the party can use its own processes to recall them. The Chairperson asked:

> **CHAIRPERSON**: … why do we then need these provisions of the constitution about a vote of no confidence in the President of the **country** if everything will be dictated by the majority party can be dictated by the majority party outside of Parliament? [308]

375. President Ramaphosa said that while a motion of no confidence is an important "check and balance" embedded in the Constitution, the party system is a part of our Constitutional architecture and also provides important checks and balances. This, he argued, was evinced by the fact that the ANC has twice recalled its own Presidents. He suggested that these two accountability mechanisms (the party and the motion of no confidence) are complimentary:

> "**PRESIDENT RAMAPHOSA:** Sometimes they fail but for the most part there would be good checks and balances that can put the brakes on a runaway vehicle that is going to crash. But then again it does not mean that that dilutes the efficacy of the construct that we have in the constitution that provides for a vote of no confidence in a President because when the wheels have come off in the party itself you do need that check and balance in the constitution of the country where you would be able to have the type of outcome that you are talking about."[309]

376. President Ramaphosa also echoed the sentiments of Mr Mantashe when he highlighted that allowing MPs to vote contrary to the party line would have "divided the party down the middle."[310] The natural conclusion of this particular argument is that the ANC

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[308] Transcript of Day 385, 86.

[309] Transcript of Day 385, 86–88.

[310] Transcript of Day 385, 88.

prioritises its own survival and strength over the Constitutional obligations of its members.

377. Unfortunately, President Ramaphosa failed to grapple with the core of the issue, which is that the ANC's internal checks and balances *did* fail, and that the party sought to prevent the proper exercise of a Constitutional mechanism of accountability by forcing its members to vote according to the party line. The "runaway vehicle" of State Capture, as he put it, *did* crash. A vast amount of damage to the country's institutions and fiscus was already done by the time the party decided to initiate Parliamentary enquiries, and decided to recall former President Zuma. The evidence here is unequivocal.

Was it enough?

378. The Chairperson asked President Ramaphosa if the ANC had done enough:

> "**CHAIRPERSON:** Do you think that the party did enough to deal with the situation relating to the influence of the Guptas after Mr Mbalula had raised the alarm at the NEC Meeting at 2011 and of course after the lending of the Gupta aircraft at Waterkloof and with all the media articles that were coming up in between from 2010 on what is about statements about the Guptas and so on? Does the party think that in relation to acting on those, it acted correctly? Or a lack of action?"[311]

379. President Ramaphosa stated that "there was some action but it was not enough." The party, he said, was blindsided due to the fact that the Gupta family were friends of the "ultimate leader" of the ANC (former President Zuma).[312] He had also previously stated that the ANC did not have direct evidence of State Capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged. [313]

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[311] Transcript of Day 428, 88–89.

[312] Transcript of Day 428, 89–90.

[313] Transcript of Day 385, 18–19.

380. The Chairperson raised the need for specificity about the party's shortcomings on the first day of President Ramaphosa's testimony:

> "**CHAIRPERSON**: Well, talking about the fact that the ANC acknowledges that there were certain shortcomings, there were certain things that it might not have done properly and so on, I think that is quite important, that acknowledgement, but I would like you, maybe before you finish today or even tomorrow, I would like you to identify the actual areas where you say, as a party, we have done our homework, we think this is where we did not do what we were supposed to do properly, this is where we did something we should not have done, so we identify exactly areas where, as a party, you say here we did not do things the way we should have and we acknowledge.
>
> So why that is important is because while an acknowledgement is good and it should be given its proper weight, it is even better if one knows what you are talking about because when one knows what the party is talking about and says this is where we accept we went wrong, then one can look at what should be put in place for the future so that there is no repeats. So it is something you can deal with either today or tomorrow, it is fine, it is just that, as I say, it would be useful so that it does not go – it does not get limited to simply acknowledging without being specific." [314]

381. He undertook to provide these details upon his return. When asked to do so at his second appearance, President Ramaphosa noted the following:

381.1. In the context of inequality in South Africa, political office presents one of the few opportunities for material advancement, which could lead to political patronage. This is an issue the ANC "made some huge missteps on".[315]

381.2. There was a "decline of organisational integrity" in which internal party processes were manipulated in order to advance the interests of certain individuals and people.[316]

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[314] Transcript of Day 384, 123.

[315] Transcript of Day 428, 82 f.

[316] Transcript of Day 428, 83.

381.3. Division and factionalism compromised the party's ability to tackle corruption. Factionalism "led to a number of people having a vested interest in maintaining certain wrong practices."[317]

381.4. A system of patronage emerged within the party's ranks.[318]

381.5. The lack of an official policy on party funding led to "enormous problems" within the organisation.[319]

381.6. The party's internal problems led to the weakening of institutions, including government institutions, which themselves became factionalised.[320]

382. Ultimately President Ramaphosa agreed that there was a "delay" in the party's response to allegations which "did not service our country well". He attributed this delay to the ANC's nature as a "political organism" beset with continuous debates and contestations. It was the 'balance of power' within ANC structures which was responsible for the slow response.[321] This aligns with President Ramaphosa's testimony concerning his decision to remain as Deputy President and 'resist' State Capture from within the state. He claimed that further action was impossible until the balance of power shifted. That evidence is detailed and analysed above.

383. President Ramaphosa spoke in evidence of what he referred to as contestation about the meaning of State Capture as a concept. He did not elaborate on what else was the subject of debate. It is difficult to understand how contestations about the nature of State Capture would have prevented the ANC from investigating or taking action in

[317] Transcript of Day 428, 83.

[318] Transcript of Day 428, 83.

[319] Transcript of Day 428, 84.

[320] Transcript of Day 428, 84.

[321] Transcript of Day 385, 69–72.

regard to some very straight-forward allegations concerning corruption and fraud. Nor was it made clear how this contestation or debate was able to prevent the party, or any party structures, from acting on these allegations for over five years.

384. The 'balance of power' explanation indicates that important members of the ANC – those who held that balance of power – were against pursuing matters of corruption and State Capture, and that they held enough power effectively to hold the party in check for over five years. No justification for this opposition has been offered. The existence of internal contestation does not excuse the ANC's failure to act in terms of its own values and Constitution. If anything, it is a clear indication that the party itself – or at least significant parts of its leadership – at least facilitated State Capture by hampering oversight and accountability processes.

385. The ANC's review of the 2001 document 'Through the Eye of a Needle', which was part of its discussion document for the 2020 National General Conference, includes a notable analysis of the organisation's inaction in addressing a number of existential challenges to the movement for over a decade. In part the document reads:

> "The failure of the ANC to fully implement the guidelines in Through the Eye of a Needle and other documents arises from, amongst others, the inability to exercise political and organizational leadership functions. It is the inability to act when members deviate from established policy positions and ill-discipline. The tone is not being set from the top. The ANC is engulfed with paralysis in decision-making. The notion of democratic centralism suggests that while there is a need to allow for democratic expressions at different levels of the organization, the exercise of leadership is an important variable in the mix. The preponderance of factional activities has resulted in the emergence of what can be characterized as organizational populism: that is, the inclination to shy away from taking difficult decisions and to cave in to the conduct and demands of rogue elements.
>
> Related to the above, there is a lack of accountability for our actions as leaders and members, in terms of owning up when we deviate from the values/culture of the ANC and our struggle for the attainment of a new society. And arising out of this is

> the inability to effect consequence management. The organization is ceasing to act as an integral whole, but a collection of individuals pursuing their own self-interest.
>
> Accountability also means holding our leaders, cadres and general member's feet to fire. It is to ensure that they do what they were elected to do – serving the people of South Africa. It is also to ensure that everybody is accountable for his or her actions."[322]

386. The 'contestations' referred to by President Ramaphosa are identified here as competing factional and personal interests. These competing factions and persons were allowed to paralyse (in the words of the Party itself) the organisation where the leadership was unable or unwilling to hold them accountable for their actions, not the least because the leadership was an integral part of the 'contestations'. The role of internal discipline and accountability is covered further in the section entitled "Discipline and Accountability".

387. President Ramaphosa testified that the party lost significant support due to corruption, which made addressing those allegations an "existential challenge".[323] Opinion research at the time indicated that the issue of corruption was among the factors that contributed to the decline in electoral support for the ANC in the 2016 local government elections.[324]

388. It was put to President Ramaphosa that the loss of electoral support was the main reason that the party finally reacted as it did. He did not disagree, although that issue was contested internally. He stated:

> "**PRESIDENT RAMAPHOSA:** So that in itself also had a huge impact on getting the ANC to then have the sense that it needed to do something because otherwise it would just be a continuant slide in its electoral fortunes."[325]

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[322] BBB1-MCR-ANC-453

[323] Transcript of Day 428, 88.

[324] BBB1-MCR-ANC-041 para 103

[325] Transcript of Day 385, 174 f.

389. President Ramaphosa ultimately agreed that the "delay" in reacting to allegations of State Capture was costly and the party should have acted sooner. However, the characterisation of the party's seven years of inaction as a "delay" is itself problematic. The party did not simply take a long time to consider the allegations and arrive at decisions. This was not one continuous process. As is made clear by the evidence, the party made a series of decisions over a number of years not to act against Mr Zuma and other complicit parties. That the party later decided otherwise does not absolve it of accountability for those earlier decisions.

Cadre deployment

390. President Ramaphosa was asked to address the ANC's policy of "cadre deployment" and its possible role in facilitating corruption and state capture. President Ramaphosa was the chairperson of the Deployment Committee between December 2012 and December 2017, then in his capacity as the Deputy President of the ANC.

391. The ANC is guided in this regard by the ANC Cadre Development and Deployment Policy[326], as well as other party documents. The Deployment Committee is headed by the ANC Deputy President and comprises fifteen NEC members, including the Deputy Secretary-General.[327]

392. The ANC's approach to cadre deployment was previously discussed by Mr Gwede Mantashe in his testimony.[328] Former President Zuma also testified about cadre deployment during his brief appearance before the Commission.[329]

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[326] BBB1-MCR-ANC-118 ff.

[327] BBB1-MCR-ANC-011 f. para 27

[328] See summary prepared by Waseem Holland.

[329] Summarized as part of Project 0

Records and minutes

393. In addition to this evidence, the Commission requested the minutes of the ANC Deployment Committee under the chairmanship of President Ramaphosa. The Commission was informed that there are no minutes for the period 2012 to 2017. The Commission subsequently requested to be provided with Deployment Committee minutes for the later period (any portion of 2017 and the period 2018-2021). These records were received shortly before the President's second appearance in August 2021.[330]

394. President Ramaphosa was asked whether minutes were lost or destroyed, or were simply never taken. He responded that he did not recall minutes ever being taken, which he explained as follows:

> "**PRESIDENT RAMAPHOSA:** I think you can ascribe that to rather unfortunate record keeping processes because in the main the ANC has so **many** meetings one after the other. So many committees and I think those who are in charge will just take notes and just record a decision and it is then communicated."[331]

395. It was put to him that the ANC has a well-established practice of taking minutes, which he conceded. It was then put to him that it is improbable that there were no minutes taken of important meetings in which Ministers participated. President Ramaphosa said that this was a "lapse" due to the organisation being "always on the go" and "handling so many other processes", and that these administrative weaknesses needed to be addressed as part of the ANC's "renewal process."[332]

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[330] CR-REF-BUNDLE-038 ff.

[331] Transcript of Day 427, 10.

[332] Transcript of Day 427, 11–12.

396. While it is possible that no minutes were taken, it remains improbable that there are no records of the Committee's activities between 2012 and 2017, especially given the fact that Ministers and other senior officials would deal with the Committee multiple times in respect of a single deployment. As noted on behalf of the Commission when President Ramaphosa was questioned on the topic, the ANC has historically always ensured that important meetings are minuted.[333]

397. President Ramaphosa and Mr Mantashe both stressed the importance of cadre deployment to the ruling party. It is therefore concerning that basic record-keeping, arguably a necessity for ensuring transparency and good governance, may have been neglected for at least five years under President Ramaphosa. It is difficult to conceive how the Party would have any oversight over the Committee without any records. It is also difficult to conceive how the Committee would report on its activities to the party membership and leaders. Finally, only with an accurate and comprehensive written record could the Committee be held accountable for its decisions and recommendations.

What is the purpose of cadre deployment?

398. According to President Ramaphosa, the deployment policy is aimed at ensuring that the person most "fit-for-purpose" is appointed to whatever critical position has been identified.[334] He said that the policy aims to ensure the transformation of South Africa's institutions following the end of apartheid. He said that the Deployment policy ensures that these institutions reflect the demographics of the country. The need to ensure that these changes are "solidified" continues today.[335] He said that some of the

[333] Transcript of Day 427, 11.

[334] BBB1-MCR-ANC-011 para 25

[335] BBB1-MCR-ANC-012 para 28

considerations of the Deployment Committee are political, regarding "key positions where we seek to advance the mandate of the governing party."[336]

399. According to President Ramaphosa, the Committee considers things like gender balance, demographic representation and the developmental agenda of the governing party in making its recommendations.[337] President Ramaphosa asserted that the need to ensure the transformation of state institutions still continues.[338]

400. President Ramaphosa stressed that this policy is not unique to the ANC, and is practised in various forms worldwide and by other parties in South Africa.[339]

401. The party's deployment policy states that the immediate goal is to "deepen the hold of the liberation movement over the levers of the state."[340] President Ramaphosa argued that some degree of political involvement in administration is "essential for the proper functioning of a democracy" as the political administration needs to be able to change policy direction. However, the ANC recognises that political involvement in administration needs to be "circumscribed by legislation, convention and practice."[341] There needs to be a "balance" between political considerations, technical proficiency, and objectivity.[342] He reaffirmed the importance of a non-partisan civil service.[343]

402. It was decided at the ANC 53rd National Conference that the party should monitor the performance of deployees to ensure that the recommendations of the Deployment Committee were "bearing fruit". It was decided at the 54th National Conference that

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[336] Transcript of Day 384, 43.

[337] Transcript of Day 384, 77–78.

[338] BBB1-MCR-ANC-012 para 28, also Transcript of Day 384, 86–87.

[339] BBB1-MCR-ANC-012 f. para 30, 33, also Transcript of Day 384, 87–88.

[340] BBB1-MCR-ANC-120 para 9

[341] BBB1-MCR-ANC-014 para 36

[342] Transcript of Day 384, 92–93.

[343] Transcript of Day 384, 92.

continual development would be required to ensure there was no "sense of complacency" among deployees.[344] There has been no evidence on whether the ANC was effectively monitoring its deployees or holding them to account for their performance.

Which positions are considered by the Deployment Committee?

403. President Ramaphosa discussed the difference between the deployment of public representatives to elected positions in legislative and executive bodies in government, and the deployment of cadres to strategic positions in the state. The appointment and election of public representatives is the prerogative of the party. The Commission is concerned largely with the deployment of party cadres to positions in state institutions and in the civil service, and therefore this summary focuses on that category.

404. According to President Ramaphosa, the ANC deployment policy applies to senior positions in government such as Directors-General and Deputy Directors-General as well as leadership positions in critical institutions including the private sector.[345] It does not apply to the appointment of Ministers, which is the prerogative of the President.[346]

405. A section of the ANC's deployment policy, outlining the "key centres of authority" to which cadres should be deployed, was put to President Ramaphosa. The policy identified cabinet, the entire civil service (but most importantly from director level upwards), premiers and provincial administrations, legislatures, local government, parastatals, education institutions, independent statutory commissions, agencies,

[344] BBB1-MCR-ANC-015 f. para 37

[345] BBB1-MCR-ANC-011 para 25

[346] BBB1-MCR-ANC-011 para 26

board and institutes, ambassadorial appointments, and international organisations and institutions.

406. President Ramaphosa confirmed that this list falls within the scope of activity of the Deployment Committee, although in practice the Committee did not consider all of these categories. The Committee, he said, "has set itself its own limit."[347] Specifically:

406.1. The Committee is not involved in the appointment of Cabinet Ministers..

406.2. The Committee only considers the top leadership of the civil service, from Deputy Directors-General upwards.

406.3. The Committee "hardly ever" considers appointments to provincial administrations.

406.4. The party has a separate process of identifying candidates for legislatures which does not involve the Deployment Committee.

406.5. Local government appointments also involve the communities.

406.6. The Committee considers the "key top positions" of parastatals.

406.7. The Committee "hardly ever" considers appointments to education institutions.

406.8. The Committee considers "top key" positions to independent institutions.

406.9. Appointments to the judiciary are left to the process prescribed by law. (This is untrue and was the matter of further testimony, see below.)

[347] Transcript of Day 384, 59–60.

407. Although President Ramaphosa contended that as a matter of *practice* the Committee limits itself, the party's deployment policy nevertheless applies to all the positions mentioned above. He did not indicate whether he believed the policy should be narrowed or should remain as expansive as it is.[348]

408. On judicial appointments:

408.1. President Ramaphosa stated during his first appearance that judicial appointments are "so well managed through the dispensation we have" and the Judicial Service Commission, and that therefore the Deployment Committee does not get involved in judicial appointments.[349] Mr Mantashe had also said that the Committee does not appoint judges as it respects the separation of powers, and that no judge has ever accounted to Luthuli House.[350]

408.2. At his second appearance, minutes of a Committee meeting where judicial appointments were indeed discussed were put to President Ramaphosa. The Committee recommended two justices to fill vacancies in the Constitutional Court. It recommended a judge to fill a position on the Supreme Court of Appeal and in other capacities as well, including Deputy Judge President in a province.[351]

408.3. President Ramaphosa responded that the Committee may note vacancies, or even propose names, but it "knows very well that it is not the appointing structure" and ultimately cannot and does not decide on appointments. He also reiterated the role of the Committee in ensuring transformation in the state, for

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[348] Transcript of Day 384, 63.

[349] Transcript of Day 384, 64–65.

[350] Transcript of Day 374, 128-134.

[351] Transcript of Day 427, 27–28.

example by insisting upon the appointment of female judicial officers, and that therefore we should look at the Committee's involvement positively. Nevertheless, he reaffirmed that the ANC should not choose judges and that the process should be non-partisan and independent.[352]

408.4. I noted that the JSC, which is responsible for judicial appointments, includes members of Parliament who are ANC members, who should be able to represent the will of the party. The JSC process is transparent, and candidates are able to defend themselves or answer concerns during the process. However if appointments are decided behind closed doors by the Deployment Committee, they are not subjected to public scrutiny.[353]

408.5. President Ramaphosa gave examples of certain appointment processes which had been transparent, such as the appointment of Adv Shamila Batohi as NDPP. He thought that it was an "interesting proposition" to remove the "shroud of secrecy" around deployments, and that perhaps the party should be able to show its hand. He said: "Maybe we need to grow up and see how best the democratic process can mature on that level."[354]

408.6. While he admitted the value of transparency in appointments, he did not address the my concern, which was that decisions made by the Committee occur outside of the proper constitutional structures and are therefore not subject to scrutiny or oversight. Whether that might be changed in the future has no bearing on the consequences of this practice, with which the Commission is dealing.

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[352] Transcript of Day 427, 28–30.

[353] Transcript of Day 427, 31–32.

[354] Transcript of Day 427, 33–34.

408.7. It was noted that in this particular case, the Committee *recommended* names for the Bench. In the context of democratic centralism, this must have been intended to influence the decision of the JSC.[355]

408.8. I posited that the influence of the Deployment Committee could be very weighty for those members of the JSC who are ANC MPs. If the Committee's recommendation is known to those members before the interview process commences, that may cause those members to be biased towards or against particular candidates in circumstances where they should be quite open.[356] The Commission confirmed that, in the case cited above, the Committee had met and made its decisions about judicial appointments before the interviews took place.[357]

408.9. President Ramaphosa responded that all interest groups, including political parties, have preferences that they will articulate, and that is not necessarily unethical or illegal. He again suggested that the process should be more transparent.[358]

408.10. I noted that there was a concern that factionalism and other such issues would be carried into the judiciary. I asked the President to clarify whether this meeting was an exception, or if the Deployment Committee did in fact involve itself in judicial appointments. President Ramaphosa suggested that this should be viewed in a "positive light" as the ANC was dedicated to transforming the judiciary. He said that, although judicial officers should not have a relationship

[355] Transcript of Day 427, 34.

[356] Transcript of Day 427, 35–36.

[357] Transcript of Day 428, 71.

[358] Transcript of Day 427, 36–39.

with the ANC, the governing body must play a role in transforming the judiciary.[359]

408.11. This concession does contradict President Ramaphosa's and Mr Mantashe's earlier statements that the Committee does not consider judicial appointments and only encourages candidates to apply.

408.12. I noted that any interested party can submit comments to the JSC, including the ANC. [360]

408.13. President Ramaphosa reiterated that the process was 'safe' as the JSC is the appointing body and makes its own decisions. He said that there had been times when the ANC's preferred candidate was not appointed, which shows how robust the system is.[361]

409. President Ramaphosa testified that, under his chairpersonship, the Deployment Committee did not consider appointments to law enforcement agencies.[362] President Ramaphosa repeated that the party does seek to influence decisions but that the process is safe as the Deployment Committee has no power to make appointments.[363]

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[359] Transcript of Day 428, 72–76.

[360] Transcript of Day 428, 75–76.

[361] Transcript of Day 428, 77–81.

[362] Transcript of Day 384, 73–74.

[363] Transcript of Day 427, 35.

Does the Committee give recommendations or instructions?

410. President Ramaphosa testified that the Deployment Committee operates "like a recommendations committee" and does not make appointments or instruct appointing authorities to appoint certain persons. According to his statement:

> "The Deployment Committee does not decide who should take up specific positions. Rather it discusses who should be encouraged to apply for this or that position, and makes recommendations to the persons making the appointments. The Deployment Committee furthermore will give its opinion to any Minister who may seek its guidance on critical appointments that Minister must make. It gives guidance; it does not give an instruction to appoint.
>
> In identifying suitable candidates for positions in public entities, the ANC does not seek to circumvent the established and often legally-mandated processes for the appointment of individuals to these positions. candidates are still expected to submit their applications, meet the necessary requirements and be subjected to the normal processes of recruitment, selection and appointment."[364]

411. He also noted that the wishes of the Deployment Committee often do not materialise.[365]

412. President Ramaphosa's central claim (as well as that of Mr Mantashe and even Mr Zuma) – that the Committee merely makes recommendations and has no power to determine appointments – implies that it would be improper for a committee of the party to decide upon appointments to positions in the state. This claim was carefully scrutinised.

413. I noted that appointing authorities, who are themselves ANC members and therefore bound by the decisions of the party, such as Ministers, might feel pressured to appoint

[364] BBB1-MCR-ANC-017 para 39.2

[365] Transcript of Day 384, 42–43.

the Deployment Committee's chosen candidate, and that this would give such a candidate an unfair advantage.[366]

414. President Ramaphosa testified in response to this proposition that Ministers often seek to *convince* the Committee to support their choice:

> "**PRESIDENT RAMAPHOSA:** So they come to the deployment committee and seek to convince the deployment committee and even put up a … argumentation of why the persons that they may want to see appointed should be recommended by the deployment committee… So they seek to convince the deployment committee."[367]

415. President Ramaphosa's argument is that the Committee therefore serves as a "filter" or a type of "quality assurance" in order to ensure that the Minister's candidate is fit-for-purpose.[368] He continued:

> "**PRESIDENT RAMAPHOSA:** What often happens, it is actually the Minister who … who comes and says, I am recommending the following and the deployment committee then examines that and it is often convinced … And I have been in situations where the Minister would come back maybe two to three times. And say… This is the best one. And I want to convince you and even bring further documentation to prove the case. And then I am not suggesting that the minister brow beats the deployment committee into submission, but… That is how it often happens."[369]

416. Later in his testimony, President Ramaphosa remarked:

> "**PRESIDENT RAMAPHOSA:** But Cabinet then finally, Chairperson, deliberates on each of the names where Cabinet has a role in deciding because of legislation for that entity. It deliberates on that and some names fall off at Cabinet level and some on those lists are sent back to the Minister or Cabinet says: Take this back. We are not about to approve this.

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[366] Transcript of Day 384, 47–48.

[367] Transcript of Day 384, 49.

[368] Transcript of Day 384, 49–50.

[369] Transcript of Day 384, 51–52.

> And the Ministers pull out their hair and be frustrated but that is the rigorous role that is involved in the selection of those people. And may I add deployment committee level, I know of Ministers who have been there three times or more just to get a list recommended.
>
> So it is not as easy as that where you just have a list which is underpinned by nefarious intentions, just approved, it is quite vigorous and I have known and I have seen Ministers coming out of that type of process just pulling the sweat off their foreheads because it means they have achieved something. It is not an easy process."[370]

417. The fact that Ministers seek to convince the Committee, and go through such lengths to do so, implies however that the true and ultimate decision-making power lies with the Committee itself. This illustrates a situation where the minister makes a recommendation to the Committee, who has the final say in approving or rejecting a candidate. If the process is merely one of recommendation, Ministers would not need to return three times or more to get a list recommended.

418. This is also clear in the Deployment Committee records (2017 onwards), which were carefully reviewed by the Commission. The following trends were observed in the minutes:[371]

418.1. While the language is consistent in part with the Committee making recommendations, in other part the language is peremptory.

418.2. The Ministers make recommendations to the Deployment Committee and seek permission to appoint their chosen candidates, which the Committee "approves" or sends back for "refinement".

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[370] Transcript of Day 384, 115–16.

[371] Transcript of Day 427, 14–16.

418.3. Ministers have been taken to task by the Deployment Committee for presenting their choices as final and irrevocable, or presenting names to Cabinet which were not approved by the Committee.

418.4. The Committee insists that even before posts are advertised that the Deployment Committee should be notified.

419. It therefore appears that the Committee does not always merely make recommendations but in fact often instructs appointing authorities on who to appoint.

420. This analysis was put to President Ramaphosa. He insisted that cadre deployment is "safe" as the Committee has no formal power to appoint, and appointments are still governed by the legally mandated processes.[372] However, this sidesteps the question of how the Deployment Committee functions in reality, and whether appointing authorities have to accept or rubber-stamp decisions made by the Committee. As the Chairperson put to President Ramaphosa the party is where the real decisions are taken.[373]

421. President Ramaphosa conceded that "the party is where the power resides" and again referred to the role of political parties in our democratic framework. He also reiterated the role that the Committee plays in ensuring demographic representation in the state. Again, he did not dispute the main contention put to him – that appointment decisions are made within the party. Neither did he grapple with the implications of this.[374]

422. President Ramaphosa was asked about a passage in the minutes which illustrates the frustration on the part of a member of the Deployment Committee saying that people

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[372] Transcript of Day 427, 17–20.

[373] Transcript of Day 427, 23.

[374] Transcript of Day 427, 23–25.

accountable to the Committee do not really understand the principle of "democratic centralism". He explained that, according to democratic centralism, party members are bound by decisions taken by higher bodies. It is therefore "a sign of indiscipline" in the ANC to disobey and not follow the decisions of a higher structure.[375] Democratic centralism, applied to the system of deployment, would ensure that the power to appoint did indeed lie with the party, in its higher echelons.

423. It is also notable that the party's deployment policy states that "decisions of the organisation…are final and a breach of this policy shall constitute a serious offence" and that "deployees of the ANC should always be loyal to the organisation".

424. The evidence lent credence to the Chairperson's proposition that appointing authorities, including Cabinet, are *de facto* bound to the decisions of the Committee, which means that its 'recommendations' are in actuality instructions.

The possible role of deployment in State Capture

425. Even if it is true that the Committee has no formal power, and that it does not issue explicit instructions to appointing authorities, the evidence shows that this is not the end of the matter.

426. The evidence of Ms Barbara Hogan was put to President Ramaphosa. Ms Hogan testified that ANC membership and loyalty, and loyalty to certain factions, was a determining factor in Deployment Committee decisions. President Ramaphosa did not dispute her evidence, but cautioned against "throwing the baby out with the bathwater"

[375] Transcript of Day 427, 26–27.

as the Deployment Committee played a valuable role in, for example, implementing the developmental agenda of the state and ensuring gender balance in the public service.[376]

427. One of Ms Hogan's propositions was that the Deployment Committee does not have the necessary expertise or resources to properly consider these appointments. President Ramaphosa responded that appointing authorities, such as Ministers, do use selection committees/panels and external entities as a "layer" in the appointment process. He also asserted that the Committee is composed of diverse and knowledgeable persons, which produces a "wealth of wisdom".[377]

428. President Ramaphosa stated that the ANC recognised that "there are several instances where individuals appointed to positions may not have been fit for purpose", but that the ANC addressed this problem at its 54th National Conference by resolving that "the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards."[378] This implies that the merit principle did not apply to such deployments until the resolution in December 2017, thus rendering the resolution necessary.

429. The ANC's deployment policy notes that "the potential for NEC members to have political or other interests in the deployment of particular cadres to particular positions cannot be ruled out".[379] President Ramaphosa agreed that this section of the deployment policy, which details a number of ongoing problems concerning cadre deployment, is correct:

> "The ANC's range of national and regional deployment committees ebbed and flowed over time as the movement battled intra organisation positioning,

[376] Transcript of Day 384, 75–78.

[377] Transcript of Day 384, 79–80.

[378] BBB1-MCR-ANC-017 para 41

[379] BBB1-MCR-ANC-130 para 49

> optimisation of state governance, factionalism, careerism and opportunism, desperation for employment and the organisational dilemmas of having to act against corrupt comrades."[380]

430. President Ramaphosa has, at various points in time, acknowledged the role of patronage and corruption in government appointments:

430.1. In his January 2020 newsletter titled 'Building a Capable State Is Our Top Priority', he wrote: "We are committed to end the practice of poorly qualified individuals being parachuted into positions of authority through political patronage."[381]

430.2. In his August 2020 letter to ANC members, he wrote: "Then there are 'jobs for pals', where politicians and officials disregard hiring procedures to employ family members, friends or associates. Not only is this grossly unfair to other prospective candidates, but it often means that the people employed are simply not up to the task. Public services are not rendered, public institutions are poorly managed and public funds go to waste."[382]

430.3. In his March 2021, he wrote: "All too often, people have been hired into and promoted to key positions for which they are neither suitable nor qualified. This affects government performance, but also contributes to nepotism, political interference in the work of departments, lack of accountability, mismanagement and corruption."[383]

431. This is perhaps best articulated in the ANC's 'Eye of a Needle' document from 2001:

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[380] Transcript of Day 384, 69–71.

[381] BBB2-MCR-ANC-ADDITIONAL-304

[382] BBB1-MCR-ANC-939

[383] BBB2-MCR-ANC-ADDITIONAL-307

> "Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.
>
> Government positions also go hand-in-hand with the possibility to issue contracts to commercial companies. Some of these companies identify ANC members that they can promote in ANC structures and into government, so that they can get contracts by hook or by crook.
>
> Positions in government also mean the possibility to appoint individuals in all kinds of capacities. As such, some members make promises to friends, that once elected and ensconced in government, they would return the favour. Cliques and factions then emerge within the movement, around personal loyalties driven by corrupt intentions. Members become voting fodder to serve individuals' self-interest."[384]

432. President Ramaphosa's own analyses, as well as those of the party, detailed above, clearly show that the cadre deployment process *can* be abused to facilitate corruption and possibly State Capture.

433. While President Ramaphosa has admitted that deployment has, on occasion, failed to ensure that deployees are 'fit for purpose', he did not directly engage on the question of whether, in fact, the deployment process facilitated State Capture. The fact remains that the Commission has heard substantial evidence indicating that multiple appointments were made to key positions in order to facilitate State Capture. These appointments were all made by the National Executive, who (except for the President in some cases) were, as members of the ANC, bound to the party's deployment policy.

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[384] BBB2-MCR-ANC-ADDITIONAL-378 f.

434. President Ramaphosa was asked about the appointments of specific individuals who have been implicated in corruption and State Capture at the Commission, and whether these individuals were 'deployed'. He responded:

> "**PRESIDENT RAMAPHOSA:** Let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right know as we look at that past slate we were able to look at it and say we actually need to do things differently."[385]

435. This statement implies that certain deployments under the previous regime were done in a way which enabled the appointments of corrupt individuals.

436. He went on to say that the Deployment Committee "would not have dealt with a whole lot of those" appointments during his chairmanship.[386] There were some cases where the former President bypassed the Committee entirely, which he believed was unintentional. In these cases he would approach former President Zuma:

> "**PRESIDENT RAMAPHOSA:** And on those occasions, I would personally go to the President and say: President, you have short-changed me and the Deployment Committee here. We were supposed to be primed and informed about this appointment and that appointment, and it would be mea culpa but the appointment had been made and announced."[387]

437. President Ramaphosa's evidence was that most of those appointments had nothing to do with the Deployment Committee. He however stopped short of implicating former President Zuma in wrongdoing. He did not explain why the ANC allowed the former President to bypass a critical party structure so frequently. This is especially surprising considering that both he and Mr Mantashe vigorously defended the importance and

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[385] Transcript of Day 384, 100.

[386] Transcript of Day 384, 100.

[387] Transcript of Day 384, 101–4.

necessity of cadre deployment at the Commission, as well as the party's insistence that all members are bound by the decisions of its structures (democratic centralism.)[388]

438. According to President Ramaphosa, some of those appointments did go through the Deployment Committee, but the Committee did not know that those individuals would engage in any corrupt acts.[389] The unfortunate implication of this is that the Deployment Committee had been unable to select or recommend individuals who are "fit for purpose." It had repeatedly recommended individuals alleged to be involved in corruption or other unethical behaviour, as well as individuals with public ties to the Gupta family, who were publicly known since 2011 to be involved in corruption.

439. Yet President Ramaphosa repeatedly stressed the importance of cadre deployment, claiming that the Deployment Committee process is "vigorous" and adds an extra level of scrutiny (a "filter") to the selection process.[390] His argument is that the deployment process makes appointments processes more, not less, rigorous. His own admission that the Committee had previously deployed unfit and/or corrupt individuals to positions of power, belies this contention.

440. He conceded that there was "massive system failure" in the state and SOEs and some of that occurred because "certain people were put in certain positions to advance certain agendas." [391] He also conceded that there is a practice of "poorly qualified individuals being parachuted into positions of authority through political patronage".[392] However,

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[388] See paras 422 to 424 above.

[389] Transcript of Day 384, 117–18.

[390] Transcript of Day 384, 115.

[391] Transcript of Day 384, 117.

[392] Transcript of Day 384, 126–27.

again he did not directly address the role of the Deployment Committee in this system failure.

441. President Ramaphosa stressed the need for transparency in appointments and selections, but offered no comment on how transparent the activities of the Deployment Committee were or are.[393] Again, it is significant that the Deployment Committee under his chairmanship produced no minutes or records of its activities.

442. His own admission that the Committee had previously deployed unfit or corrupt individuals to positions of power, undermines his evidence in regard to the general integrity of the Deployment Committee and its acts. That the Committee did not prevent these appointments is an indictment on either its integrity or its ability, or both.

443. President Ramaphosa avers that things will be done differently in future. However, he did not explain where the deployment process went wrong, nor did he detail what would be changed, save to say that the ANC resolved in 2017 that "the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards."

444. It must be noted that President Ramaphosa was the Chairperson of the Deployment Committee for a period of five years, between December 2012 and December 2017, and that many of these appointments (and indeed the excesses of State Capture) occurred during this period. (Notably, this is also the period for which the party could produce no minutes or records.) It is not sufficient for President Ramaphosa to focus on the future of the party and his envisaged renewal process. Responsibility ought also to be taken for the events of the previous "era". He did so, partially.

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[393] Transcript of Day 384, 129.

445. President Ramaphosa spoke at length about the proposed National Implementation Framework towards the Professionalisation of the Public Service. The draft Framework was approved by Cabinet in November 2020 and is currently undergoing public consultation. He said that he aimed to "capacitate" those in the civil service who are not "fit for purpose." The policy also aims to ensure that "fit for purpose" individuals with the proper experience and expertise are appointed into the civil service.[394] It remains to be seen how this framework may impact the practice of cadre deployment by the party.

Party funding

The Political Party Funding Act

446. In his evidence, President Ramaphosa also addressed the legislative framework for political party funding in South Africa, including the recently adopted Political Party Funding Act (Act of 2018) (PPFA). He noted that, until the adoption of the PPFA, there were few restrictions on donations to political parties and no reporting requirements. Political party donations were previously only subject to the general laws relating to financial transactions, taxation and the prevention of corruption, money laundering and other financial crimes.

447. President Ramaphosa noted that a lack of transparency in this regard increased the potential for corruption, and that the ANC had therefore resolved to address this at its 52nd National Conference in December 2007.[395] The Political Party Funding Bill, however, was not formally introduced to Parliament until November 2017, ten years later.[396] President Ramaphosa assented to the Political Party Funding Bill in January

[394] Transcript of Day 384, 94–97.

[395] BBB1-MCR-ANC-021 f. para 53

[396] Parliamentary Monitoring Group, 'Political Party Funding Bill (B33-2017)'.

2019. The PPFA did not take effect for another two years and came into operation on 1 April 2021.[397]

448. President Ramaphosa explained the PPFA in his evidence:

> "The Act ushers in far-reaching changes in the management, accountability and transparency of the finances of political parties. The Act restricts the amount of money that a party can take from a single donor and its related parties so as to prevent undue influence over parties by big donors. No party may accept more than an upper limit of R15 million from a donor in the same year. Importantly, section 8(3) of the Act says: "A political party may not accept donations that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission". … The Act is a victory for accountability, good governance and transparency in political activity. It marks a new era in our body politic, and is a milestone in our quest to build a capable, ethical state free of corruption and influence-peddling."[398]

449. President Ramaphosa also noted that the Promotion of Access to Information Amendment Act, which also took effect on 1 April 2021, makes political party finances subject to applications for information in terms of that Act.[399]

<u>Donations to the ANC</u>

450. President Ramaphosa stated that the ANC relies on several sources for funding, including funds allocated from the Represented Political Parties' Fund, membership subscriptions and levies, fundraising initiatives like the Progressive Business Forum, fundraising dinners and other events, and donations from individuals and companies.[400]

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[397] BBB1-MCR-ANC-022 para 55

[398] BBB1-MCR-ANC-023 f. para 56-59

[399] BBB1-MCR-ANC-024 para 60

[400] BBB1-MCR-ANC-021 para 50

451. The finances of the ANC are the responsibility of the Treasurer-General, and corresponding Treasurers in sub-national structures. An NEC sub-committee, the Finance Committee, supports the Treasurer-General in managing the party's finances.[401]

452. President Ramaphosa confirmed that the ANC has no official policy on donations.[402] He stated:

> "There is an expectation – based on the ANC Constitution, its principles and its values – that the ANC would not knowingly accept monies that are the product of a criminal act, are offered in exchange for favours or are from a source known to engage in illegal or unethical activities."[403]

453. When asked to explain how breaches in respect of this principle occur, President Ramaphosa posited that these breaches happened when the unlawful or unethical conduct of a donor only came to light after the donation was made. So the breach happened "after the fact." He said that parties could not "refund" donors as they are "always strapped for cash."[404]

454. It was put to President Ramaphosa that the ANC had accepted donations from companies that were heavily reliant on government contracts, such as Bosasa, without investigating them. President Ramaphosa stated that open and transparent donations from companies contracted by the state were not necessarily problematic, especially if the value of the donation is limited, as it is by the PPFA.[405]

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[401] BBB1-MCR-ANC-021 para 49

[402] Transcript of Day 384, 138–40.

[403] BBB1-MCR-ANC-021 para 51

[404] Transcript of Day 384, 140.

[405] Transcript of Day 384, 141–43.

455. It was then put to President Ramaphosa that the unlawful activities of Bosasa had been the subject of media reports since at least 2009, and that it was difficult to accept that vigilant members of the ANC would not have been aware that Bosasa was the recipient of large government contracts under dubious circumstances.[406] How, then, it may be asked, could the party continue to accept donations and other benefits from Bosasa? President Ramaphosa conceded that this "should be regarded as a major lapse" on the part of the ANC, and that, in hindsight, the party should have been more alert and should have become aware of the issue earlier.[407]

456. It was put to President Ramaphosa that it was difficult to believe that the issue only became clear in hindsight, and that party leaders must have known at the time the donations were received. President Ramaphosa agreed:

> "**ADV PRETORIUS SC:** But it is difficult to avoid the conclusion on the facts that in the circumstances … the principle that it would not knowingly accept donations in these circumstances, was in fact in breach because people knew, the President of the time knew.
>
> **PRESIDENT RAMAPHOSA:** Yes. Yes, Chairperson."[408]

457. It was put to President Ramaphosa that the reason for this lapse must have been that former President Zuma was in control of the party. President Ramaphosa did not dispute this proposition, although he did not directly answer the question:

> "**PRESIDENT RAMAPHOSA**: Yes, certainly the President plays a very key role in the life the party, it leads or she leads the party and provides leadership and gives direction. That is so."[409]

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[406] Transcript of Day 385, 91–92.

[407] Transcript of Day 385, 92–93.

[408] Transcript of Day 385, 93–94.

[409] Transcript of Day 385, 94.

458. President Ramaphosa agreed that the donations received by the ANC from the Guptas and Bosasa should have been investigated or examined by the party, as there was enough information in the public domain about these entities to raise suspicions.[410]

459. He did not know whether the allegation that the Guptas funded the party's 2012 Conference in Mangaung was correct.[411]

Internal elections

460. According to President Ramaphosa, the ANC has for many years been concerned about the role of money within the organisation, and particularly in the contestation for leadership positions. There are few campaigns for regional, provincial or national elective conferences that are not funded. The ANC, he stated, has identified weaknesses in its approach to the funding of internal contests and has initiated a process to review its policies.[412] In raising this issue during an NEC meeting in July 2019, President Ramaphosa stated:

> "In the absence of clear, appropriate and realistic guidelines, our leadership contests will continue to play themselves out in the shadows, in conditions of secrecy and mistrust, encouraging patronage and factionalism."[413]

461. The 'Through the Eye of a Needle' document produced by the ANC in 2001 also clearly outlined the role played by internal election campaigns in fostering corruption:

> "Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus

[410] Transcript of Day 385, 106–7.

[411] Transcript of Day 385, 106.

[412] BBB1-MCR-ANC-024 f. para 61-63

[413] BBB1-MCR-ANC-025 para 63

> resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.**"**[414]

462. President Ramaphosa also cited the ANC's 2020 review of 'Through the Eye of a Needle', one of the discussion documents for that year's NGC.[415] The document notes that "something deeper has gone wrong in the movement":

> "…it is clear that money politics has put the ANC in a precarious position of risking being auctioned at all levels. It will lead or it is already happening that the state and private resources are being used thus making corruption to be an essential modus operandi of these transactional politics.[416]
>
> There has emerged a strong tendency for the emergence of leaders whose sole objective is to use the membership of the ANC as a means to advance their personal ambitions to attain positions of power and access to resources for their own individual gratification."[417]

463. This is a clear admission that the role of money in contests for ANC leadership positions contributed to the conditions in which corruption and State Capture could take place. Given the dominance of the ANC in national elections over the past twenty years, those in party leadership hold significant power in both the party and state. Patronage relationships do not have to involve donations to the party itself in order to flourish. The PPFA therefore does not alleviate the risk posed by these internal electoral contests and the financing thereof.

464. President Ramaphosa was asked to address a donation made by Bosasa to his campaign for the ANC presidency (the CR17 campaign), which has been the subject of a Public Protector report (since reviewed and set aside) and extensive litigation. He had previously deposed to an affidavit detailing his interactions with Bosasa. He testified that

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[414] BBB2-MCR-ANC-ADDITIONAL-378 f.

[415] BBB1-MCR-ANC-024

[416] BBB1-MCR-ANC-447

[417] BBB1-MCR-ANC-449

there was nothing “sinister” or “underhand” about the campaign. His explanation was as follows:[418]

464.1. His campaign managers made a decision to separate him from the fundraising process and to ensure that he did not know the source of any campaign donations. This was ostensibly done to ensure that donors would not expect anything in return. Though he was kept in the dark, he did meet some donors at fundraising dinners to explain his campaign platform.

464.2. One of his campaign managers solicited a donation from Gavin Watson as an individual, not from Bosasa. President Ramaphosa was not aware of this at the time. Some of the money “went from one account to another” before arriving in the campaign’s account, which the Public Protector incorrectly viewed as money laundering.

464.3. His campaign raised around R300 million in total. The money was used for transport, venue hire, campaign paraphernalia etc., but not for buying votes.

464.4. His campaign managers methodically documented donations received and monies spent.

464.5. He subsequently requested the ANC NEC to start regulating the funding of internal leadership contests.

464.6. On the matter of the bank statements which are not the subject of litigation, he stated that some donors did not want to be publicly identified as such, and his campaign agreed. It is not unusual for donors to want to remain unidentified.

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[418] Transcript of Day 385, 95–104.

465. President Ramaphosa agreed that the principles which applied to party funding should also apply to individual campaign within a party.[419]

466. The facts of this donation fall out of the Commission's ambit. However, the following should be noted:

466.1. President Ramaphosa conceded that the ANC should have known about Bosasa's unethical and unlawful activities and therefore should not have accepted donations. This surely would apply to his own campaign as well.

466.2. He has repeated the claim that he was in the dark about his campaign funding ("Up to today I do not know how those funds had been managed. … I do not know the full facts because they have naturally decided to keep it away from me."[420]) has potentially troublesome implications. It was his responsibility to ensure that such funds were solicited and used transparently and accountably. By removing himself from the management of funds, he failed to fulfil this responsibility. This is made clear by the simple fact that his campaign not only accepted but solicited donations from individuals suspected to be involved in corrupt activities.

466.3. It is clear from his own testimony that he did know about certain donors, and that the firewall supposedly protecting him from feeling beholden to donors was not absolute.

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[419] Transcript of Day 385, 104–5.

[420] Transcript of Day 385, 95–102.

Levies

467. President Ramaphosa was questioned on the affidavit of Dr Moloi, a career diplomat at DIRCO who had made substantial allegations about the role of the party in appointing ambassadors and soliciting payments from diplomats. Part of his evidence was that ambassadors were required to sign debit forms for monthly payments to the ANC.

468. President Ramaphosa testified that it is standard for members of the ANC to sign a levy form in order to pay a certain amount from their monthly salaries or accounts to the party. This occurs in both public and private sectors, and includes all persons deployed into public office[421]:

> "**PRESIDENT RAMAPHOSA:** For instance, today every member of Parliament representing the ANC in the legislature and local government, we pay levies to the ANC so that we can boost the coffers of the ANC. And the same would happen if you are an ANC member, if you are, let us say, the chair or the CEO of one of the entities or if you are an ANC member. I know when I was Secretary-General I used to solicit members who were in the private sector to sign levy forms. … Even ambassadors who are ANC members would – they do not do it because they are appointed as ambassadors. They do it because they are ANC members."[422]

469. However, this does not address Dr Moloi's allegation that persons who were not members of the ANC, including himself, were persistently solicited for levies. This was put to President Ramaphosa. His response was that "I do not know anything about that, I would have a huge question mark around that."[423]

470. Unfortunately, time did not permit the further questioning of President Ramaphosa on the subject of levies. Nevertheless, it is pertinent to highlight that the party plays a decisive role in appointing ambassadors through its Deployment Committee. As

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[421] Transcript of Day 385, 110.

[422] Transcript of Day 385, 108–9.

[423] Transcript of Day 385, 109–10.

Dr Moloi contended in his affidavit, this allowed the party to appoint its members to high-paying positions and consequently to benefit financially from those appointments.

471. While this may be particularly pronounced in ambassadorial appointments, as they are made directly by the President with hardly any prescribed preceding processes, this could feasibly occur throughout the state. The ANC Deployment Committee has a financial incentive to appoint its own members to well-paying positions in the public service, especially given that levies appear to be proportional to income.[424]

Discipline and accountability

472. President Ramaphosa addressed the issue of accountability in his opening statement on the first day of his evidence:[425]

> "**PRESIDENT RAMAPHOSA:** The position of the ANC on leaders and members who have been complicit in acts of corruption and other crimes is clear. Their actions are a direct violation, not only of the laws of the land, but also of the ANC Constitution, its values and principles, and the resolutions and decisions of the ANC's constitutional structures. Such members must face the full legal consequences of their actions. They cannot rely on the ANC for support or protection, nor may they appeal to the principle of collective responsibility. In accounting for their actions they must be accountable for their actions themselves, because the ANC did not and could never direct its members or leaders to commit acts of corruption."

473. The Commission's concern in regard to the accountability of the ANC's members for corruption and related unlawful acts arises precisely because of the power and influence the ANC wields and the knowledge of unlawful acts by its members it would have. If members of the party are not so held accountable it is inevitable that they would continue

[424] Transcript of Day 385, 109.

[425] Transcript of Day 384, 31.

to exploit the advantages of party membership and all it entails for their own unlawful gains.

474. Furthermore, as admitted by President Ramaphosa, our law enforcement institutions were themselves weakened and rendered unable to ensure corrupt individuals were held accountable.[426] Parliament had failed to use the oversight and accountability measures at its disposal.

475. In these circumstances, but not only in these circumstances, party discipline could and should play a significant role in curtailing corruption where it is likely to continue to occur and in ensuring that State Capture does not recur.

Internal disciplinary proceedings

476. President Ramaphosa remarked in his statement that:

> "Members of the ANC also affirm that they join the organisation selflessly, without anticipation of any personal reward. Clearly, any member that is involved in corrupt activities or seeks in any other way to use their position for undue self-enrichment is in violation of this basic undertaking."[427]

477. Rule 25.27.9 of the ANC Constitution prohibits the "abuse of elected or employed office in the Organisation or in the State to obtain any direct or indirect undue advantage or enrichment".[428] Rule 25.17.4 prohibits "Engaging in any unethical or immoral conduct which detracts from the character, values and integrity of the ANC, as may be determined by the Integrity Commission, which brings or could bring or has the potential to bring or as a consequence thereof brings the ANC into disrepute". Other offences for which members can be disciplined include being convicted of fraud, theft, corruption, or

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[426] BBB3-MCR-RSA-077 para 169

[427] BBB1-MCR-ANC-032 para 79

[428] BBB1-MCR-ANC-100

other acts of financial impropriety (rule 25.17.18), soliciting or accepting a bribe (rule 25.17.19), and bringing the organisation into disrepute (rule 25.17.5).[429]

478. The ANC Constitution provides that ANC members who violate its rules must be subjected to disciplinary proceedings.[430]

479. The Commission requested the ANC disciplinary records. It received records of the ANC's National Disciplinary Committee (NDC) and National Disciplinary Committee of Appeal (NDCA) for the period 2014 – 2021.[431]

479.1. All the cases recorded were concerned with acts of organisational indiscipline allegedly committed by members in breach of Rule 25.17 of the ANC Constitution.[432] From the period 2014 to 2021, there were only two new cases. There were, however, numerous appeals and reviews from provincial disciplinary committees heard during this period. These were in respect of matters which originated prior to 2014.

479.2. In respect of all of the records of disciplinary proceedings which were made available to the Commission, the most serious sanction was (temporary) suspension from the party. This was often only after numerous appeals.

479.3. The cases provided to the Commission concerned misconduct such: disrupting meetings and/or conferences, issuing unauthorised statements to the press, taking the party to court, assault and sexual assault, theft, failure to comply with

[429] BBB1-MCR-ANC-033 para 91

[430] BBB1-MCR-ANC-032 para 80

[431] CR-REF-BUNDLE-047 ff.

[432] At BBB1-MCR-ANC-100 f.

party policy, insulting other ANC members, participating in "organised factional activity", and bringing the party into disrepute.

479.4. None of the cases concerned corruption.[433] It is remarkable that the ANC has been grappling with corruption within its ranks for years and has promised change and renewal, but has not held a single person to account on corruption since at least 2014. It is clear that the party's internal system was not effective in holding its members to account in regard to corruption.

480. The above was put to President Ramaphosa during his evidence. He stated in response that discipline has been taken in some cases but did not surface at the level of the NDC and NDCA. He conceded that these mechanisms had "not been as robust as they should be and they have not been overarching as they should be."[434] He also reiterated that the ANC has "drawn a line in the sand" and would now deal with corruption seriously. He continued:

> "**PRESIDENT RAMAPHOSA:** You may well say: Well, why did you not do so over a period of so many years? But it is better late than never and in this case we are serious about what we are saying."[435]

481. The disciplinary records received encompass a period up to and including August 2021. The Commission is unable to conclude if the proverbial line has indeed been drawn in the sand, and what that might mean for ensuring accountability within the party.

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[433] BBB1-MCR-ANC-100

[434] Transcript of Day 427, 43.

[435] Transcript of Day 427, 44.

Concurrent criminal proceedings

482. In his statement, President Ramaphosa stated that, in certain instances, particularly concerning corruption and fraud, "the institution of disciplinary proceedings is dependent on a conviction in a court of law." He stated that the organisation has therefore been unable to act against members facing serious charges of financial impropriety until the completion of court processes, which could often be lengthy.[436]

483. However, it is not true that the organisation cannot act. While rule 25.17.18 refers to those convicted of specific offences, many other rules relate directly to corruption and are not dependent on prosecutions.[437] It was noted that there is no necessary legal barrier to internal disciplinary proceedings being instituted and completed before criminal conviction.[438]

484. President Ramaphosa responded that it would pose a problem for the ANC if they disciplined a member for an offence that they were later found not guilty of in a court of law. He explained that this was the reason for the party's "step aside" rule, which requires members who have been charged with a serious crime to step aside from their positions until they clear their names. This was determined by the ANC to be the safest route.[439]

485. I pointed out that this concern was widespread and that most employers or organisations do not wait for criminal proceedings to conclude; there were fora where aggrieved

[436] BBB1-MCR-ANC-034 para 86

[437] See BBB1-MCR-ANC-100

[438] Transcript of Day 385, 146–47. See also *Davis v Tip NO 1996 (1) SA 1152 (W)*

[439] Transcript of Day 385, 147–48.

parties could challenge the outcomes of these disciplinary processes if necessary. He put to President Ramaphosa the following:

> "**CHAIRPERSON:** Every organisation you know, has its own rules. You cannot let somebody who you believe has done something completely unacceptable to your organisation, not be disciplined by the organisation because if you are going to wait until the outcome of a criminal case, which might finish in three years and then there might be an appeal which might take another three years. By the time the process is finished, how can you still say you are going to have a disciplinary hearing? So it is like you just wait for the courts and when you can deal with the matters yourselves."[440]

486. President Ramaphosa stated that political organisations were not like companies or NGOs. The "step aside" rule was a relatively new rule in the party that "should be given time and space" as the organisation matured. He continued:

> "**PRESIDENT RAMAPHOSA:** I would argue that you know suddenly changing it before it is tried and tested would lead to a lot of confusion. Hitherto people have always argued that innocent until proven guilty and they have always said I stay where I am, come hell or high water and yet it has an impact – a very negative impact on the integrity of the organisation."[441]

487. These arguments are unsatisfactory. The ANC disciplinary bodies have their own standards for proof of misconduct and their own appeals process. They are mandated to deal with many types of misconduct, which are not dependent on criminal convictions. They do not have the bureaucratic trappings of prosecutions, which may take many years.

488. While there may be certain cases that the ANC disciplinary bodies are ill-equipped to consider, this cannot be true for all alleged instances of corruption. It may be that a disciplinary committee will conclude *in a particular case* that it cannot make a finding

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[440] Transcript of Day 385, 148–49.

[441] Transcript of Day 385, 150–51.

based on the evidence available to it but for the ANC to decide not to consider *any* corruption cases is unacceptable.

489. One would also expect that the ANC would hold its members, and especially its leaders, to higher standards than saying that anyone who "has not been convicted in a court of law" in regard to corruption may not be disciplined by the party.

490. Furthermore, President Ramaphosa himself admitted that "the weakening of law enforcement agencies allowed corruption to go unpunished, perpetrators to be protected and the public purse to be looted without consequence."[442] It was known to the party that the criminal justice system could not always be relied upon to act against corrupt individuals. Yet the party had continually abdicated its responsibility to its members and voters to enforce its own rules and preserve the integrity of the organisation.

491. It is clearly against the party's best interests to allow its leadership positions to be occupied by those credibly accused of corruption and other crimes. Not only does this practice bring the ANC into disrepute, but there is a high risk that corrupt persons in powerful positions will continue to abuse their offices. This is a risk that the party, by failing to discipline those accused of corruption, has deemed acceptable. This certainly does not augur well for the prevention of corruption in the future. Nor does it give positive reassurance that State Capture will not recur.

492. It remains to be seen whether the 'step aside' rule will address this concern, especially given the significant push back within the party. It must be stated that 'stepping aside' is not a disciplinary process, and that the rule only applies to those who are formally facing criminal prosecution.

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[442] BBB3-MCR-RSA-077 para 169

The Integrity Commission

493. In addition to disciplinary processes, the ANC has another structure called the Integrity Commission which can recommend action against leaders and members of the ANC who face allegations of improper conduct. President Ramaphosa stated that "while the work of the Integrity Commission would not substitute for disciplinary action, it was established with the expectation that it would assist in dealing with allegations that had not yet been tested in court".[443]

494. In resolving on the establishment of the Integrity Commission, the 53rd National Conference noted the following:

> "More urgent steps should be taken to protect the image of the organisation and enhance its standing in society by ensuring among others, that urgent action is taken to deal with public officials, leaders and members of the ANC who face damaging allegations of improper conduct. In addition, measures should be put in place to prevent abuse of power or office for private gain or factional interests. The ANC can no longer allow prolonged processes that damage its integrity."

495. What is clear is that the Integrity Commission does not have the power to discipline any member. Since 2018, the Integrity Commission has had the power to *make recommendations* on alleged unethical conduct by ANC members, including recommendations for disciplinary action.[444] There is no evidence that the Integrity Commission recommendations have resulted in disciplinary action against any ANC member accused of corruption, save for recommendations that certain individuals should step aside from their positions.

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[443] BBB1-MCR-ANC-034 para 87

[444] BBB1-MCR-ANC-036 para 90

The absence of accountability

496. It was noted in the ANC's 2020 "Through the Eye of a Needle" review that the party had been unable to deal with various challenges identified in 2001 – of patronage, factionalism, money politics, corruption, among others – because "little emphasis has been placed on consequence management for dereliction of duty and the undermining of the value system of the movement." The document attributes the failures of the party to a lack of accountability:

> "The failure of the ANC to fully implement the guidelines in Through the Eye of a Needle and other documents arises from, amongst others, the inability to exercise political and organizational leadership functions. It is the inability to act when members deviate from established policy positions and ill-discipline. The tone is not being set from the top. The ANC is engulfed with paralysis in decision-making. The notion of democratic centralism suggests that while there is a need to allow for democratic expressions at different levels of the organization, the exercise of leadership is an important variable in the mix. The preponderance of factional activities has resulted in the emergence of what can be characterized as organizational populism: that is, the inclination to shy away from taking difficult decisions and to cave in to the conduct and demands of rogue elements.
>
> Related to the above, there is a lack of accountability for our actions as leaders and members, in terms of owning up when we deviate from the values/culture of the ANC and our struggle for the attainment of a new society. And arising out of this is the inability to effect consequence management. The organization is ceasing to act as an integral whole, but a collection of individuals pursuing their own self-interest.
>
> Accountability also means holding our leaders, cadres and general member's feet to fire. It is to ensure that they do what they were elected to do – serving the people of South Africa. It is also to ensure that everybody is accountable for his or her actions."[445]

[445] BBB1-MCR-ANC-453

The "renewal" of the party

497. President Ramaphosa spoke frequently of the "process of renewal" upon which the ANC had ostensibly embarked.

> "**PRESIDENT RAMAPHOSA:** …The ANC is so broadly supported, it is the leader of society, it has to do things not so much for its own interest but for the interest of the people of South Africa. It, therefore, needs to embark on a renewal process so that it corrects all these maladies within the organisation and if you like, clean up its own act so that it is much more presentable, even electorally to the people of South Africa and I comment on this in my document that over time we saw the electoral support of the ANC going down largely because of the corrosive corruption that our people found abhorrent and it is this, even at our 54th conference that we sought to address. That we've got to arrest this and reverse it and it is for that reason that we embarked on a renewal process to renew the organisation and organisations do go through these ups and downs and that's what we've also gone through, renew our organisation but renewal should not just be in theory it should be in practice, which is precisely where we are now. We are putting into practice the entire renewal process and we – as it were, trying to herd everyone, everyone in the same direction and that is why I referred to the resolution that we passed at our 54th conference, were supported by thousands of members of the ANC who came from right across the length and the breadth of the country. So, what remains now is the full implementation as we move."[446]

498. He also spoke at length in evidence about the party's ostensible process of renewal and the corrective measures he stated are being implemented. This includes the "cleansing" of certain government institutions, the strengthening of the party's Integrity Commission, the new legislation on party funding, and processes such as lifestyle audits.[447]

499. What is abundantly clear from the evidence before the Commission, is that for as long as the ANC is in power, the failure of the ANC successfully to reform and renew itself as undertaken by President Ramaphosa will render the South African state unable to rid

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[446] Transcript of Day 384, 71–72.

[447] Transcript of Day 428, 84–88.

itself of the scourge of State Capture and corruption. What is equally clear from the evidence is that such reform and renewal should take clear precedence over attempts to appease various competing factions within the governing party for the sake of party unity.

500. The important questions with which President Ramaphosa had to deal with in his evidence related to what he knew about what was going on in respect of State Capture and what he did about it. President Ramaphosa's evidence was that it was only after the Gupta emails had been released – which was in June 2017 – that he realised that the allegations of state capture were credible. He said that, before that, he saw certain signs of state capture. These included the dismissal of Mr Nhlanhla Nene and Mr Pravin Gordhan. Of course the dismissal of Mr Gordhan was at the end of March 2017 whereas the dismissal of Mr Nene was in December 2015.

501. It is necessary to highlight the following:

501.1. From 2011 already there were many articles in the media about the Guptas

501.2. At an NEC meeting in 2011 Mr Fikile Mbalula had told the NEC that Mr Ajay Gupta had told him in advance that he was going to be appointed as Minister of Sports and Recreation and had complained about it on the basis that he should have been told by President Zuma about his appointment. In effect, Mr Mbalula was alerting the ANC NEC that the Guptas were exercising undue influence over President Zuma.

501.3. In April 2013 the Guptas had landed their commercial aircraft at Waterkloof Military Base; this Waterkloof landing caused a huge outcry in the whole country.

502. In my view these three factors or events were enough to have shown President Ramaphosa that the allegations of state capture were credible. So by April 2013 there was enough already. However, just in case those three factors were not enough, then the dismissal of Mr Nene as Minister of Finance ought to have convinced President Ramaphosa that there was credence in the allegations of state capture.

503. The next question relates to what President Ramaphosa did. In this regard he said that he had five options:

These were:

503.1. resign

503.2. speak out

503.3. acquiesce and abet

503.4. remain and keep silent

503.5. remain and resist.

504. He testified that he was morally opposed to acquiescing and abetting as well as to keeping silent. He said that, if he and others had resigned, there would have been even fewer impediments to the unfettered expansion of the State Capture project. He said that, if he had been confrontational, he would have been removed and, therefore, would have been unable to prevent state capture. He said that he chose to remain silent and resist as he believed this to be the only way he could contribute to ending state capture and corruption in government.

505. In my view, if President Ramaphosa had spoken out - and he did not need to have been confrontational - and spoken out firmly against state capture and wrongdoing, and President Zuma fired him, that stance could have given hope to a lot of other members of the Cabinet who may have been looking for someone to lead in this regard. Indeed, there may have been many in the ANC who would have given him support and spoken out. If President Zuma fired him as Deputy President, he would have continued as Deputy President of the ANC because President Zuma could not have fired him from that position. President Ramaphosa could have inspired others in the ANC to be more, vocal and the more voices became vocal the less chances there were that those who were pursuing state capture, would have continued as before. President Ramaphosa had nothing to lose by speaking out against what was happening. The option he chose did not prevent state capture from continuing. There are good chances, in my view, that, if he was removed, that would have shaken those who were pursuing state capture. If he was fired as Deputy President of the country and remained simply as Deputy President of the ANC, he would have had more time to prepare or campaign for the position of the President of the ANC in December 2017. He ought to have remembered that there was a precedent for this. President Zuma was fired as Deputy President of the country and used the time to campaign for the position of President of the ANC in Polokwane in 2007 and, indeed Mr Zuma won in Polokwane, defeating President Mbeki. Accordingly, in my view he should have spoken out. I accept that it may be difficult to choose between the option that keeping quiet and keeping quiet but resisting. It would be untenable send a message that, if the same scenario were to happen again sometime in the future, the right thing to do would be not to speak out.

506. President Ramaphosa's role in regard to the appointment of Mr Pravin Gordhan as Minister of Finance after Mr Nene's dismissal is dealt with in Part IV of the Report.

Judicial Commission

of

Inquiry into Allegations

of

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

Report: Part VI

Vol. 2: The Role of the ANC

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

THE ROLE OF THE ANC

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THE ROLE OF THE RULING PARTY

Introduction

507. Understanding the role of the African National Congress ("ANC") is vital to understanding State Capture in South Africa. It has been the only governing party since the advent of democracy in South Africa in 1994, and specifically during the years under review. It has been responsible for deploying persons to the highest positions in the state. It has a significant majority in Parliament, allowing it effectively to control oversight of the Executive. State capture happened under its watch.

508. In addition, various ANC leaders have been implicated by witness testimony at the Commission. There has also been substantial evidence that the party itself was a beneficiary of State Capture, as it received payments from third parties who are alleged to have corruptly acquired government contracts.

509. It is necessary therefore to interrogate the role of the party in:

509.1. actively engaging in corrupt activities for its own gain;

509.2. allowing corrupt activities to continue under its watch and failing to intervene to prevent or halt such activities;

509.3. creating the framework for corruption and State Capture to flourish.

Structures of the ANC

510. The National Conference is the supreme ruling and controlling body of the ANC and is convened every five years. It decides on and determines the policies and programmes of the ANC.

511. The National Executive Committee ("NEC") is the highest organ of the ANC between National Conferences and has the authority to lead the organisation, subject to the provisions of its Constitution.

512. The President, Deputy President, National Chairperson, Secretary-General, Deputy Secretary-General and Treasurer-General of the ANC are known collectively as the National Officials or, informally, the 'Top Six'.

513. The National Working Committee ("NWC") is elected by the NEC and is expected to conduct the current work of the ANC and to ensure ANC structures carry out the decisions of the party. It is composed of the Top Six, up to 20 directly elected NEC members, and one representative from each ANC League (the Women's League and the Youth League). The NWC meets every two weeks.

The relationship between party and state

514. In his first appearance before the Commission on behalf of the party, the ANC's Secretary-General Gwede Mantashe stated that "the ANC believes that a key outlook of the Commission should be the relationship between the party and the state."[448]

515. As correctly noted by Mr Mantashe and President Ramaphosa, the party is an essential part of our democratic framework, which is that of a multiparty system with proportional

[448] Mantashe, Day 31, p 84.

representation. It is not in question that the ruling party, by virtue of its election, sets the policy of the government of the day. However, the interface between the party and state is of concern to the Commission.

516. It is clear that the ANC took on the responsibility of being the leader in society, in the process of liberation, in the establishment of the constitutional and democratic state, and the furtherance of the interests of the population as a whole. This is evident from this statement made by President Ramaphosa:

> "In such circumstances, political parties do not merely represent their members, but often act as instruments to advance the needs and interests of entire sections of society. … This is among the reasons that the ANC describes itself as a 'liberation movement' first and foremost that, among other things, contests elections as a registered political party."

517. It is evident from Mr Mantashe's evidence that the ANC's self-identification as leader of society has led to the conflation two separate notions: the interests of the party and the constitutionally enshrined public duty of those in government.

517.1. The decision by the ANC to ignore a number of allegations directed at Mr Jacob Zuma and the influence of the Gupta family on key functions in the state, as well as obstructing various avenues to achieve accountability in this regard, has seen the ANC sacrifice its public duty in order to protect itself.

517.2. The justification for the latter is the belief that the fate of the ANC is inextricably linked to that of the public or society. Mr Mantashe told the Commission that "Impulsive action, I believe, could unleash a set of negative forces which would

> have a detrimental impact on the democratic gains we have made thus far. The ANC can never take the Samson option."[449]

518. Mr Mantashe was also unequivocal about the role of the party in terms of state power. He said: "Our immediate goal is to deepen the hold of the Liberation Movement over the levers of the state."[450] He explained at length that the ANC did not cease to govern after it is elected, and that it must meaningfully engage in governing, and that in fact "state entities are tools in the hands of the governing party in order to execute its programs."

519. President Ramaphosa said that some degree of political involvement in administration is "essential for the proper functioning of a democracy" as the political administration needs to be able to change policy direction. However he said that the ANC recognises that political involvement in administration should be "circumscribed by legislation, convention and practice."[451] He said: there needs to be a "balance" between political considerations, technical proficiency, and objectivity.[452]

520. Mr Mcebisi Jonas gave his opinion during his evidence on the conflation of party and state. He stated that the easiest vehicle through which to capture the state is through the capture of the ruling party, where the party becomes an instrument for the project of wealth accumulation. State institutions, particularly the public service, he said are the product of and are bound to the political life-cycle where elections are the beginning and the end. He said that even within the elected ruling party there exist factions and contests which affect the constitution of the public service. Mr Jonas said:

> "It is what I would call the political system that we have. … In our system, if you kind of cut out the frills again, you have a particular relationship between the state and

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[449] Mantashe para118

[450] Mantsahe, Day 31, p 62

[451] Ramaphosa, BBB1-MCR-ANC-014 para 36

[452] Ramaphosa, Day 384, 92–93.

> the party. Now firstly the – you go into elections and elect a party. And normally whilst the party gets elected of course, the party goes to its own conference. Once it goes to its own conference, it takes power to provinces, it takes to provincial executives, it notionally takes it to the national executive. Ultimately power then gets taken to the working committee, and at a later point then power gets taken to another committee, the Top Six. Then later on it gets taken to the President basically. … **I think ultimately you going to have a problem where capturing the party is the easy vehicle of capturing the state.** Because the relationship between the party and the state is so – it is not – there is no kind of lines that are as strong as you would want to have. … As we think constructively about this, is actually to revisit our political system, particularly how do you draw a wall between the political party and the state, and how do you build institutions of the state that go beyond political cycles like election cycles for instance I mean and so on and so on.[453]"

Corruption and State Capture

521. President Ramaphosa has conceded the existence of corruption, the existence of state capture, and the role of the ANC therein. He has conceded not only that there has been corruption, but that it is both continuing and pervasive, in government and in the party.

522. A particularly clear example of this is in a letter written by President Ramaphosa to ANC members in August 2020, titled 'Let this be a turning point in our fight against corruption.'[454] The letter discusses the corruption problem at length and says that the ANC "needs to take responsibility". In the letter he continued and said:

> "We must acknowledge that our movement, the African National Congress, has been and remains deeply implicated in South Africa's corruption problem. … Today the ANC and its leaders stand accused of corruption. The ANC may not stand alone in the dock, but it does stand as Accused No.1. This is the stark reality that we must now confront."

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[453] Jonas, Day 67, pp 12–13.

[454] Ramaphosa, BBB1-MCR-ANC-936

523. President Ramaphosa repeatedly emphasised that the party has “drawn a line in the sand” and is committed to renewal and change. However, these statements – acknowledging corruption within the party and promising to fight it – are not new. In fact, similar statements, all expressing extreme urgency, have been made by ANC leaders since 1994. As he put it in his statement, the ANC has long recognised the existence of corruption within the democratic state, that some members of the ANC are complicit in this corruption, and that such corruption undermines our democracy and the integrity of the ANC.[455]

524. It is uncontested that:

524.1. Corruption, within the ranks of the ANC, had been recognised and acknowledged for over twenty years.

524.2. The various forms of corruption so acknowledged included: the looting of public resources; the abuse of state power; patronage; bribery; vote-buying; nepotism; state capture; and others.

524.3. Even in the last six months, corruption of “industrial proportions” has been identified by law enforcement bodies and has emerged – as allegations – in the media.

524.4. Corruption has not declined but worsened.

524.5. The ANC as “leader of society”, as controller of the “levers of power”, has been unable to halt or even significantly slow down corruption.

[455] Ramaphosa, BBB1-MCR-ANC-027 ff. para 68-74

525. Unfortunately, neither President Ramaphosa nor Mr Mantashe offered any explanation of why the party's previous attempts to deal with these problems have failed, and why any such attempts might now succeed.[456] If Mr Mantashe gave any explanation, it would be that he said that the ANC is a very slow organisation.

The ANC's response to State Capture:

526. In his opening statement to the Commission, President Ramaphosa said:

> **"PRESIDENT RAMAPHOSA:** State capture took place under our watch as the governing party. It involves some members and leaders of our organisation and had fertile ground in the divisions and weaknesses and the tendencies that have developed in our organisation since 1994. … We all acknowledge that the organisation could and should have done more to prevent the abuse of power and the misappropriation of resources that defined the era of state capture.
>
> Particularly the period under review by this Commission, the ANC does admit that it made mistakes as we have admitted in our various conferences. We made mistakes as it sought to execute the mandate that it was given by the voters. It had shortcomings and living up to the expectations of the people of South Africa in relation to enforcing accountability and in generating a culture of effective of consequence management."[457]

527. Despite the general acknowledgement by President Ramaphosa that the ANC was itself 'implicated' in relation to corruption and state capture, both he and Mr Mantashe also denied that the party itself was complicit in state capture.

527.1. President Ramaphosa largely said that the ANC as a party was, to a large extent, in the dark, and slow to act. However, there were multiple 'warning signs' in the public domain, on which the ANC did not act in any meaningful

[456] Ramaphosa, Day 427, p 44.

[457] Ramaphosa, Day 427, p 32.

way for at least five years. There was arguably at least a knowing abdication of responsibility.

527.2. Mr Mantashe was emphatic that individual members may have been 'captured' but that the party remains innocent.[458] However it appears that the party did very little to prevent the abuse of power from those 'captured' members.

528. The party's failure to act against State Capture for an extensive period of time was discussed during both President Ramaphosa's and Mr Mantashe's evidence.

529. The early warning signs of State Capture included the following:

529.1. It is clear that the particular issue of the influence of the Gupta family was being discussed within the Alliance by as early as 2011.[459]

529.2. Mr Fikile Mbalula reported to the NEC in 2011 that the Guptas had foreknowledge of his appointment to as Minister of Sport and Recreation. [460]

529.3. The Waterkloof landing in April 2013 caused much consternation.[461]

529.4. Various newspaper articles demonstrated that credible allegations that the Gupta family were engaged in corruption were publicly known since at least 2011.

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[458] Gwede Mantashe testimony page 268

[459] Matuma Letsoalo, 'Cosatu Raises Red Flag on Guptas', *Mail & Guardian* (25 February 2011), <https://mg.co.za/article/2011-02-25-cosatu-raises-red-flag-on-guptas/>.

[460] Mbalula, Exhibit V3, FM-006, para 5.1-5.5.

[461] Mantashe, p 36, para 145.

530. The ANC failed to act on these claims in any way over a span of at least five years. President Ramaphosa conceded that "there was a dropping of the ball,"[462] and that, in hindsight, the party should have been more alert to such warning signs.[463] President Ramaphosa remarked in his statement that the ANC did not have direct evidence of State Capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged.[464]

531. Mr Mantashe testified that the Integrity Commission of the ANC had recommended that Mr Zuma step down in 2013, following the Waterkloof incident.[465] Nothing came of this recommendation.

532. Dr Popo Molefe testified that he had met with the ANC Top Six to inform them of serious corruption at PRASA. Dr Molefe had testified that the ANC leadership had remained silent and failed to act against ongoing attacks on PRASA and the Board, which he had been deployed to lead by the ANC. President Ramaphosa admitted that that meeting took place. He said that Mr Molefe had said he was going to use to state institutions to deal with corruption at Prasa and that was supported. President Ramaphosa attended a meeting with Dr Molefe as a member of the Top Six in July or August 2015.[466] He claimed that Dr Molefe "received nothing else but support" and that the ANC leadership was of the view that Dr Molefe had to use the structures of the state, and not the party, to deal with these challenges:[467]

> **"PRESIDENT RAMAPHOSA:** Those things that are wrong and that are being done at the PRASA level should also be subjected to the right structures and authorities

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[462] Ramaphosa, Day 385, p 50.

[463] Ramaphosa, Day 384, pp 17–18; BBB1-MCR-ANC-037 para 93.

[464] Ramaphosa, Day 385, p 18–19.

[465] Mantashe, Day 374 p 245 ff.

[466] Ramaphosa, Day 427, p 125.

[467] Ramaphosa, Day 427, pp 127–28.

> and laws and processes so that they can want the investigation to be dealt with and there can be proper accountability. … There must be active follow-through through the various structures of the state because the ANC, and indeed it is various officials, Secretary-Generals or otherwise, they do not have the power, the capability themselves to be able to do anything about these matters.[468]"

532.1. President Ramaphosa said that Dr Molefe, as Board chairman, had the capability to act, and that it was disingenuous to suggest that he needed support from the ANC leadership to do so.[469] I pointed out that Dr Molefe had indeed attempted to use the means at his disposal to address the issues at PRASA, but that the state machinery was not operating as it should, and that he therefore may have sought the help of the party.[470]

532.2. President Ramaphosa denied as "inconceivable" the allegation made by Dr Molefe that the ANC leadership remained inactive because they wanted the Board to collapse.[471]

532.3. That Dr Molefe did try to address corruption at PRASA through the means available to him is borne out by the evidence. As detailed during his evidence, Mr Molefe and his Board approached the courts to deal with corrupt contracts. They received no support from the Minister, the Portfolio Committee, nor the Speaker of Parliament. They reported matters to the Hawks, which failed to act. The Top 6 were approached by the Chairperson of the Board of an important state owned entity that had serious problems, indeed, one that had often or was often in the media with allegations of corruption and that chairperson, a deployee of the ANC, had serious problems and wanted the Top leadership to

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[468] Ramaphosa, Day 427, pp 131.

[469] Ramaphosa, Day 427, pp 135–37, 146–47.

[470] Ramaphosa, Day 427, pp 137–39.

[471] Day 427, pp 132–34.

support his Board in its fight against corruption. I believe that the Top 6 should have taken more interest in what was happening at Prasa because whatever problems were there in August 2015 would have been problems left behind by another deployee of the ANC, Mr Lucky Montana who had just left Prasa in July. You cannot deploy somebody to be the CEO in such an organisation and when he has failed to steer it in the right direction you do not want to look into the matter. That is of course on even the approach of the ANC that it deploys its members to such strategic positions in state-owned entities. That would be on the assumption that that approach of deploying certain people is correct. Obviously, if that approach is wrong the ANC should not have deployed in the first people and, therefore, it should not have got involved when things had gone wrong.

533. In December 2015, the former President, Mr Zuma, dismissed the finance Minister, Mr Nene, and replaced him with Mr Des van Rooyen. President Ramaphosa, with other senior ANC officials, managed to convince the former President to appoint Mr Gordhan in the position instead. Despite President Ramaphosa's conviction that this was a clear sign of State Capture, and their apparent success in resisting it, the party did not act further, in relation to other matters.[472]

534. In 2016 various approaches were made to the ANC to report corruption and State Capture, or to call for action from the party.

534.1. In March 2016, Mr Mcebisi Jonas issued a media statement that the Guptas had attempted to bribe him. Mr Jonas's revelation was swiftly followed by

[472] BBB3-MCR-RSA-039 para 86.3

others, including reports made by Ms Barbara Hogan, Ms Vytjie Mentor and Mr Themba Maseko.

534.2. Party veterans Mr Jeff Maqetuka, Mr Moe Shaik, General Siphiwe Nyanda and Mr Jabu Moleketi met with Ms Jessie Duarte, Mr Gwede Mantashe and Mr Zweli Mkhize at ANC Headquarters, Luthuli House on 31 March 2016 to discuss their concerns.[473] These included a view that ANC polices were being subordinated due to the influence of a few comrades and that many people working in State institutions were beholden to the Gupta family; and that many members of the NEC expressed the view that the environment was such that they were afraid to speak out about what was happening in the ANC.[474][475]

534.3. In March 2016, the Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation and the Ahmed Kathrada Foundation wrote jointly to the NEC, calling for "urgent corrective action."[476] The letter said:

> "Letter from Stalwarts' foundations to ANC NEC
>
> To: The National Executive Committee of the ANC c/o The Secretary-General, Mr Gwede Mantashe
>
> The Oliver and Adelaide Tambo Foundation, the Nelson Mandela Foundation and the Ahmed Kathrada Foundation jointly write to you at a difficult time in the history of the African National Congress and our country, South Africa. The ANC has been through challenging times before, but with the resourceful and courageous leadership the organisation has been blessed with in its long history, it can yet again provide an invigorated, visionary course into the future. We are deeply concerned

[473] Duarte, Exhibit GG, FP-JGZ-3281 para 10.

[474] Exhibit GG (additional bundle 32.1), Affidavit of Yasmin Duarte dated 7 July 2020, pp.FP-JGZ-3283 paras.18-19.

[475] Exhibit GG (additional bundle 32.1), Affidavit of Jackson Mphkwa Mthembu dated 8 July 2020, pp.FP-JGZ-3295 paras.8-10 and Exhibit GG (additional bundle 32.1), Affidavit of Lawrence Zwelini Mkhize dated 8 July 2020, pp.FP-JGZ-3300 para.11.

[476] BBB2-MCR-ANC-ADDITIONAL-484

about the current course on which our country is headed. We believe this course is contrary to the individual and collective legacy of our Founders. We read disturbing stories in newspapers and other media about “state capture”; we see important institutions of democracy such as Parliament under great strain; we hear what ordinary South Africans tell us through our work, and are challenged by friends and comrades who witness cumulative fragmentation of the ANC, a great organisation our Founders helped build and sustain over generations. In the spirit of our Founders, we cannot passively watch these deeply concerning developments unfold and get worse by the day. Leaders such as Tambo, Mandela and Kathrada helped shape the ANC by providing a vision of a better future for all our people. Their vision of freedom, social justice, and democracy was embraced by millions of South Africans. It was based on and driven by strong moral authority and principled engagement. Their leadership and that of the ANC were admired the world over. It inspired other people in their own struggles. In 1994, the humanity and dignity of our people were restored, and the new state, a constitutional democracy, began to support that humanity and dignity with varied institutions it created and which were dedicated to achieving a better quality of life for all its citizens. In its leadership of this new democracy the government of the African National Congress enjoyed overwhelming support across the nation: the youth, religious communities, civil society, and South Africans of all persuasions. The worldwide solidarity in support of a cause that was as universal as it was humanistic, showed the extent to which South Africa had inspired the world. Sadly, by the day we witness the steady erosion of something very rare in human history: a near universal admiration of a country and what it had pledged itself to achieve.

All South Africans have a living memory of the freedoms we have won and experienced. We cannot sit back and watch those freedoms being taken away. It is in this respect that it seems to us that the ANC has significantly drifted away from the ideals to which our Founders and many others, dedicated their lives. We are disturbed by accounts we receive from students, religious leaders, members of our community, the media and from civil society organisations about the disillusionment of our people and their waning trust in the ANC as a result of the unfolding events. We believe we have reached a watershed moment. We appeal to the National Executive Committee of the ANC as they meet over the weekend to take note of the mood of the people across the country, to reflect deeply on their solemn responsibilities, to make urgent choices, and to take urgent corrective actions in the best interest of South Africa and its peoples. We make this call to remain true to our Founders and to continue their life’s work to champion the cause of freedom and democracy for our people. It is for these that they were “prepared to die”. History will judge the ANC leadership harshly if it fails to take the decisions that will restore the trust and confidence of the people of South Africa. In the true spirit of our

> Founders we offer our experience and expertise in any manner that might assist in facilitating a critical process of dialogue in which South Africans can find one another in the restoration of visionary cohesion and nation-building at this hour of need. Our doors are open! Yours sincerely, Dr Frene Ginwala Acting Chairperson of the Oliver and Adelaide Tambo Foundation Prof Njabulo S Ndebele Chairperson of the Board of Trustees of the Nelson Mandela Foundation Mr. Derek Hanekom On behalf of the Ahmed Kathrada Foundation"[477]

534.4. In March 2016, a memorandum was sent by 101 former members of uMkhonto we Sizwe to the Top Six of the ANC expressing their concerns about developments in the country and the ANC, in particular with regard to the Guptas.[478]

534.5. In April 2016, a group of former Directors-General with histories in the liberation movement, wrote a letter to members of Cabinet (including President Ramaphosa) calling for various interventions to address state capture. Nothing ever appeared to come of this and the group of former officials disbanded. [479] The letter read thus:

[477] Id.

[478] Mzuvukile Maqetuka, Transcript of Day 231 (10 July 2020), 261–262.

[479] BBB2-MCR-ANC-ADDITIONAL-478

22 April 2016

Addressed to:

Minister of Finance, Minister Pravin Gordhan, MP
Minister of Public Service and Administration, Minister Ngaoko Ramatlhodi, MP
Cc: The President of the Republic of South Africa
The Deputy President of the Republic of South Africa

We, the undersigned, are former Directors General in the post-apartheid South African government, with a prior history in the liberation struggle where we served as cadres of Umkhonto we-Sizwe, officials of the African National Congress (ANC), Azanian People's Organisation (AZAPO), the Pan Africanist Congress (PAC), and various organisations of the Mass Democratic Movement.

We were privileged, honoured and challenged to serve in various capacities at the inception of the new democratic government, in particular as Directors General from 1994. We served in our individual capacities as public servants, for periods ranging between 3 years to 15 years each in single or multiple departments. We played a role in the early efforts to transform the South African State into a more effective organ to achieve the aspirations and transformatory goals of the liberation struggle and the new democratic government to ensure a better life for our people and to address the inequities and injustices of the past.

In pursuit of the above, we believe we upheld the principles of the Constitution, and were guided primarily by the founding legislation for public sector management - the Public Service and Administration of 1994 as amended and the Public Finance Management Act (Act 1 of 1999).

We submit this memorandum to express our collective concern at recent revelations of state capture by the Gupta family, their apparent influence over political and administrative appointments, and their involvement in the irregular facilitation, securing and issuing of government tenders and contracts. We also express our concern at the effect of the recent Constitutional Court judgement in the Nkandla matter on the legitimacy of the State and its ability to focus resources and efforts on delivering services to our people, growing the economy and achieving our transformatory and developmental goals.

Whilst noting the the initiative undertaken by the ANC to conduct an internal inquiry we as former accounting officers believe that, to the extent that the issues raised are of an administrative nature, there are adequate provisions within the PFMA and PSA that make it obligatory for these allegations to be addressed.

We therefore call for the establishment of an Independent Public Inquiry in terms of Section 4(1)(a) of the Promotion of Administrative Justice Act to include representatives of Chapter 9 institution such as the Public Protector and Auditor General and the Chapter 10 institution - the Public Service Commission, as well as accountants, retired judges, advocates and experts on international financial flows. This inquiry should investigate all senior political and administrative officials who may, in their dealings with the Guptas and associated companies, have contravened the Constitution, the PFMA and the Public Service Act as amended. We strongly recommend that this Commission be established within three months and give a public progress report within six months.

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We believe that there is adequate provision in existing statutes to mitigate corruptive practices and ensure good governance. However, in our view the reported allegations of Gupta involvement in Ministerial appointments, manipulation of awarding of tenders, appointment of Gupta nominated individuals to strategic positions, show possible legislative breach. These include but are not limited to:

- Section 91(2) of the Constitution;
- Section 96 (1) and (2a, b, and c) and Schedule 2 of the Constitution;
- Chapter 10 of the Constitution, Section 195(1);
- Chapter 10, section 195(4) of the Constitution;
- Section 64 of the PFMA Act.

We note and welcome the initiatives of the Minister of Finance and the National Treasury to investigate existing contracts involving the Guptas. We call upon the Auditor General and Chief Procurement Officer to further investigate all government tenders and contracts awarded to Gupta associated companies to assess their compliance with the PFMA Act and Regulations and the Preferential Procurement Policy Framework Act of 2000 and Regulations.

We call upon the Public Service Commission to investigate all irregular or suspicious appointments of public servants in critical positions of Directors General, Ministerial Chiefs of Staff, Heads of Procurement Units, Members of Bid Specification Committees, Bid Evaluation Committees and Bid Adjudication Committees.

We also call upon the National Treasury to initiate an investigation into the possible involvement of the Guptas and associated companies in illicit financial flows out of South Africa and recommend the appointment of an independent research institution to assist in this investigation.

We call upon the Minister of the Public Service and Administration to create an enabling environment to allow all public servants to act in terms of the existing prescripts and to freely come forward to provide information to the Public Inquiry as well as to report any breaches of the relevant legislation, regulations and codes of conduct.

SIGNED BY:

Frank Chikane
Barry Gilder
Ketso Gordhan
Thozi Gwanya
Roger Jardine
Themba Maseko
Mzuvukile Maqetuka
Mogopodi Mokoena
Itumeleng Mosala
Mpumi Mpofu
Mavuso Msimang
Andile Ngcaba
Gibson Njenje
Bongiwe Njobe
Ayanda Ntsaluba
Siphiwe Nyanda
Dipak Patel
Mallele Pitje
Vusi Pikoli
Sipho Pityana
Allistair Ruiters
Sipho Shabalala
Xoliswa Sibeko
Moe Shaik
Lyndall Shope-Mafole
Vincent Zwelibanzi Mntambo
Pam Yako

534.6. In May 2016, the Top Six met with General Anwa Dramat, Mr Robert McBride, Mr Ivan Pillay and others, all of whom held senior positions in law enforcement.

They "provided details of efforts to isolate them and drive them out of their positions in the State."[480]

534.7. Further meetings were held by members of the Top Six (Ms Duarte, Mr Mantashe and Mr Mkhize) with representatives of Business Leadership South Africa, with ANC veterans, the South African Council of Churches and senior ANC comrades where it appears all groups highlighted serious concerns about corruption and State Capture.[481]

534.8. President Ramaphosa also cited a number of other actions taken by those within the Tripartite Alliance.[482]

535. This chronology shows just how long the ANC waited to do anything, despite repeated calls to act from its own members and political allies.

The ANC acts

536. In March 2016 the ANC NEC published a media statement in which it rejected the notion of any business or family group seeking influence over the ANC. The NEC simultaneously mandated the Top Six and the NWC to gather information about the allegations concerning the Gupta family and their purported influence in the State appointments, in order to "enable the ANC to take appropriate action on this matter." [483]

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[480] BBB2-MCR-ANC-ADDITIONAL-133 para 43 f.

[481] Exhibit GG (additional bundle 32.1), Affidavit of Yasmin Duarte dated 7 July 2020, pp.FP-JGZ-3287 paras.30-36.

[482] BBB1-MCR-ANC-050 ff. para 128. The ANC is in an alliance with the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). Each Alliance partner is an independent organisation with its own constitution, membership and programmes.

[483] African National Congress, 'Statement of the ANC Following the NEC Meeting Held 18-20 March 2016', <https://www.polity.org.za/article/anc-statement-of-the-anc-following-the-nec-meeting-held-18-20-march-2016-2016-03-20-1>.

537. In May 2016, Mr Mantashe reported that, in response to the ANC's invitation to its members that those with knowledge of state capture should approach the Secretary General, only eight ANC members made oral submissions, only one of whom made a written submission. Among the issues raised were: [484]

537.1. the public allegations about the Gupta family offering Cabinet positions to people.

537.2. the fact that three former Directors-General had spoken about the authority that the Gupta family appeared to have; they firmly believed that failing to comply with instructions issued by the Guptas would be career-limiting.

537.3. Concerns that the 'playing field' was not level in competing for business opportunities and that the BEE program was being undermined. ("If you are not working with the Guptas you get elbowed out.")[485]

537.4. the systematic corroding of SOEs such as Transnet, Eskom, Safcol, South African Airways and Alexkor.

538. Mr Mantashe also reported that ANC members believed that making submissions to the ANC would have the effect of exposing them instead of helping the organisation to deal with the problem, and that "for their own protection" they would rather make their submissions to an independent body.[486] Mr Mantashe said that ultimately, the NEC "accepted that eight comrades should make their submissions to an independent body, and we accepted that. That was the beginning of the process of discussing ANC

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[484] Exhibit H6: Submission made by the African National Congress, 11–12.

[485] Gwede Mantashe, Transcript of Day 31 (27 November 2018), 111.

[486] Exhibit GG (additional bundle 32.1), Affidavit of Yasmin Duarte dated 7 July 2020, pp.FP-JGZ-3287-3288 paras.27. Exhibit H6: Submission made by the African National Congress, 12.

supporting the establishment of a Commission."[487] The NEC did not further address the submissions made to them.

539. President Ramaphosa told the Commission that the ANC had realised that the problem was much bigger than they could deal with. He also stated that the complainants had wanted a more formal process so that a thorough investigation could be conducted, and so that they could be shielded.[488]

540. The statement which announced the NEC's inquiry simultaneously affirmed the NEC's confidence in President Jacob Zuma. This was not an independent or neutral space. The evidence leader put it to President Ramaphosa that the complainants may have distrusted party structures. President Ramaphosa said that they did not distrust the ANC and were in fact grateful for the opportunity. They simply preferred a more formal process.[489]

541. It should be noted that President Ramaphosa had, at the time, publicly promised that the ANC would conduct a further methodical and rigorous investigation. This clearly did not occur.[490] There is in fact no evidence that the ANC ever proactively sought to make even basic inquiries.

542. The ANC had the opportunity to get Parliament to initiate a public inquiry in terms of the Rules of Parliament to look into the allegations of the influence of the Gupta family on President Zuma but, not only did they not do so but even when another political party, the DA tabled a motion for the initiation of such enquiry the ANC opposed that motion. It was only in 2017 that the ANC changed its position and began to support the idea of

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[487] Gwede Mantashe, Transcript of Day 31 (27 November 2018), 111.

[488] Transcript of Day 385, 169–169.

[489] Transcript of Day 385, 170.

[490] BBB2-MCR-ANC-ADDITIONAL-475 ff.

public inquiries. It is notable in particular that in March 2016, when the ANC publicly announced its internal probe, the ANC opposed a motion from the opposition in Parliament to investigate the involvement of the Guptas in various SOEs.[491]

543. In November 2016 the Public Protector's *State of Capture* report was released. When the report was discussed by the NEC, that Committee resolved not to support the call for the former President to step down. The NEC felt that "it was more urgent to direct the energies of the ANC in its entirety to working towards the unity of the movement."[492] In my view this position taken by the NEC on this occasion reflects one of the biggest weaknesses in their approach. It is like the ANC will in one sentence make a statement that is bold or promising that, if implemented, could help address their problem but in the next sentence they will make a statement that is either in conflict with the first one or undermines the first one. On some occasion the NEC would criticise state capture and corruption and say how unacceptable corruption is but in the next sentence they will find it necessary to reaffirm their confidence in President Zuma and yet they knew that Mr Zuma was friends with the Guptas and he refused to end his friendship with them even when it was clear that the Guptas were doing all the things they were doing because they were abusing their proximity to him. In this instance the Public Protector's Report was out and in the face of the Report they were deciding effectively to close ranks and say: Unity, Unity and Unity! The problem, of course, is that the emphasis on unity in this context would be used by Mr Zuma and his supporters to say that the NEC should not hold him to account and if anybody sought to pursue the idea that Mr Zuma had to resign, he would be accused of seeking to divide the organisation. So, you would have a group that wanted the party to do the right thing but when they sought to pursue that, the other group may accuse them of threatening the unity of the party and the mentioned group would withdraw or slow down on what they believe should be done. In

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[491] Transcript of Day 385, 60 f.

[492] BBB1-MCR-ANC-041 para 105

my view it is a problem that will stand in the way of renewal because renewal has to mean doing things differently from how the organisation has done things before which includes acting decisively against corruption and those involving themselves in corruption but they and their supporters may accuse the other group of threatening the unity of the organisation. I say what I say in this context because it is not possible to find solutions to state capture and corruption if the ruling party does things that either protect those involved in corruption and state capture or adopts positions that constitute fertile ground for state capture and corruption.

544. The evidence heard by the Commission has revealed that it was the approach taken by the ANC as the majority party in Parliament which prevented Parliament from establishing public inquiries before 2017 and the position is that if the ANC had supported the motions for the initiation of public inquiries into the allegations of undue influence of the Gupta family on President Zuma, may be state capture would have been stopped in its tracks quite early. However, the ANC opposed those motions and this resulted in the Gupta brothers and Mr Zuma continuing with their state capture project. So it is necessary to deal with what the ruling party does or does not do that either helps in the fight against corruption and state capture or that may make it worse.

545. The implication of this statement is that the NEC decided to prioritise the survival and success of the party over acting on the allegations of State Capture. This is consistent with President Ramaphosa's own evidence before the Commission as to why he had been constrained from speaking out earlier than he did.

546. In May 2017 the NEC again decided not to act against Mr Zuma. It did, however, endorse the proposal for a judicial commission of inquiry.[493]

[493] BBB1-MCR-ANC-042 f. para 106-107

547. The ANC's 54th National Conference in December 2017, at which President Ramaphosa was elected as President of the ANC, the Conference adopted a resolution noting the following:[494]

> "an increase in corruption, factionalism, dishonesty and other negative practices that seriously threaten the goals and support of the ANC;
>
> that the lack of integrity perceived by the public has seriously damaged the ANC's image, the people's trust in the ANC, its ability to occupy the moral high ground, and its position as leader of society;
>
> that current leadership structures seem helpless to arrest these practices, either because they lack the means or the will, or are themselves held hostage by them;
>
> that the state investigative and prosecutorial authorities appear to be weakened and affected by factional battles, and unable to perform their functions."

548. The Conference resolved that:[495]

548.1. ANC members accused of corruption must account to the Integrity Commission or face disciplinary processes;

548.2. those who fail to give an acceptable explanation must voluntarily step down while they face disciplinary, investigative or prosecutorial procedures, or must be suspended;

548.3. the party should publicly disassociate itself from anyone accused of corruption;

548.4. party members and structures must cooperate with law enforcement agencies;

548.5. ANC deployees to Cabinet must strengthen state capacity to successfully prosecute corruption and account for any failure to do so.

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[494] BBB1-MCR-ANC-055 para 133

[495] BBB1-MCR-ANC-056 para 134

549. In February 2018, the ANC NEC decided to recall Mr Zuma from his position as President.[496] Mr Zuma resigned as President of the country on 14 February 218 and on 15 February 2018 President Ramaphosa was elected as President of South Africa.

The ANC in Parliament

550. President Ramaphosa remarked that the ANC did not have direct evidence of State Capture "at the time" and did not have the investigative capacity to probe various allegations as they emerged. [497] It was put to him in evidence that Parliament *would* have this investigative capacity, which he conceded.[498]

551. A number of allegations against the Guptas had surfaced since 2011, but Parliament failed to investigate these claims in any way over a period of about five years. President Ramaphosa conceded that "there was a dropping of the ball".[499] He said that the party did eventually realise it could not sufficiently investigate on its own and referred the matter to Parliamentary structures.[500]

552. President Ramaphosa agreed that the ANC's opposition to a proposed Parliamentary investigation into allegations of State Capture in March 2016 was "ill-advised". This error, he claimed, was later corrected. He said that the ANC had opposed the proposal, earlier because there was contestation between the political parties.[501]

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[496] BBB1-MCR-ANC-043 para 109

[497] Transcript of Day 385, 18–19.

[498] Transcript of Day 385, 18–19.

[499] Transcript of Day 385, 49–50.

[500] Transcript of Day 385, 57–59.

[501] Transcript of Day 385, 60–64.

553. The ANC's counter-motion in Parliament was to direct all allegations of State Capture to law enforcement authorities or Chapter 9 institutions.[502] According to President Ramaphosa, at the time they believed that these structures would be more effective than Parliament. Although there was initially inertia, President Ramaphosa stated that although initially the ANC was not keen on the investigation of these allegations by Parliament, ultimately the ANC was determined to let the allegations be probed by Parliament.

554. President Ramaphosa said, the two processes did not need to be mutually exclusive. He was referring to a probe by Parliament and an investigation by the police or by the Public Protector. Despite the explanations offered by President Ramaphosa[503] and Mr Mantashe, the evidence shows that there was a determined resistance and unwillingness on the part of the ANC in Parliament for Parliament to investigate and exercise oversight in relation to allegations of state capture. This could only have been because the investigation would involve investigating the relationship between Mr Jacob Zuma and the Gupta brothers. That was similar to when Ambassador Maqethuka, Ambassador Mo Shaik and General Njenje who were the Top three heads of the State Security Agency approached Minister Siyabonga Cwele and told him that the SSA was going to investigate the Guptas. Dr Cwele expressed a strong view against it. Mr Zuma also expressed opposition to the investigation.

555. Further questions were raised over the role of 'party discipline' and the ANC's insistence that its MPs vote against a motion of no confidence in Mr Zuma. President Ramaphosa

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[502] Transcript of Day 385, 65–66.

[503] Transcript of Day 385, 67.

and Mr Mantashe both emphasised the need for party discipline and the idea that MPs were supposed to represent the collective will of the party.[504]

556. Mr Mantashe suggested that the no-confidence motions were simply ploys by opposition parties. Mr Mantashe went on to say that the opposition in Parliament being able to dismiss a sitting President was a "mischief that we should resist all the time."[505] This is part of the problem which enabled the Gupta-Zuma state capture to happen, flourish and allow the Guptas to steal billions and billions of Rands of taxpayers' money. It is this idea that an opposition party can never be justified in calling for a President of the ruling party to be removed from his or her position as President of the country. However, it is wrong because they can be spot-on. The ruling party needs to abandon the idea that whenever an opposition party moves a motion of no confidence in the President, the motion is wrong and unjustified irrespective of the facts. It is this attitude that put the country where it is about state capture. If the ANC continues with this attitude, it will mean that, if others could institute another state capture in this country and the opposition parties table a motion of no confidence in the President if the new captors have used the same method as the Guptas by capturing the President of the ruling party who is also the President of the country, the ANC would take the attitude that they will oppose the opposition party's motion of no confidence as they did during Mr Zuma's time and the country landed where we are.

557. Mr Mantashe asserted that the removal of a President is a matter of party organisational discipline which should best be dealt with within the confines of the party.[506] What is strange about this view is that the ANC as a party was not doing anything internally to investigate the allegations that formed the basis of the motion of no confidence in

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[504] Gwede Mantashe testimony page 306

[505] Gwede Mantashe Testimony page 288

[506] DAY 374 p 341

President Zuma. So, if the removal of a President of the country was a matter for the ANC to handle internally, when were they going to handle it internally? Did Mr Mantashe not say that the ANC did not have capacity to investigate the allegations against Mr Zuma and/or the Guptas? So, where would they have suddenly got the capacity from to investigate the allegations because, I assume, they would have to investigate the allegations.

558. Mr Mantashe and President Ramaphosa also stressed the need to avoid dividing the party.[507] Mr Mantashe testified: "I have a responsibility to keep the ANC intact for it to have the vibrancy and the capacity to govern. … obviously it will be a huge call for any ANC member to destroy the ANC because he thinks it is in the interest of the country … I can tell you with my eyes closed, you allow an opposition party to remove your president and you remove that president there will be a massive split in the ANC and collapse."[508] The natural conclusion of this particular argument is the recurring theme that the ANC prioritises its own survival and strength over the interests of the country. It seems that Mr Mantashe was pre-occupied with the survival of the ANC irrespective of what happened to the country and its economy. The Guptas were alleged to be involved in all kinds of wrong things abusing their proximity to President Zuma and President Zuma did not want to end his friendship with the Guptas but Mr Mantashe was not prepared to let Parliament hold President Zuma to account or to let Parliament initiate a public inquiry.

559. The constitutional framework – including Members of Parliament's oaths of office – does not allow MPs to vote according to the party's wishes if they believed that to do so would be against the interests of the people of South Africa. The oaths of office of the President, Deputy President, and Members of the National Assembly includes these

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[507] Transcript of Day 385, 88.

[508] Day 374 p 293 ff.

words: “I, A.B, swear/solemnly affirm that I will be faithful to the Republic of South Africa….”. This suggests that, if the interests of the Republic clash with the interests of your party, then a person who has taken that oath will choose to be faithful to the Republic. When they do something else, prefer their political party over the Republic, they will be in breach of their oath of office.

560. The Chairperson posited that the imposition of a party decision on MPs in a vote of no confidence would render this mechanism of accountability ineffective, given that the President would enjoy majority support in the party and therefore in Parliament:

> **CHAIRPERSON:** … the mechanism of accountability of the vote of no confidence which is meant to keep the President on his or her toes will be rendered ineffective if the President will know that there is no way Parliament can pass a vote of no confidence in me because my party will never allow that.[509]

561. President Ramaphosa said that, while a motion of no confidence is an important “check and balance” embedded in the Constitution, the party system is a part of our constitutional architecture and also provides important checks and balances.[510]

562. Unfortunately, this approach fails to grapple with the core issue, which is that the ANC’s internal checks and balances *did* fail, and that the party sought to prevent the proper exercise of a constitutional mechanism of accountability by forcing its members to vote according to the party line. The “runaway vehicle” of State Capture, as President Ramaphosa put it, *did* cause untold harm. A vast amount of damage to the country’s institutions and fiscus was already done by the time the party decided to initiate Parliamentary enquiries, and later on decided to recall its President, Mr Zuma. The evidence here is unequivocal.

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[509] Transcript of Day 385, 85.

[510] Transcript of Day 385, 86–88.

563. Mr Mantashe highlighted that "the effectiveness of legislative oversight is not a function of oversight capacity but of political will." That is the crux of the matter. Although Mr Mantashe stated that the ANC had the political will to "make Parliament work and to ensure effective oversight and accountability", the evidence shows that there was no political will to act by Parliament until 2017. This was because the ANC majority had no political will to deal with the Guptas.

Was it enough?

564. When asked to be specific about the party's shortcomings, President Ramaphosa had this to say:

564.1. In the context of inequality in South Africa, political office presents one of the few opportunities for material advancement, which could lead to political patronage. This is an issue where the ANC "made some huge missteps on".[511]

564.2. There was a "decline of organisational integrity" in which internal party processes were manipulated in order to advance the interests of certain individuals and people.[512]

564.3. Divisions and factionalism compromised the party's ability to tackle corruption. Factionalism "led to a number of people having a vested interest in maintaining certain wrong practices."[513]

564.4. A system of patronage emerged within the party's ranks.[514]

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[511] Transcript of Day 428, 82 f.

[512] Transcript of Day 428, 83.

[513] Transcript of Day 428, 83.

[514] Transcript of Day 428, 83.

564.5. The lack of an official policy on party funding led to “enormous problems” within the organisation.[515]

564.6. The party’s internal problems led to the weakening of institutions, including government institutions, which themselves became factionalised.[516]

565. Concerning state capture specifically, President Ramaphosa stated that “there was some action but it was not enough.” The party, he said, was blindsighted by the fact that the Gupta family were friends of the “ultimate leader” of the ANC (Mr Zuma).[517] He had also previously stated that the ANC did not have direct evidence of state capture “at the time” and did not have the investigative capacity to probe various allegations as they emerged.[518]

566. Mr Mantashe explained that the ANC had to move slowly and with care in order to protect itself.[519]

567. President Ramaphosa agreed that there was a “delay” in the party’s response to allegations which “did not service our country well”. He attributed this delay to the ANC’s nature as a “political organism” beset with continuous debates and contestations. He said that it was the ‘balance of power’ within ANC structures which was responsible for the slow response.[520]

568. President Ramaphosa spoke in his evidence about what he referred to as contestation concerning the meaning of state capture as a concept. He did not elaborate. This

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[515] Transcript of Day 428, 84.

[516] Transcript of Day 428, 84.

[517] Transcript of Day 428, 89–90.

[518] Transcript of Day 385, 18–19.

[519] Transcript of Day 374, 238

[520] Transcript of Day 385, 69–72.

contestation meant that it was not easy to have agreement on certain issues connected with allegations of state capture.

569. President Ramaphosa indicated that the problem in the ANC was the balance of power inside the ANC. What he meant was that, if most people are against a certain route, the ANC could not take that route.

570. The ANC's review of the 2001 document 'Through the Eye of a Needle', which was part of its discussion document for the 2020 National General Conference, includes a notable analysis of the organisation's inaction in addressing a number of challenges for over a decade. The document reads:

> "The failure of the ANC to fully implement the guidelines in Through the Eye of a Needle and other documents arises from, amongst others, the inability to exercise political and organizational leadership functions. It is the inability to act when members deviate from established policy positions and ill-discipline. The tone is not being set from the top. The ANC is engulfed with paralysis in decision-making. The notion of democratic centralism suggests that while there is a need to allow for democratic expressions at different levels of the organization, the exercise of leadership is an important variable in the mix. The preponderance of factional activities has resulted in the emergence of what can be characterized as organizational populism: that is, the inclination to shy away from taking difficult decisions and to cave in to the conduct and demands of rogue elements.
>
> Related to the above, there is a lack of accountability for our actions as leaders and members, in terms of owning up when we deviate from the values/culture of the ANC and our struggle for the attainment of a new society. And arising out of this is the inability to effect consequence management. The organization is ceasing to act as an integral whole, but a collection of individuals pursuing their own self-interest.
>
> Accountability also means holding our leaders, cadres and general member's feet to fire. It is to ensure that they do what they were elected to do – serving the people of South Africa. It is also to ensure that everybody is accountable for his or her actions."[521]

[521] BBB1-MCR-ANC-453

571. The ‘contestations’ referred to by President Ramaphosa are identified here as competing factional and personal interests. These competing factions and persons were allowed to paralyse (in the words of the Party itself) the organisation where the leadership was unable or unwilling to hold them accountable for their actions.

572. President Ramaphosa testified that the party lost significant support due to corruption, which made addressing those allegations an “existential challenge”.[522] Opinion research at the time indicated that the issue of corruption was among the factors that contributed to the decline in electoral support for the ANC in the 2016 local government elections.[523] The evidence may suggest that loss of electoral support was the main reason that the party finally reacted as it did.

573. The characterisation of the party’s seven years of inaction as a “delay” is itself problematic. The party did not simply take a long time to consider the allegations and arrive at decisions. This was not one continuous process. As is made clear by the evidence, the party made a series of decisions over a number of years *not* to act against Mr Zuma and other complicit parties. That the party later decided otherwise does not absolve it of accountability for those earlier decisions.

Cadre Deployment Policy

The political-administrative interface

574. The Constitution envisages a public administration that maintains a high standard of professional ethics; that is efficient, economic and effective in its use of resources; is development-oriented; provides services in a manner that is impartial, fair, equitable and

[522] Transcript of Day 428, 88.

[523] BBB1-MCR-ANC-041 para 103

without bias; encourages participation in policy-making; and is accountable and transparent. It should support good human-resource management and career development. It should promote 'employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation'.[524]

575. Section 197 requires the public service to "loyally execute the lawful policies of the government of the day", while also stipulating that "no employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause." There is no provision for political criteria to enter into decisions about appointments to fixed posts within the public administration.[525]

576. In *Mlokoti v Amathole District Municipality*,[526] the Eastern Cape Division of the High Court found that in a contestation for the position of municipal manager, despite the fact that there was an expressed political preference for another candidate, the municipality was obliged to appoint the best candidate. In his judgment Judge Pickering's criticism of the municipality's decision was severe:

> "Be that as it may, one fact emerges clearly from VM23, a fact which is not in any way refuted, and that is that the Regional Executive Committee of the ANC instructed the caucus to appoint the second respondent and the caucus carried out this instruction. This is not an example of democracy in action as was submitted by Mr. Quinn, certainly not of constitutional democracy. It, rather than the two legal opinions, amounted to **an usurpation of the powers of first respondent's council by a political body** which, on the papers, does not appear even to have had sight of the documents relevant to the selection process including the findings of the interview panel. In my view, the involvement of the Regional Executive Council of the ANC in the circumstances described in VM23 constituted an unauthorised and unwarranted intervention in the affairs of first respondent's council."

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[524] Section 195 of the Constitution.

[525] The only exception is the appointment of persons on grounds of policy considerations, usually special advisers of political executives. which are governed by S 197(4) and section 12(A) of the PSA.

[526] [2008] ZAECHC 184; 2009 (6) SA 354 (ECD)

> It is clear that **the councillors of the ANC supinely abdicated to their political party their responsibility** to fill the position of the Municipal Manager with the best qualified and best suited candidate on the basis of qualifications, suitability and with due regard to the provisions of the pertinent employment legislation as set out in paragraph 1 of the recruitment policy. This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters.
>
> In the circumstances it is clear that the councillors comprising the ANC caucus failed to exercise the discretion vested in them at all. That abdication of their discretionary powers must result in the decision to appoint second respondent being declared unlawful and being set aside.
>
> The first respondent has demonstrated a **lamentable abdication of its responsibilities by succumbing to a political directive from an external body**, regardless of the merits of the matter. It continues, with an equally lamentable lack of insight into its conduct, to contend that it was proper for it to have done so."[527]

577. The Constitution's requirement of a non-partisan public service cuts both ways, and the requirement of loyal execution calls for personnel who, without blind loyalty to any party, are committed to faithfully implementing lawful government policies with which they may personally disagree. Active attention to achieving this by political parties – not least by a majority party democratically elected to govern – may not be considered objectionable in principle.

578. The problem obviously is to reconcile this in practice with the achievement of a 'non-partisan' public service loyally executing only lawful government policies and nothing more. It clearly could not be justified for a party to use its internal 'recommendation' of a candidate for office as a means of placing political pressure on and distorting the objective statutory process of selection and appointment to that office in the state.

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[527] 379J-381A

The ANC's version

579. Mr Mantashe and President Ramaphosa testified about "cadre deployment".

580. The ANC is guided in this regard by the ANC Cadre Development and Deployment Policy[528], as well as other party documents. The Deployment Committee ("the Committee") is headed by the ANC Deputy President and comprises fifteen NEC members, including the Deputy Secretary-General.[529]

581. According to Mr Mantashe, the strategic deployment of ANC members is an important part of the ANC's strategy to control the levers of power in the state. The party seeks to exercise control over the public administration, including the public service and the state-owned enterprises.[530] According to both Mr Mantashe and President Ramaphosa, the ANC accepts the principle that the public service is required to be non-partisan,[531] but they say that there is no conflict or tension between this principle and the ANC's Deployment policy.[532]

582. According to President Ramaphosa, the deployment policy is aimed at ensuring that the person most "fit-for-purpose" is appointed whatever critical position has been identified.[533] He stated in evidence that the relevant policy aims to ensure the transformation of South Africa's institutions following the end of apartheid. He said that deployment ensures that these institutions reflect the demographics of the country. He continued and said that the need to ensure that these changes were "solidified"

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[528] BBB1-MCR-ANC-118 ff.

[529] BBB1-MCR-ANC-011 f. para 27

[530] Day 374 p 63

[531] Day 374 p 63

[532] Day 374 p 65

[533] BBB1-MCR-ANC-011 para 25

continued to exist to this day.[534] He said that some of the considerations of the Deployment Committee were political, regarding "key positions where we seek to advance the mandate of the governing party."[535]

583. According to President Ramaphosa, the Committee considers things like gender balance, demographic representation and the developmental agenda of the governing party in making its recommendations. President Ramaphosa asserted that the need to ensure the transformation of state institutions still continued.

584. President Ramaphosa stressed that this policy was not unique to the ANC, and was practised in various forms worldwide and by other parties in South Africa.

585. The version put forward by President Ramaphosa and Mr Mantashe is that the ANC's Deployment Committee is a "recommending structure" that:

585.1. identifies vacancies in strategic positions in the state;

585.2. encourages suitable persons to apply for positions;

585.3. provides advice and recommendations to appointing authorities (such as Ministers) on important appointments.

586. They contend that the Committee has no power to decide on appointments and issues no instructions. They said that the Committee simply presents recommendations based on the outcomes of the mandated appointment processes.

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[534] BBB1-MCR-ANC-012 para 28

[535] Transcript of Day 384, 43.

587. However, the above evidence is not borne out by other evidence before the Commission.

Records and minutes

588. The Commission requested the minutes of the ANC Deployment Committee under the chairmanship of President Ramaphosa. The Commission was informed that there were no minutes for the period 2012 to 2017. The Commission then requested to be provided with Deployment Committee minutes for the later period (any portion of 2017 and the period 2018-2021). These records were received shortly before the President's second appearance in August 2021.[536]

589. President Ramaphosa was asked whether minutes were lost or destroyed, or were simply never taken. He responded that he did not recall minutes ever being taken, which he attributed to "unfortunate record-keeping processes."[537]

590. It is concerning that basic record-keeping, arguably a necessity for ensuring transparency and good governance, may have been neglected for at least five years under President Ramaphosa. It is difficult to conceive how the Party would have any oversight over the Committee without any records. It is also difficult to conceive how the Committee would report on its activities to the party membership and leaders. Finally only with an accurate and comprehensive written record could the Committee be held accountable for its decisions and recommendations.

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[536] CR-REF-BUNDLE-038 ff.

[537] Transcript of Day 427, 10.

What is the scope of the Deployment Committee?

591. There is a difference between the deployment of public representatives to elected positions in legislative and executive bodies in government, and the deployment of cadres to strategic positions in the state and state employment. The appointment and election of public representatives (for example, to Parliament or Provincial Legislatures or Municipal councils) is the prerogative of the party. The Commission is concerned largely with the deployment of party cadres to positions in state institutions and in the civil service.

592. According to President Ramaphosa and Mr Mantashe, the ANC deployment policy applies to senior positions in government such as Directors-General and Deputy Directors-General as well as leadership in critical institutions including the private sector.[538] It does not apply to the appointment of Ministers, which is the prerogative of the President.[539]

593. The ANC Cadre Deployment Policy contains the following provisions:

> "10. The following are the key centres of authority and responsibility within the state that should be given priority:
>
> 10.1 Cabinet;
>
> 10.2 The entire civil service, but most importantly from director level upwards;
>
> 10.3 Premiers and provincial administrations;
>
> 10.4 Legislatures;
>
> 10.5 Local Government
>
> 10 .6 Parastatals;
>
> 10.7 Educational institutions;
>
> 10.8 Independent statutory committees, agencies, boards and institutes;

[538] BBB1-MCR-ANC-011 para 25; Day 374 p 105

[539] BBB1-MCR-ANC-011 para 26

> 10.9 Ambassadorial appointments; and
>
> 10.10 International organisations and institutions
>
> …
>
> 20. A core or pool of comrades needs to be identified for deployment in each of the key strategic centres of authority and responsibility, particularly in relation to the legislatures, civil service, parastatals, independent bodies and ambassadorial appointments."

594. President Ramaphosa confirmed that this list falls within the scope of activity for the Deployment Committee, although *in practice* the Committee did not consider all of these categories. The Committee, he said, "has set itself its own limit." He said that of the above categories, the Committee tends to focus on civil servants of DDG level and above and SOE executives and Board members only.[540]

595. The question of judicial appointments was a contentious issue. It was eventually conceded that the Committee does sometimes make recommendations on judicial appointments. There is a danger that this could compromise the transparency and independence of the Judicial Service Commission process, and that internal party concerns such as factionalism could be carried into the judiciary.[541]

596. Although President Ramaphosa contended that as a matter of *practice* the Committee limits itself, the party's deployment policy nevertheless applies to all the positions mentioned above.[542]

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[540] Transcript of Day 384, 59–60.

[541] Transcript of Day 427, 35–36.

[542] Transcript of Day 384, 63.

Does the Committee give recommendations or instructions?

597. Echoing Mr Mantashe and Mr Zuma[543], President Ramaphosa testified that the Deployment Committee operates "like a recommendations committee" and does not make appointments or instruct appointing authorities to appoint certain persons. He also noted that the wishes of the Deployment Committee often do not materialise, which must show that the Committee has no real power.[544]

598. However, the Committee may have more power in reality than it does on paper. I noted that appointing authorities, who are themselves ANC members and therefore bound to the decisions of the party, such as Ministers, might feel pressured to appoint the Committee's chosen candidate, and that this would give such candidate an unfair advantage.[545]

599. President Ramaphosa testified in response to this proposition that Ministers often sought to*convince* the Committee to support their choice.[546] President Ramaphosa's argument was that the Committee therefore served as a "filter" or a type of "quality assurance" in order to ensure that the Minister's candidate was fit-for-purpose.[547]

600. Later in his testimony, he remarked:

> **PRESIDENT RAMAPHOSA**: And may I add deployment committee level, I know of Ministers who have been there three times or more just to get a list recommended. So it is not as easy as that where you just have a list which is underpinned by nefarious intentions, just approved, it is quite vigorous and I have known and I have seen Ministers coming out of that type of process just pulling the sweat off their

[543] Jacob Zuma, transcript, 17 July 2019, p.10.

[544] Transcript of Day 384, 42–43.

[545] Transcript of Day 384, 47–48.

[546] Transcript of Day 384, 49.

[547] Transcript of Day 384, 49–50.

> foreheads because it means they have achieved something. It is not an easy process.[548]

601. The fact that Ministers seek to convince the Committee, and go through such lengths to do so, implies however that the true and ultimate decision-making power lies with the Committee itself.

602. This is also clear in the Deployment Committee records (2017 onwards), which were carefully reviewed by the Commission. The following trends were observed in the minutes:[549]

602.1. While the language is consistent in part with the Committee making recommendations, in other parts the language is peremptory.

602.2. The Ministers make recommendations to the Deployment Committee and seek permission to appoint their chosen candidates, which the Committee "approves" or sends back for "refinement".

602.3. Ministers have been taken to task by the Deployment Committee for presenting their choices as final and irrevocable, or presenting names to Cabinet which were not approved by the Committee.

602.4. The Committee insists that even before posts are advertised the Deployment Committee should be notified.

603. It therefore appears that the Committee does not always merely make recommendations but in fact often instructs appointing authorities on who to appoint.

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[548] Transcript of Day 384, 115–16.

[549] Transcript of Day 427, 14–16.

604. President Ramaphosa insisted that cadre deployment is “safe” as the Committee has no formal power to appoint, and appointments are still governed by the legally mandated processes.[550] However this sidesteps the question of how deployment actually functions in reality, and whether appointing authorities have to accept or rubber-stamp decisions made by the Committee. As I put to President Ramaphosa, the party is where the real decisions are taken.[551] President Ramaphosa conceded that “the party is where the power resides”.[552]

605. The minutes reveal that the Committee has been frustrated that people accountable to the Committee do not really understand the principle of “democratic centralism”. President Ramaphosa explained that, according to democratic centralism, party members are bound by decisions taken by higher bodies. It is therefore “a sign of indiscipline” in the ANC to disobey and not follow the decisions of a higher structure.[553] It is also notable that the party’s deployment policy states that “decisions of the organisation … are final and a breach of this policy shall constitute a serious offence”.[554] Democratic centralism, applied to the system of deployment, would ensure that the power to appoint did indeed lie with the party, in its higher echelons.

606. Other witnesses have testified to the effect that the Deployment Committee has and exercises more power than the Party would like to concede:

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[550] Transcript of Day 427, 17–20.

[551] Transcript of Day 427, 23.

[552] Transcript of Day 427, 23–25.

[553] Transcript of Day 427, 26–27.

[554] Transcript of Day 374, 113-115

606.1. In her testimony,[555] Ms Hogan claimed that the Committee *determines* who gets certain positions in government, and that the NWC instructs Ministers on appointments, which is an abuse of power. [556]

606.2. Ms Lynne Brown, in her affidavits to the Commission, made repeated references to consultations with the Deployment Committee concerning appointments to SOEs. For example, she stated that "before the names of proposed Directors were relayed to Cabinet for approval, the ANC Deployment Committee had to give its endorsement first"[557] and "all appointments to the boards of State owned Entities must also be approved by the African National Congress' Deployment Committee whereafter it gets approved by Cabinet."[558]

606.3. Dr Ben Ngubane spoke about cadre deployment unprompted. He said:

> "There has been a very strong deployment of cadres. So it may be competitive, but when the elite, the governing party, knows someone they think can fulfil their objectives, they will make sure that person gets it … people are earmarked for some type of jobs."[559]

606.4. Ambassador Francis Moloi said that ambassadorial and Head of Mission positions have consistently been dominated ("grotesquely and disproportionately so") by political appointees and party deployees to the exclusion of professional diplomats, and that this is driven by the ANC's policy of cadre deployment.[560]

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[555] Barbara Hogan, Transcript Day 21, 12 November 2018, pp.39-42 & 46.

[556] Barbara Hogan, Transcript of Day 21 (12 November 2018), 41.

[557] Brown affidavit of Sept 2020, pg 33, para. 109

[558] Lynnette Brown, Exhibit DD21, DD21-LB-083, para 65 (Annexure B).

[559] Day 320, p. 35-36

[560] Dr Moloi, Affidavit, at para 25.

607. The *Amathole* case referred to earlier is a clear example of a Committee making appointment decisions.

608. The evidence referred to above gives credence to the proposition that appointing authorities, including Cabinet, are *de facto* bound by the decisions of the Committee, which means that its 'recommendations' are in fact instructions.

What are the Committee's selection criteria?

609. Appointments in the public service are governed by a number of laws and policies, most significantly the Public Service Act, which seek to ensure that appointment processes are fair, effective, and in line with the Constitution. If appointment decisions are not made within this governance regime, but rather made behind the closed doors of the party, these checks and balances are circumvented.

610. Furthermore, if the party does have the power to decide appointments, the concern is that the Party can *abuse* this power to achieve ends which are not in the best interests of the country. If the Party prioritises loyalty or party membership as selection criteria, there is a risk that it will not select the best person for the job, and moreover that deployees will serve the interests of the party even to the detriment of the country.

611. In her testimony, Ms Hogan claimed that the Committee did have power and deliberately chose candidates for their loyalty to the party, and after the ANC 2007 Polokwane conference, for loyalty to a particular faction.[561] Part of Ms Hogan's evidence was that the Deployment Committee did not have the necessary expertise or resources to properly consider these appointments.

[561] Barbara Hogan, Transcript Day 21, 12 November 2018, pp.39-42 & 46.

612. President Ramaphosa responded that appointing authorities, such as ministers, do use selection committees or panels and external entities as a "layer" in the appointment process. He also asserted that the Committee is composed of diverse and knowledgeable persons, which produces a "wealth of wisdom".[562]

613. He stated that those persons deployed must understand that they sit there on behalf of the ANC. Mr Mantashe said that once deployed and responsibility is assumed, the cadre must be non-partisan in his or her approach because they are a public representative.[563]

614. Mr Zuma stated that, of course, they would want people who are known to the party, who 'would implement the policies appropriately', and that this is normal in other countries where the winning party will "remove everybody out and put their people." He also stated that the party could not take people they did not know and "of course" there were people who were there because they were loyal to the party and believe in its policies.[564]

615. Furthermore, many of the minutes scrutinised by the Commission show that the Committee did consider loyalty and party membership when evaluating candidates. This would give an unfair advantage to ANC members, which would effectively contravene section 197(3) of the Constitution, which states that "No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."

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[562] Transcript of Day 384, 79–80.

[563] Transcript of Day 374, p 94.

[564] Jacob Zuma, transcript, 17 July 2019, p.10.

The possible role of deployment in State Capture

616. Even if it is true that the Committee has no formal power, and that it does not issue explicit instructions to appointing authorities (which is ultimately not accepted), the evidence shows that this is not the end of the matter.

617. The ANC recognises that "there are several instances where individuals appointed to positions may not have been fit for purpose". The ANC claims to have addressed this problem at its 54th National Conference by resolving that "the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards."[565] The unfortunate implication is that the merit principle did not apply to such deployments until the resolution in December 2017, thus rendering the resolution necessary.

618. The ANC's deployment policy itself identifies that the process can be abused. It notes that "the potential for NEC members to have political or other interests in the deployment of particular cadres to particular positions cannot be ruled out".[566] President Ramaphosa agreed that this section of the deployment policy, which details a number of ongoing problems concerning cadre deployment, is correct. He said:

> "The ANC's range of national and regional deployment committees ebbed and flowed over time as the movement battled intra organisation positioning, optimisation of state governance, factionalism, careerism and opportunism, desperation for employment and the organisational dilemmas of having to act against corrupt comrades."[567]

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[565] BBB1-MCR-ANC-017 para 41

[566] BBB1-MCR-ANC-130 para 49

[567] Transcript of Day 384, 69–71.

619. The danger of political influence in appointments is perhaps best articulated in the ANC's 'Eye of a Needle' document from 2001:

> "Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC.
>
> Government positions also go hand-in-hand with the possibility to issue contracts to commercial companies. Some of these companies identify ANC members that they can promote in ANC structures and into government, so that they can get contracts by hook or by crook.
>
> Positions in government also mean the possibility to appoint individuals in all kinds of capacities. As such, some members make promises to friends, that once elected and ensconced in government, they would return the favour. Cliques and factions then emerge within the movement, around personal loyalties driven by corrupt intentions. Members become voting fodder to serve individuals' self-interest."[568]

620. President Ramaphosa was asked about the appointments of specific individuals who have been implicated in corruption and state capture at the Commission, and whether these individuals were 'deployed'. He responded:

> "**PRESIDENT RAMAPHOSA**: Let us accept, Chairperson, that some of those deployments were done in a particular era and in a particular way and right now as we look at that past slate we were able to look at it and say we actually need to do things differently."[569]

621. He went on to say that the Deployment Committee "would not have dealt with a whole lot of those" appointments during his chairmanship of the Deployment Committee.[570] There were some cases where former President Zuma bypassed the Committee

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[568] BBB2-MCR-ANC-ADDITIONAL-378 f.

[569] Transcript of Day 384, 100.

[570] Transcript of Day 384, 100.

entirely, which he believed was unintentional. In these cases President Ramaphosa would approach Mr Zuma to ask why the Deployment Committee was not consulted on an appointment and Mr Zuma who would take responsibility and apologise.[571]

622. It must be noted that President Ramaphosa was the Chairperson of the Deployment Committee for a period of five years, between December 2012 and December 2017, and that many of these appointments (and indeed the excesses of State Capture) occurred during this period. Notably, this is also the period for which the party could produce no minutes or records. It is not sufficient for President Ramaphosa to focus on the future of the party and his envisaged renewal process. Responsibility ought also to be taken for the events of the previous "era". He did so, partially and only in the most general terms.

623. According to President Ramaphosa, some of those appointments did go through the Deployment Committee, but the Committee did not know that those individuals would engage in any corrupt acts.[572] If this was the case, Deployment Committee had been *unable* to select or recommend individuals who were "fit for purpose." What is true is that during a certain period a lot of people who occupied senior positions in SOEs and government departments as well as in Boards of SOEs would have been appointed to those positions after their names were put through and approved by the Deployment Committee. Many of these people are people who enabled state capture.

624. Yet President Ramaphosa repeatedly stressed the importance of cadre deployment, and said that the Deployment Committee process is "vigorous" and adds an extra level

[571] Transcript of Day 384, 101–4.

[572] Transcript of Day 384, 117–18.

of scrutiny (a "filter") to the selection process.[573] His argument was that the deployment process makes appointments processes *more*, not less, rigorous.

625. President Ramaphosa conceded that there was "massive system failure" in the state and SOEs and some of that occurred because "certain people were put in certain positions to advance certain agendas." He also conceded that there was a practice of "poorly qualified individuals being parachuted into positions of authority through political patronage".[574]

626. President Ramaphosa spoke at length about the proposed National Implementation Framework towards the Professionalisation of the Public Service. The draft Framework was approved by Cabinet in November 2020 and was undergoing public consultation at the time of President Ramaphosa's evidence. He said that he aimed to "capacitate" those in the civil service who are not "fit for purpose." The policy also aims to ensure that "fit for purpose" individuals with the proper experience and expertise are appointed into the civil service.[575]

627. It may be that many politically motivated appointments in fact occurred independently of the Deployment Committee. The party has indeed had to struggle with factions and divisions.

628. Lastly, the ANC has acknowledged that, for an extended period of time, it has been having problems including patronage, factionalism and corruption. The ability to place individuals in strategic positions in the state is a substantially powerful one. It would be

[573] Transcript of Day 384, 115.

[574] Transcript of Day 348 p 126.

[575] Transcript of Day 384, 94–97.

naïve to think that these systemic problems would not spill over into the deployment process.

629. The evidence has demonstrated that state capture has been facilitated by the appointment of pliant individuals to powerful positions in state entities. The essential danger remains that appointment processes which are conducted behind closed doors and outside of the constitutionally and legally stipulated processes are open to abuse:

> "If external bodies, a party structure or otherwise, control a politician, then they can control appointments within that politician's authority. The essential mechanism of 'state capture', where administrative decisions regarding procurement and other matters are effectively externalised into undemocratically-constituted and opaque fora, thus comes into view. Resources that are by this mechanism extracted from the state are used, in part, to purchase, by patronage, the mass political support necessary to win elections and retain power."[576]

The legislative scheme rendering the Deployment Policy unlawful

630. To begin with the Constitution, certain provisions of section 195 of the Constitution are paramount in this regard. These are the provisions of section 195(1)(a), (b), (f), (g), (i). They read:

> "Basic values and principles governing public administration -
>
> 195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) … .
>
> (d) … .
>
> (e) … .

[576] Brunette, R. (2020). Position Paper on Appointment and Removal in the Public Service and Municipalities. Position Papers on State Reform. Public Affairs Research Institute.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) … .

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

631. Section 195(2) and (3) of the Constitution provides:

"(2) The above principles apply to -

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1)."

632. Section 196 of the Constitution establishes the Public Service Commission for the Republic whose powers and functions are set out in section 196(4). Section 196(2) and (3) reads:

"(2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.

(3) Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of state may interfere with the functioning of the Commission."

633. Section 196(4) of the Constitution reads as follows insofar as it is relevant:

"(4) The powers and functions of the Commission are -

(a) to promote the values and principles set out in section 195, throughout the public service;

(b) to investigate, monitor and evaluate the organisation and administration, and the personnel practices of the public service;

(c) to propose measures to ensure effective and efficient performance within the public service;

(d) to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195;

(e) to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with; and

(f) either of its own accord or on receipt of any complaint—

(i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

(ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

(iii) to monitor and investigate adherence to applicable procedures in the public service; and

(iv) to advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service; and

(g) to exercise or perform the additional powers or functions prescribed by an Act of Parliament."

634. In terms of section 196(5) of the Constitution, the Public Service Commission "is accountable to the National Assembly".

635. Section 197(1) of the Constitution provides:

"Public Service

> 197(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day."

636. Very importantly, section 197(3) of the Constitution precludes the favouring and prejudicing of any employee for supporting a particular political party or cause. The section reads:

> "No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause."

637. Apart from the Constitution, it is also necessary to consider certain provisions of the Public Service Act, 1994 (PSA). Section 9 reads:

> "9 Powers of executing authority -
>
> (1) The appointment of any person or the promotion or transfer of any officer or employee in the employ of a department shall be made by the relevant executing authority or by an officer or officers to whom the said authority has delegated his or her power of appointment, promotion or transfer.
>
> (2) Subject to the provisions of this Chapter, appointments and promotions in, and transfers in or to, the public service shall be made in such manner and on such conditions as may be prescribed."

638. In the PSA, the word "prescribed" is defined as meaning "prescribed by or under this Act". That means "prescribed by or under" the PSA. In other words, no appointment, promotion or transfer may be made or effected or decided upon in a manner that is not prescribed by or under the PSA. Anything in the appointment, promotion or transfer of an officer or employee in the public service that is not prescribed by or under the PSA is unlawful or renders the appointment, promotion or transfer unlawful.

639. A very important provision of the PSA concerning appointments and the filling of posts is section 11. It provides:

> "11 Appointments and filling of posts -
>
> *(1)* In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution."

640. What this provision does is to direct anyone who seeks to make an appointment or to fill a post in the public service to have due regard to "equality and the other democratic values and principles enshrined in the Constitution". The phrase "democratic values" means or at least includes within its ambit the democratic values referred to in section 7 of the Constitution, namely "human dignity, equality and freedom". Equality is already expressly mentioned in section 11(1) of the PSA. The reference to democratic values may well also include some of the values listed in section 1 of the Constitution. Leaving out universal adult suffrage which would not be applicable in the context of section 11 of the PSA, the values listed in section 1 of the Constitution are:

> "(a) Human dignity, the achievement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law."

641. The term "principles" in section 11 of the PSA is qualified by the phrase "enshrined in the Constitution." Those principles must include the principles listed in section 195 of the Constitution (see above). It may well be that the principles to which section 11 refers go beyond those listed in section 195 of the Constitution. The constitutional and statutory framework reflected in section 11 includes the following requirements in the context of the appointment and filling of posts:

641.1. there must be equality in the treatment of candidates;

641.2. there must be transparency;

641.3. there must be accountability; and

641.4. there must be fairness.

642. The above requirements mean that, if there are two or more candidates competing for appointment to a position, they must be treated equally, there must be transparency in the process and they must be treated fairly; and those making the decision to appoint or to recommend must be accountable.

643. Section 11(2) of the PSA reads:

> "In the making of any appointment or the filling of any post in the public service -
>
> (a) all persons who qualify for the appointment, transfer or promotion concerned shall be considered; and
>
> (b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability."

644. Section 11(2)(b) is of cardinal importance because it prescribes which matters count in the evaluation of candidates for appointment to a post. In other words, anyone who makes a decision to recommend or appoint a particular candidate among candidates who are competing for appointment to a particular position can only base his or her decision on the matters listed in section 11(2)(b) and on no other matter. Those matters listed in section 11(2)(b) are:

644.1. training;

644.2. skills;

644.3. competence;

644.4. knowledge; and

644.5. the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people including representation according to race, gender and disability.

645. There is no mention in section 11(2) of membership of a political party including the ANC or current ruling party, nor is there mention of a recommendation made by the Deployment Committee of the ANC or any political party. A factor which falls outside the matters listed in section 11(2) may not be taken into account in evaluating the candidature of the candidates or of any candidate. It means that such a factor cannot be part of the evaluation of any candidate. Therefore, knowledge of the policies of the ANC or any particular political party cannot be taken into account. It is only the policies of the government that may legitimately be taken into account if they are relevant to a particular post. Any policy or policies that are ANC policies or policies of any political party that have not been adopted by the government may not be taken into account. Taking it or them into account would be unlawful since that would fall outside of section 11(2) of the PSA.

646. Section 11(3) of the PSA reads:

> "Notwithstanding the provisions of subsection (2), the relevant executing authority may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195 (1) of the Constitution."

647. The reference to "prescribed conditions" is a reference to conditions prescribed by or under the PSA.

648. For purposes of determining whether the ANC's Deployment Policy or its implementation is unlawful, section 11(3) does not contain anything that would make it lawful to take into account a recommendation of the ANC's Deployment Committee or recommendation of any committee or official of any other political party in evaluating various candidates for appointment.

649. The MSA contains provisions that are similar to those contained in the PSA. Section 54A deals with the appointment of a municipal manager and acting municipal manager. Section 54A(2) provides:

> "A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed."

650. The term "prescribed" means "prescribe[d] by regulation or guidelines in terms of section 120" of the MSA.

651. Section 54A(3)(a) goes on to provide that a decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if "the person appointed does not have the prescribed skills, expertise, competencies or qualifications".

652. Importantly, section 54A(4) and (5) of the MSA provides:

> "(4) If the post of municipal manager becomes vacant, the municipal council must-
>
> (a) advertise the post nationally to attract a pool of candidates nationwide; and
>
> (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.
>
> (5) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements."

653. Section 56 of the MSA deals with the appointment of managers directly accountable to municipal managers. It contains provisions that replicate those outlined above in relation to the appointment of municipal managers.

654. The findings made above in relation to the PSA are equally applicable to the provisions of the MSA. In short, a recommendation by the Deployment Committee would fall

outside the scope of legitimate selection criteria (unless expressly prescribed as a requirement).

655. Turning finally to the provisions of the LRA, section 186(2) defines an "unfair labour practice" as including:

> "(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an em*ployee".*

656. If a government official were to make an appointment regulated by the PSA or MSA based on the recommendation of the ANC Deployment Committee, which would be an impermissible consideration, and pass over an internal candidate for promotion on this basis, this would be actionable as an unfair labour practice.

657. What is said above makes it clear that within the current constitutional and statutory framework it is unlawful and unconstitutional for a President of this country and any Minister, Deputy Minister or Director-General or other government official, including those in parastatals, to take into account recommendations of the ANC Deployment Committee or any deployment committee or any similar committee of any other political party in deciding who should be appointed to a position in the public service or in organs of state or parastatals.

President Ramaphosa's evidence: undue weight will be attached to recommendations

658. Reverting to the evidence of President Ramaphosa, the composition of the Deployment Committee (set out in paragraph 27 of his affidavit) exacerbates concerns about the legality of the Deployment Policy.

659. The Deployment Committee is of high status within the structures of the ANC. It is a committee that is chaired by the second-in-command in the ANC, the ANC's Deputy President. That is the second highest ranking office-bearer or official of the organisation. That is somebody who, in the absence of the President in the country, is the boss of all the Ministers. That is somebody that every ANC Minister is entitled and justified to think unless something very unexpected happens, will be the next President of the ANC. In the period of about 28 years since 1994 except for one, every one of those who occupied the position of Deputy President of the ANC ultimately became President of the ANC.[577]

660. The significance of the fact that the Deployment Committee is chaired by the Deputy President of the ANC, and this is the second point, is that it naturally will make it very difficult for any Cabinet Minister – not to speak of a Deputy Minister or Director-General – particularly who is an ANC member to go against a position taken by a Committee headed by the Deputy President of the organisation. To deviate from such a position may be a career limiting decision by any Minister or Director-General. This is not to necessarily say no Minister who feels strongly that he or she would like to deviate from the position taken by the Deployment Committee may approach the Deployment Committee and seek to persuade it otherwise. I do not know whether there is such a procedure in the processes of the ANC's Deployment Committee. I shall assume in favour of the ANC that there is such a procedure. However, even if such a procedure exists and even if it is permissible for a Minister to make such an approach to the Deployment Committee, it would ordinarily not be an easy thing for a Minister to do and no Minister would want to be seen to be in the habit of doing that. If I am correct about that, which I think I must be, then this means that the pronouncement of the Deployment Committee – whether you call it a recommendation or an instruction to a Minister to

[577] The only exception is Mr Motlanthe. Although he became the President of the country for a brief period from September 2008 to May 2009, he never became President of the ANC. He was a candidate for the President of the ANC at its elective conference in Mangaung in December 2012 but lost to Mr Jacob Zuma.

appoint a particular candidate to a particular position – will be so weighty that when the Minister considers which candidate to appoint, it will most of the time in all probability carry the day. Apart from the fact that the Deployment Committee is chaired by the Deputy President of the ANC, one of its members is the Deputy Secretary General of the organisation – that is like the Deputy Prime Minister in a country that has such a position – and all its other members are members of the ANC's National Executive Committee. So, what chance does a Minister have of going against the pronouncement of a Committee made up of such high ranking leaders of the organisation? In this regard one must remember that some Ministers might not even be members of the NEC. For all intents and purposes, there is no chance of a Minister or Director-General going against a pronouncement of the Deployment Committee.

Problems with equality, fairness and transparency arising from President Ramaphosa's evidence

661. Out of President Ramaphosa's evidence as contained in his affidavit, there are certain additional features that need special consideration. President Ramaphosa said that in the case of the deployment of candidates to positions in the state and society – as opposed to the deployment of candidates to legislative bodies and executive bodies – the ANC identifies candidates who would be suitable, by virtue of their skills, experience and personal attributes, to be considered for positions in various entities in the public sector.

662. President Ramaphosa testified that the ANC's Deployment Committee does not decide who should take up specific positions. He said that it discusses who should be encouraged to apply for various positions and makes recommendations to the persons making the appointments. There were, however, certain indications during the hearing that the Deployment Committee effectively decides who must be appointed to certain

positions, unless there is a strong reason that emerges why their decision should not be given effect to even if their decisions may be dressed up as recommendations. I am quite happy to approach the matter on the ANC's version that the Deployment Committee makes recommendations and does not appoint. However, it seems to me that, as mentioned above, even if the Deployment Committee's decisions are recommendations, they are such weighty recommendations that any deployee of the ANC – be it the President, a Minister, a Deputy Minister, a Director-General or other government official – would feel bound to give effect to the Committee's recommendation, unless there was really something extraordinary to justify going back to the Committee to ask it to allow that its decision be not given effect to.

663. Part of the difficulty with the recommendation of the Deployment Committee is that it is made by a Committee that would not have interviewed the other candidates who would have applied for a particular position. Indeed, it is made by a Committee that would not have considered any information about other candidates against whom the candidate it recommends is competing. The Commission was not told that the Deployment Committee ensures that it has seen the CVs of other candidates applying for the same position.

664. Since the Deployment Committee makes its recommendations in favour of a particular candidate without having compared the credentials of that candidate with the credentials of other candidates, its recommendations cannot sensibly and legitimately be taken into account. If it is taken into account when it was made by a body that knew nothing about the credentials of the other candidates, that is unfair and is in breach of, amongst others, the injunction in section 195 of the Constitution and section 11 of the Public Service Act that there must be equality and fairness in the appointment of persons and the filling of posts in the public service. Indeed, when a Minister and Director-General, for example, takes into account such a recommendation, he or she will be in breach of the

constitutional principle of transparency to be found in section 195 of the Constitution because that recommendation will not have been made known to all concerned including the other candidates. So, the other candidates would not know that there is a candidate who, apart from what is in his or her CV, profile and supporting documents that are official, also carries the special advantage of a recommendation of the ANC's Deployment Committee. The taking into account of such a recommendation also means that the candidates are not treated equally because they would not have been given an opportunity to compete with that candidate for the recommendation of the Deployment Committee. The unequal and unfair treatment caused by the taking into account of such a recommendation is even more pronounced in relation to candidates who are not members of the ANC and, therefore, have no chance of securing a recommendation of the Deployment Committee. This means that the taking into account of the recommendation of the Deployment Committee by a President, Minister, Deputy Minister, Director-General or other government official or Board of a parastatal, constitutes an unfair competition to the prejudice of the other candidates and in favour of the ANC candidate who is a beneficiary of a recommendation of the Deployment Committee.

665. With reference to paragraph 39.3 of President Ramaphosa's affidavit, I am not sure that the President's statement that the ANC does not, through its Deployment Policy and the recommendations of its Deployment Committee, seek to circumvent "the established and often legally-mandated processes for the appointment of individuals to these positions" is correct. I say this because in any advertisement of a post things that are essential or basic requirements and things that will simply be an advantage or are recommended as opposed to required, are stated. However, the public and the potential candidates are not told that a recommendation of the ANC's Deployment Committee will be an advantage, and yet the ANC deployees in Government including the President, Deputy President, Ministers, Deputy Ministers and Directors-General would know that a

recommendation of the ANC Deployment Committee confers a huge advantage on a candidate and greatly enhances a candidate's candidature. Such a recommendation would sometimes subvert the prospects of a candidate who in the absence of a candidate benefiting from such a recommendation, would have been picked for a position if all that was considered, were the factors in the public advertisement of the post or the factors in the legal framework.

666. Furthermore, as is reflected elsewhere in this section of the Report, recommendations of the ANC's Deployment Committee fall outside the constitutional and statutory framework for the appointment, promotion and transfer of public servants or candidates. Our law does not provide for any government official or body or Minister or the President to take into account a recommendation of the ANC's Deployment Committee or similar body of any political party in filling posts in the public service or in parastatals. If the ANC or any political party wants the recommendations of its Deployment Committee or similar body to be taken into account in the filling of posts in the public service and in parastatals, it should take steps to ensure that the relevant legislation is amended to include a provision accommodating such a recommendation. Otherwise, taking such a recommendation into account while it is outside the legal framework is unlawful.

667. President Ramaphosa testified that the ANC acknowledged that there had been instances where individuals appointed to positions may not have been "fit-for-purpose" and may also not have performed the tasks in the way that it was envisaged.[578] He said that at its 54th National Conference the ANC had recognised this problem and resolved on capability and capacity building in the public service that "the merit principle must apply in the deployment to senior appointments, based on legislated prescripts and in line with the minimum competency standards".[579] He went on to say that it is the ANC's

[578] Affidavit para 40.

[579] Affidavit para 41

view that the practice of cadre deployment should not be inconsistent with the principles of fairness, transparency and merit in the appointment of individuals to public entities.[580]

668. In response to this it needs to be pointed out that in this section of the Report it is shown that the implementation of the Deployment Policy of the ANC as it has happened thus far and in the context of the current constitutional and statutory framework is unfair to other candidates and is not implemented transparently. However, above all it is unlawful for any government functionary to implement a recommendation of the Deployment Committee in the filling of any post in the public service in which section 11 of the Public Services Act applies. Such a recommendation is not contemplated or provided for in the constitutional and legal framework governing the filling of posts in the public service. No President, Deputy President or Minister, Deputy Minister or Director-General may take it into account.

669. President Ramaphosa pointed out that, because the ANC's view is that the practice of cadre deployment should not be inconsistent with the principles of fairness, transparency and merit, it seeks to continually revise its cadre deployment policies and practices. He said that that was also why his administration had proceeded to implement ANC resolutions on the professionalisation of the public service.[581]

670. President Ramaphosa said that "the [cadre deployment] policy of the ANC is aimed at ensuring that the person most fit-for-purpose is appointed whatever critical position has been identified".[582] The difficulty with this statement by President Ramaphosa is that the manner in which the Deployment Committee of the ANC makes its recommendations is completely inconsistent with the objective that the most fit-for-purpose candidate should

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[580] Affidavit para 42

[581] Affidavit para 42

[582] Affidavit para 25

be appointed to a position. The very manner in which a Deployment Committee's recommendation is arrived at is in conflict with such a goal. When, for example, there are five candidates who have applied for a position, how can you say that you want the most fit-for-purpose of those candidates to be appointed to the position when you recommend one of them to the appointing authority:

670.1. Without having studied the CVs and supporting documents of the other four candidates and without knowing them and their credentials.

670.2. Without knowing whether any of the other four candidates either equally deserves a recommendation or better deserves a recommendation than the candidate you have recommended?

671. If the ANC wants the most fit-for-purpose candidate to be appointed, making a recommendation through its Deployment Committee in the way it does at the moment and in the way it has been doing all these years is not the way to go. The way to go, if that is what it wants, is to allow government officials and bodies to make appointments in accordance with the Constitution and the law. After all, many of those officials who will make those decisions are its deployees such as the President, Deputy President, Ministers, Deputy Ministers, Directors-General, Deputy Directors-General, etc. At the moment, when the ANC insists that these officials should consider its Deployment Committee's recommendations in making certain appointments in the public service or in parastatals, it requires them to take into account something that is not provided for in the law that governs those appointments and, therefore, requires them to act unlawfully.

672. The President testified that the ANC's cadre deployment policy applies to the filling of senior positions in government such as Directors-General, Deputy Directors-General as well as leadership in critical institutions including the private sector. He pointed out, however, that the appointment of Ministers is not a matter that would serve before the

Deployment Committee. He said that the ANC respects the President's constitutional prerogative to appoint his or her cabinet.[583] However, it seems that at the Polokwane Conference of the ANC one of the resolutions that were taken was that the President should consult the officials of the ANC in making appointments to the Cabinet or in dismissing Ministers. That would explain why President Zuma raised the issue of his intention to fire Minister Pravin Gordhan and replace him with Mr Brian Molefe with the officials of the ANC in March 2017 before he fired Minister Gordhan and Mr Jonas.

Why the need for the Deployment Committee?

673. An important question that arises about the ANC's Deployment Committee and its role in the implementation of the ANC's Deployment Policy is why it is necessary for there to be a Deployment Committee that makes recommendations to the President, Deputy President, Cabinet Ministers, Deputy Ministers, Directors-General and other Government officials most of whom would be ANC leaders and members and, therefore, would understand ANC policies very well? In other words, why can the ANC not leave its President, Cabinet Ministers and Directors-General to make the staff appointments that need to be made without any recommendation by the Deployment Committee, on the basis that they trust those ANC Ministers etc to make the right decisions? Why must there be a party structure that makes recommendations to government officials as opposed to recommendations to a party structure?

674. It is difficult to understand this alleged need because, if the need is said to be justified on the basis that an ANC government needs personnel who understand the ANC's policy very well and can implement them effectively, there is no reason why the President, Ministers and Directors-General who are ANC deployees cannot be trusted to have due regard to that factor in making appointments if it is lawful to have due regard

[583] Affidavit para 26

to it. In other words, the question that arises is: if the ANC legitimately believes that such a factor is a proper factor that should be taken into account in making certain staff appointments, why should it not simply ensure that the law allows the taking into account of such a factor and then leave the selection of a successful candidate to its deployees who are in government?

675. I cannot see why the ANC cannot deal with the matter on that basis if all it wants is the appointment of candidates who have a good understanding of the ANC's policies. The advantage or benefit which the ANC obtains if it has a Deployment Committee that makes recommendations to those in government as to who should be appointed to certain positions is that the ANC individuals who get appointed will feel grateful to the party for giving them such jobs. That may strengthen their loyalty to the party and may make them beholden to the party. This may be particularly so in the case of senior officials such as Directors-General and SOE Chief Executive Officers who are appointed on fixed-term contracts of five years, because at the end of the contract they would be needing the support of the party in the form of another Deployment Committee recommendation for appointment to another post. So, such people become beholden to the party. That is highly undesirable because such an official should put the interests of the people of South Africa first and there should be no risk that he or she may put the interests of the party above those of the country or of the people, if a conflict arose between the interests of the party and the interest of the country or of the people.

Party funding

676. The Commission has heard evidence that suggests that the ANC may have been the recipient of donations from individuals and companies that received contracts from the state, including instances where the awarding of those contracts is alleged to have been unlawful.

The Political Party Funding Act

677. In his evidence, President Ramaphosa addressed the legislative framework for political party funding in South Africa, including the recently adopted Political Party Funding Act (PPFA). He noted that, until the adoption of the PPFA, there were few restrictions on donations to political parties and no reporting requirements. Political party donations were previously only subject to the general laws relating to financial transactions, taxation and the prevention of corruption, money laundering and other financial crimes.

678. President Ramaphosa noted that a lack of transparency in this regard increased the potential for corruption, and that the ANC had therefore resolved to address this at its 52nd National Conference in December 2007.[584] The Political Party Funding Bill, however, was not formally introduced into Parliament until November 2017, ten years later.[585] President Ramaphosa assented to the Political Party Funding Bill in January 2019 to make it the Political Party Funding Act 6 of 2018 ("PPPFA"). The PPFA did not take effect for another two years and came into operation on 1 April 2021.[586]

679. President Ramaphosa explained the PPFA in his evidence as follows:

> "The Act ushers in far-reaching changes in the management, accountability and transparency of the finances of political parties. The Act restricts the amount of money that a party can take from a single donor and its related parties so as to prevent undue influence over parties by big donors. No party may accept more than an upper limit of R15 million from a donor in the same year. Importantly, section 8(3) of the Act says: "A political party may not accept donations that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission"…The Act is a victory for accountability, good governance and transparency in political activity. It marks a

[584] BBB1-MCR-ANC-021 f. para 53

[585] Parliamentary Monitoring Group, 'Political Party Funding Bill (B33-2017)'.

[586] BBB1-MCR-ANC-022 para 55

new era in our body politic, and is a milestone in our quest to build a capable, ethical state free of corruption and influence-peddling."[587]

680. President Ramaphosa also noted that the Promotion of Access to Information Amendment Act, which also took effect on 1 April 2021, makes political party finances subject to applications for information in terms of that Act.[588]

Evidence of money flows to the ANC

681. The Commission heard evidence that the ANC received donations from persons and entities which had benefitted from corrupt government contracts.

681.1. The Guptas sponsored various events, including buying tables at fundraising dinners. The ANC received substantial donations from entities linked to the Gupta enterprise. [589] [590]

681.2. Bosasa bribed government officials to the tune of around R66 million per annum. Bosasa directed extensive benefits to the ANC, by catering for rallies, setting up a "war room" for elections, hosting parties, and donating money.

681.3. Blackhead Consulting received payments from the Department of Human Settlements in excess of R1 billion over the 12 year period 2008-2019 whilst outflows show that between 2013 and 2018 payments to the ANC by Blackhead alone was in excess of R10 million for the period in question. There were also payments to the ANC for T-shirts and for volunteers amounting to R3.5 million:

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[587] BBB1-MCR-ANC-023 f. para 56-59

[588] BBB1-MCR-ANC-024 para 60

[589] Shiwa Elijah Mazibuko, Exhibit BB12, 2019, SEM-024.

[590] Kyle Cowan, 'Gupta-Linked Front Donated R10m to ANC Weeks before Transnet, Free State, Kickbacks Flowed through It', *News24*

some of it was paid directly to the ruling party, some of it to pay service providers for example, T-shirt printers.

682. EOH Group donated money to the ANC and ANC Youth League (Greater Johannesburg branch), coinciding with contracts being awarded to EOH at the Johannesburg municipality. Of particular note was R50 million donated to the ANC for the 2016 local government elections. A former Group CEO of Prasa, Mr Lucky Montana, claimed that the ANC had a history (not limited to the period under Mr Zuma) of its leaders putting pressure on CEOs of public entities to assist with funding – including through asking their contractors to contribute to the party, and of organizing meetings for business with government in return for being paid facilitation fees.[591] Mr Montana said that PRASA buses had been used to transport supporters to ANC events.[592]

The ANC's donations policy

683. President Ramaphosa stated that ANC relies on several sources of funding, including funds allocated from the Represented Political Parties' Fund, membership subscriptions and levies, fundraising initiatives like the Progressive Business Forum, fundraising dinners and other events, and donations from individuals and companies.[593]

684. The finances of the ANC are the responsibility of the Treasurer-General, and corresponding Treasurers in sub-national structures. An NEC sub-committee, the Finance Committee, supports the Treasurer-General in managing the party's finances.[594]

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[591] Exhibit GG (Additional Bundle 38), Affidavit of Lucky Montana dated, ppFP-JGZ-3881i paras.1531-1601

[592] Popo Molefe, Day 223, 118–119. It should be noted that the Represented Political Parties Fund (RPP F) has been in operation since 1997. The aim of the Fund is to provide funding for political parties represented in the national and provincial legislatures. Funds for the RPPF are provided annually from the National Revenue Fund and are distributed to political parties represented in the National Assembly or in any provincial legislature.

[593] BBB1-MCR-ANC-021 para 50

[594] BBB1-MCR-ANC-021 para 49

685. Ms Nomvula Mokonyane testified that ANC fundraising could not be carried out without the involvement of party leadership, and specifically the Treasurer-General. Although her testimony concerned Bosasa specifically, she spoke about ANC funding processes generally. She said:

> "The fund-raising committee of the ANC is headed by the Treasurer-General of the ANC. There is a fund-raising committee and there are fund-raising initiatives it is not the individual, no individual has the capacity and the ability to go all out and go and look for resources, you have to actually work and even be led by a Treasurer-General of the African National Congress. … The ANC has never hidden its fund raising initiatives, people have come to the gala dinners of the ANC, people have been acknowledged."

686. In 2017, when asked about donations from the Guptas, the then-ANC Treasurer-General, Dr Zweli Mkhize, told the media: "There is not a single donor who can claim to control the ANC … We will not accept a donation we can't accept publicly."[595] However, this was clearly not always the case. ANC Treasurer-General, Mr Paul Mashatile, has said that since the signing of the Act, the ANC has found it very difficult to fundraise from the private sector. He said: "There are many private companies that don't want to be disclosed. That is why at the moment we don't disclose who is funding us. [The Act] has created a very difficult environment for fundraising." This is evinced by the party's current well-publicised inability to pay its employees' salaries.[596]

687. President Ramaphosa confirmed that the ANC has no official policy on donations.[597] He stated:

> There is an expectation – based on the ANC Constitution, its principles and its values – that the ANC would not knowingly accept monies that are the product of a

[595] BBB2-MCR-ANC-ADDITIONAL-461

[596] BBB2-MCR-ANC-ADDITIONAL-464

[597] Transcript of Day 384, 138–40.

> criminal act, are offered in exchange for favours or are from a source known to engage in illegal or unethical activities.[598]

688. When asked to explain how breaches in respect of this principle occur, President Ramaphosa posited that these breaches happened when the unlawful or unethical conduct of a donor only came to light after the donation was made. So the breach happened "after the fact." Parties could not, he said, "refund" donors as they were "always strapped for cash."[599]

689. The evidence shows that the ANC had accepted donations from companies that were heavily reliant on government contracts, such as Bosasa, without investigating them. It was put to President Ramaphosa that the unlawful activities of Bosasa had been the subject of media reports since at least 2009, and that it was difficult to accept that vigilant members of the ANC would not have been aware that Bosasa was the recipient of large government contracts under dubious circumstances.[600] How, then, it may be asked, could the party continue to accept donations and other benefits from Bosasa?

690. President Ramaphosa conceded that this "should be regarded as a major lapse" on the part of the ANC, and that, in hindsight, the party should have been more alert and should have become aware of the issue earlier.[601]

691. It was put to President Ramaphosa that it was difficult to believe that the issue only became clear in hindsight, and that party leaders must have known at the time the donations were received. President Ramaphosa agreed:

> "**ADV PRETORIUS SC:** But it is difficult to avoid the conclusion on the facts that in the circumstances … the principle that it would not knowingly accept donations in

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[598] BBB1-MCR-ANC-021 para 51

[599] Transcript of Day 384, 140.

[600] Transcript of Day 385, 91–92.

[601] Transcript of Day 385, 92–93.

> these circumstances, was in fact in breach because people knew, the President of the time knew.
>
> **PRESIDENT RAMAPHOSA:** Yes. Yes, Chairperson."[602]

692. It was put to President Ramaphosa that the reason for this lapse must have been that Mr Zuma was in control of the party. President Ramaphosa did not dispute this proposition, although he did not directly answer the question. He said:

> **PRESIDENT RAMAPHOSA:** Yes, certainly the President plays a very key role in the life the party, it leads or she leads the party and provides leadership and gives direction. That is so.[603]

693. President Ramaphosa agreed that the donations received by the ANC from the Gupta's and Bosasa should have been investigated or examined by the party, as there was enough information in the public domain about these entities to raise suspicions.[604]

Internal elections

694. According to President Ramaphosa, the ANC has for many years been concerned about the role of money within the organisation, and particularly in the contestation for leadership positions. There are few campaigns for regional, provincial or national elective conferences that are not funded. The ANC, he stated, has identified weaknesses in its approach to the funding of internal contests and has initiated a process to review its policies.[605] In raising this issue during an NEC meeting in July 2019, President Ramaphosa stated:

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[602] Transcript of Day 385, 93–94.

[603] Transcript of Day 385, 94.

[604] Transcript of Day 385, 106–7.

[605] BBB1-MCR-ANC-024 f. para 61-63

> "In the absence of clear, appropriate and realistic guidelines, our leadership contests will continue to play themselves out in the shadows, in conditions of secrecy and mistrust, encouraging patronage and factionalism."[606]

695. The 'Through the Eye of a Needle' document produced by the ANC in 2001 also clearly outlined the role played by internal election campaigns in fostering corruption:

> "Because leadership in structures of the ANC affords opportunities to assume positions of authority in government, some individuals then compete for ANC leadership positions in order to get into government. Many such members view positions in government as a source of material riches for themselves. Thus resources, prestige and authority of government positions become the driving force in competition for leadership positions in the ANC."[607]

696. President Ramaphosa also cited the ANC's 2020 review of 'Through the Eye of a Needle', one of the discussion documents for that year's National General Council ("NGC").[608] The document notes that "something deeper has gone wrong in the movement":

> "… it is clear that money politics has put the ANC in a precarious position of risking being auctioned at all levels. It will lead or it is already happening that the state and private resources are being used thus making corruption to be an essential modus operandi of these transactional politics.[609]
>
> There has emerged a strong tendency for the emergence of leaders whose sole objective is to use the membership of the ANC as a means to advance their personal ambitions to attain positions of power and access to resources for their own individual gratification."[610]

697. This is a clear admission that the role of money in contests for ANC leadership positions contributed to the conditions in which corruption and State Capture could take place.

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[606] BBB1-MCR-ANC-025 para 63

[607] BBB2-MCR-ANC-ADDITIONAL-378 f.

[608] BBB1-MCR-ANC-024

[609] BBB1-MCR-ANC-447

[610] BBB1-MCR-ANC-449

Given the dominance of the ANC in national elections over the past twenty-eight years or so, those in party leadership hold significant power in both the party and state. Patronage relationships do not have to involve donations to the party itself in order to flourish. The PPFA therefore does not alleviate the risk posed by these internal electoral contests and the financing thereof.

Levies

698. President Ramaphosa was questioned on the affidavit of Ambassador Moloi, a career diplomat at DIRCO who had made substantial allegations about the role of the party in appointing ambassadors and soliciting payments from diplomats. One of his allegations was that ambassadors were required to sign debit forms for monthly payments to the ANC.

699. President Ramaphosa testified that it is standard for members of the ANC to sign a levy form in order to pay a certain amount from their monthly salaries or accounts to the party. This occurs in both public and private sectors, and includes all persons deployed into public office[611]:

> "**PRESIDENT RAMAPHOSA:** For instance, today every member of Parliament representing the ANC legislature and local government, we pay levies to the ANC so that we can boost the coffers of the ANC. And the same would happen if you are an ANC member, if you are, let us say, the chair or the CEO of one of the entities or if you are an ANC member. I know when I was Secretary-General I used to solicit members who were in the private sector to sign levy forms. … Even ambassadors who are ANC members would – they do not do it because they are appointed as ambassadors. They do it because they are ANC members."[612]

[611] Transcript of Day 385, 110.

[612] Transcript of Day 385, 108–9.

700. However, this does not address Ambassador Moloi's allegation that persons who were not members of the ANC were persistently solicited for levies. This was put to President Ramaphosa. His response was that "I do not know anything about that, I would have a huge question mark around that."[613]

701. The party plays a decisive role in appointing ambassadors through its Deployment Committee. As Ambassador Moloi contended in his affidavit, this allowed the party to appoint its members to high-paying positions and consequently to benefit financially from those appointments.

702. While this may be particularly pronounced in ambassadorial appointments, as they are made directly by the President with hardly any prescribed preceding processes, this could feasibly occur throughout the state. The ANC Deployment Committee has a financial incentive to appoint its own members to well-paying positions in the public service, especially given that levies appear to be proportional to income.[614]

Discipline and accountability

703. President Ramaphosa addressed the issue of accountability in his opening statement on his first day of testimony:[615]

> "**PRESIDENT RAMAPHOSA:** The position of the ANC on leaders and members who have been complicit in acts of corruption and other crimes is clear. Their actions are a direct violation, not only of the laws of the land, but also of the ANC Constitution, its values and principles, and the resolutions and decisions of the ANC's constitutional structures. Such members must face the full legal consequences of their actions. They cannot rely on the ANC for support or protection, nor may they appeal to the principle of collective responsibility. In

[613] Transcript of Day 385, 109–10.

[614] Transcript of Day 385, 109.

[615] Transcript of Day 384, 31.

> accounting for their actions they must be accountable for their actions themselves, because the ANC did not and could never direct its members of leaders to commit acts of corruption."

704. The Commission's concern in regard to the accountability of its members for corruption and related unlawful acts arises precisely because of the power and influence the Party wields and the knowledge of unlawful act by its members it would have. If members of the party are not so held accountable it is inevitable that they would continue to exploit the advantages of party membership and all that that entails for their own unlawful gain.

705. Furthermore, as admitted by President Ramaphosa, law enforcement institutions were themselves weakened and rendered unable to ensure corrupt individuals are held accountable.[616] Parliament too, has failed to use the oversight and accountability measures at its disposal.

706. In these circumstances, but not only in these circumstances, party discipline could and should play a significant role in curtailing corruption where it is likely to continue to occur and in ensuring that State Capture does not recur.

Internal disciplinary proceedings

707. President Ramaphosa remarked in his statement that:

> "Members of the ANC also affirm that they join the organisation selflessly, without anticipation of any personal reward. Clearly, any member that is involved in corrupt activities or seeks in any other way to use their position for undue self-enrichment is in violation of this basic undertaking."[617]

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[616] BBB3-MCR-RSA-077 para 169

[617] BBB1-MCR-ANC-032 para 79

708. Rule 25.27.9 of the ANC Constitution prohibits the "abuse of elected or employed office in the Organisation or in the State to obtain any direct or indirect undue advantage or enrichment".[618] Rule 25.17.4 prohibits "Engaging in any unethical or immoral conduct which detracts from the character, values and integrity of the ANC, as may be determined by the Integrity Commission, which brings or could bring or has the potential to bring or as a consequence thereof brings the ANC into disrepute". Other offences include being convicted of fraud, theft, corruption, or other acts of financial impropriety (rule 25.17.18), soliciting or accepting a bribe (rule 25.17.19), and bringing the organisation into disrepute (rule 25.17.5).[619]

709. The ANC Constitution mandates that ANC members who violate its rules must be subject to disciplinary proceedings.[620]

710. The Commission requested the ANC disciplinary records. It received records of the ANC's National Disciplinary Committee ("NDC") and National Disciplinary Committee of Appeal ("NDCA") for the period 2014 – 2021.[621]

710.1. All the cases recorded were concerned with acts of organisational ill-discipline allegedly committed by members in breach of Rule 25.17 of the ANC Constitution.[622] From the period 2014 to 2021, there were only two new cases. There were, however, numerous appeals and reviews from provincial disciplinary committees heard during this period. These were in respect of matters which originated prior to 2014.

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[618] BBB1-MCR-ANC-100

[619] BBB1-MCR-ANC-033 para 91

[620] BBB1-MCR-ANC-032 para 80

[621] CR-REF-BUNDLE-047 ff.

[622] At BBB1-MCR-ANC-100 f.

710.2. In respect of all of the records of disciplinary proceedings which were made available to the Commission, the most serious sanction was (temporary) suspension from the party. This was often only after numerous appeals.

710.3. The cases provided to us concerned misconduct such as: disrupting meetings or conferences, issuing unauthorised statements to the press, taking the party to court, assault and sexual assault, theft, failure to comply with party policy, insulting other ANC members, participating in "organised factional activity", and bringing the party into disrepute.

710.4. None of the cases concerned corruption.[623] It is remarkable that the ANC has been grappling with corruption within its ranks for years and has promised change and renewal, but has not held a single person to account since at least 2014.

711. The above was put to President Ramaphosa during his evidence. He stated in response that discipline had been taken in some cases but did not surface at the level of the NDC and NDCA. He conceded that these mechanisms had "not been as robust as they should be and they have not been overarching as they should be."[624] He also reiterated that the ANC has "drawn a line in the sand" and would now deal with corruption seriously. He continued:

> **PRESIDENT RAMAPHOSA:** You may well say: Well, why did you not do so over a period of so many years? But it is better late than never and in this case we are serious about what we are saying.[625]

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[623] BBB1-MCR-ANC-100

[624] Transcript of Day 427, 43.

[625] Transcript of Day 427, 44.

712. The disciplinary records received encompass a period up to and including August 2021. The Commission is unable to conclude if the proverbial line has indeed been drawn, and what that might mean for ensuring accountability within the party.

Concurrent criminal proceedings

713. In his statement, President Ramaphosa stated that, in certain instances, particularly concerning corruption and fraud, "the institution of disciplinary proceedings is dependent on a conviction in a court of law." He stated that the organisation had therefore been unable to act against members facing serious charges of financial impropriety until the completion of court processes, which could often be lengthy.[626]

714. However it is not true that the organisation cannot act. While rule 25.17.18 refers to those convicted of specific offences, many other rules relate directly to corruption and are not dependent on prosecutions.[627] It was pointed out that there was no necessary legal barrier to internal disciplinary proceedings being instituted and completed before criminal conviction.[628]

715. President Ramaphosa responded that it would pose a problem for the ANC if they disciplined a member for an offence that they were later found not guilty of in a court of law. He explained that this was the reason for the party's "step-aside" rule, which requires members who have been charged with a serious crime to step aside from their positions until they cleared their names. This was determined by the ANC to be the safest route.[629]

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[626] BBB1-MCR-ANC-034 para 86

[627] See BBB1-MCR-ANC-100

[628] Transcript of Day 385, 146–47. See also *Davis v Tip NO 1996 (1) SA 1152 (W)*

[629] Transcript of Day 385, 147–48.

716. I pointed out that this concern was widespread and that most employers or organisations do not wait for criminal proceedings to conclude; there were fora where aggrieved parties could challenge the outcomes of these disciplinary processes if necessary:

> **CHAIRPERSON:** Every organisation you know, has its own rules. You cannot let somebody who you believe has done something completely unacceptable to your organisation, not be disciplined by the organisation because if you are going to wait until the outcome of a criminal case, which might finish in three years and then there might be an appeal which might take another three years. By the time the process is finished, how can you still say you are going to have a disciplinary hearing? So it is like you just wait for the courts and when you can deal with the matters yourselves.[630]

717. President Ramaphosa stated that political organisations were not like companies or NGOs. The "step-aside" rule was a relatively new rule in the party that "should be given time and space" as the organisation matured. He continued:

> **PRESIDENT RAMAPHOSA:** I would argue that you know suddenly changing it before it is tried and tested would lead to a lot of confusion. Hitherto people have always argued that innocent until proven guilty and they have always said I stay where I am, come hell or high water and yet it has an impact – a very negative impact on the integrity of the organisation.[631]

718. These arguments are unsatisfactory. The ANC disciplinary bodies have their own standards for proof of misconduct and their own appeals process. They are mandated to deal with many types of misconduct, which are not dependent on criminal convictions. They do not have the bureaucratic trappings of prosecutions, which may take many years.

719. While there may be certain cases that the ANC disciplinary bodies are ill-equipped to consider, this cannot be true for all alleged instances of corruption. It may be that a

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[630] Transcript of Day 385, 148–49.

[631] Transcript of Day 385, 150–51.

disciplinary committee will conclude *in a particular case* that it cannot make a finding based on the evidence available to it. However, for the ANC to decide not to consider *any* corruption cases is not acceptable.

720. One would also expect that the ANC would hold its members, and especially its leaders, to higher standards than "has not been convicted in a court of law".

721. Furthermore, President Ramaphosa himself admitted that "the weakening of law enforcement agencies allowed corruption to go unpunished, perpetrators to be protected and the public purse to be looted without consequence."[632] It was known to the party that the criminal justice system could not be relied upon to act against corrupt individuals. Yet the party has continually abdicated its responsibility to its members and voters to enforce its own rules and preserve the integrity of the organisation.

722. It is clearly against the party's best interest to allow its leadership positions to be occupied by those credibly accused of corruption and other crimes. Not only does this practice bring the ANC into disrepute, but there is a high risk that corrupt persons in powerful positions will continue to abuse their offices. This is a risk that the party, by failing to discipline those accused of corruption, has deemed acceptable. This certainly does not augur well for the prevention of corruption in the future. Nor does it give positive reassurance that State Capture will not recur.

723. I am afraid the step aside rule will not address this problem.

The Integrity Commission

724. In addition to disciplinary processes, the ANC has another structure called the Integrity Commission which can recommend action against leaders and members of the ANC

[632] BBB3-MCR-RSA-077 para 169

who face allegations of improper conduct. President Ramaphosa stated that "while the work of the Integrity Commission would not substitute for disciplinary action, it was established with the expectation that it would assist in dealing with allegations that had not yet been tested in court".[633]

725. In resolving on the establishment of the Integrity Commission, the 53rd National Conference noted the following:

> "More urgent steps should be taken to protect the image of the organisation and enhance its standing in society by ensuring among others, that urgent action is taken to deal with public officials, leaders and members of the ANC who face damaging allegations of improper conduct. In addition, measures should be put in place to prevent abuse of power or office for private gain or factional interests. The ANC can no longer allow prolonged processes that damage its integrity."

726. What is clear is that the Integrity Commission does not have the power to discipline any member. Since 2018, the Integrity Commission has had the power to *make recommendations* on alleged unethical conduct by ANC members, including recommendations for disciplinary action.[634] There is no evidence that Integrity Commission recommendations have resulted in disciplinary action against any ANC member accused of corruption, save for recommendations that certain individuals should step aside from their positions.

The absence of accountability

727. It was noted in the ANC's 2020 'Through the Eye of a Needle review' that the party has been unable to deal with various challenges identified in 2001 – of patronage, factionalism, money politics, corruption, among others – because "little emphasis has been placed on consequence management for dereliction of duty and the undermining

[633] BBB1-MCR-ANC-034 para 87

[634] BBB1-MCR-ANC-036 para 90

of the value system of the movement." The document attributes the failures of the party to a lack of accountability:

> "The failure of the ANC to fully implement the guidelines in Through the Eye of a Needle and other documents arises from, amongst others, the inability to exercise political and organizational leadership functions. It is the inability to act when members deviate from established policy positions and ill-discipline. The tone is not being set from the top. The ANC is engulfed with paralysis in decision-making. The notion of democratic centralism suggests that while there is a need to allow for democratic expressions at different levels of the organization, the exercise of leadership is an important variable in the mix. The preponderance of factional activities has resulted in the emergence of what can be characterized as organizational populism: that is, the inclination to shy away from taking difficult decisions and to cave in to the conduct and demands of rogue elements.
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> Related to the above, there is a lack of accountability for our actions as leaders and members, in terms of owning up when we deviate from the values/culture of the ANC and our struggle for the attainment of a new society. And arising out of this is the inability to effect consequence management. The organization is ceasing to act as an integral whole, but a collection of individuals pursuing their own self-interest.
>
> Accountability also means holding our leaders, cadres and general member's feet to fire. It is to ensure that they do what they were elected to do – serving the people of South Africa. It is also to ensure that everybody is accountable for his or her actions."[635]

The "renewal" of the party

728. President Ramaphosa spoke frequently of the "process of renewal" upon which the ANC had ostensibly embarked.

> "**PRESIDENT RAMAPHOSA:** …The ANC is so broadly supported, it is the leader of society, it has to do things not so much for its own interest but for the interest of the people of South Africa. It, therefore, needs to embark on a renewal process so that it corrects all these maladies within the organisation and if you like, clean up its own act so that it is much more presentable, even electorally to the people of South Africa and I comment on this in my document that over time we saw the electoral

[635] BBB1-MCR-ANC-453

> support of the ANC going down largely because of the corrosive corruption that our people found abhorrent and it is this, even at our 54th conference that we sought to address. That we've got to arrest this and reverse it and it is for that reason that we embarked on a renewal process to renew the organisation and organisations do go through these ups and downs and that's what we've also gone through, renew our organisation but renewal should not just be in theory it should be in practice, which is precisely where we are now. We are putting into practice the entire renewal process and we – as it were, trying to herd everyone, everyone in the same direction and that is why I referred to the resolution that we passed at our 54th conference, were supported by thousands of members of the ANC who came from right across the length and the breadth of the country. So, what remains now is the full implementation as we move."[636]

729. He also spoke at length in evidence about the party's process of renewal and the corrective measures he stated are being implemented. This includes the "cleansing" of certain government institutions, the strengthening of the party's Integrity Commission, the new legislation on party funding, and processes such as lifestyle audits.[637]

730. The ANC takes the position that it will not take disciplinary action against its members who are accused of corruption until they have been convicted by a court of law. As long as the ANC position is that it will not take disciplinary action against its members who are accused of corruption until they have been convicted in a court of law which means they are acquitted on the basis of the criminal law standard of proof beyond reasonable doubt, no disciplinary action will be taken against them even though by the civil law standards they may be guilty of corruption. It is difficult to see how the ANC will succeed in getting the people to think that it is serious about fighting corruption if it continues to adopt this position.

731. What needs to be said about the ANC and its contribution to state capture is that it opposed proposals by opposition parties for Parliament to establish public inquiries to

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[636] Transcript of Day 384, 71–72.

[637] Transcript of Day 428, 84–88.

investigate allegations of corruption and wrong doing by the Guptas and yet it did not itself make any investigations because it said it did not have capacity to investigate the allegations against President Zuma and the Guptas. In that way the Guptas continued to pursue state capture to the detriment of the people of South Africa. If the ANC had not opposed the establishment of those inquiries, the Guptas' agenda of state capture could have been stopped and South Africa might not have lost the billions of Rands that it lost.

732. Furthermore, the ANC's deployment policy has ensured that many institutions of state are weakened because very often the people who are appointed to certain positions are either not qualified for the positions they occupy or do not have the necessary experience to perform the work all of which provide fertile ground for corruption and state capture.

733. The ANC's further contribution to state capture is that when opposition parties tabled motions of no confidence in President Zuma because of the allegations of corruption and state capture and what the Guptas were reported to be doing such as summoning Ministers to their home, the ANC protected President Zuma and ensured that he remained in office as President which also meant that the Guptas got more time to pursue state capture and continued to loot the taxpayers' money. If the ANC had not protected President Zuma and he had been removed from office, the Guptas would probably have fled as they did in 2018 and therefore would not have looted the way they did. The ANC must take responsibility for this. In this regard it needs to be pointed out that at the latest the ANC should have realised after the Waterkloof Landing incident that President Zuma should be removed from office. Mr Mantashe testified that the Integrity Commission recommended in 2013 that President Zuma should step down. This was after the Waterkloof Landing incident and the ANC ignored that

recommendation. It should have followed the recommendation. Had it followed it, billions of Rands of taxpayer's money would have been saved.

Judicial Commission

of

Inquiry into Allegations

of

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

Report: Part VI

Vol. 2: Parliamentary Oversight

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

PARLIAMENTARY OVERSIGHT

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PARLIAMENTARY OVERSIGHT

Introduction

734. The Commission is required by its terms of reference[638] to "*inquire into, make findings, report on and make recommendations concerning*" what is summarized in its title as "*allegations of state capture, corruption and fraud*" in the public sector, including organs of state[639]. Those allegations include allegations concerning undue influence by, or benefit to, members of the Gupta family and extend to alleged corruption in the awarding of contracts or tenders by state owned companies.

735. In the main the Commission has concerned itself with determining whether state capture, corruption or fraud occurred in the public sector, the nature and scale thereof and who participated in this. However, to make recommendations concerning the avoidance of similar problems in the future, it is necessary to consider what explains why state capture and corruption were able to become so entrenched and to persist over an extended period and to consider, in particular, why institutions which ought to have contributed to detecting or addressing these maladies may not have been as effective in doing so as one would have hoped. Amongst these institutions is Parliament.

736. Parliament has a constitutional duty to exercise oversight over the executive branch of government ("the executive"), including organs of state such as State-Owned Entities

[638] Proclamation No. 3 of 2018, GG No. 41403 of 25 January 2018

[639] This term may be taken to summarize the allegations referred to in paragraphs 1.1 to 1.9 of the Terms of Reference

(SOE's); and the executive is accountable to Parliament. Questions, therefore, arise as to whether, during the period considered by the Commission, Parliament exercised effective oversight over the executive and SOE's in respect of allegations of state capture or corruption; whether it held the executive properly accountable in this regard; and, if not, whether this failure contributed to the perpetuation or scale of state capture or corruption. If and to the extent that Parliament may have failed in this regard, a question arises as to what recommendations the Commission should make which, if implemented could help avoid another episode of state capture or a repetition of the same levels of corruption in the future.

737. It is to these issues that this report now turns.

Constitutional Provisions on Parliamentary Oversight and Accountability to Parliament

738. The Constitution is explicit that Parliament is obliged to exercise oversight over the executive and that the executive is accountable to Parliament.

739. Section 42(3) of the Constitution provides:

> "The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action**."**

740. The Constitutional Court has held [640] that to "scrutinise", in this context, means to "subject to scrutiny"; and "scrutiny" implies a careful and thorough examination or a penetrating or searching reflection.

741. In a document adopted by Parliament[641] it has been said that

> "oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery for the achievement of a better quality of life for all citizens."

742. Section 55(2) of the Constitution provides:

> "The National Assembly must provide for mechanisms-
>
> (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
>
> (b) to maintain oversight of
>
> (i) the exercise of national executive authority, including the implementation of legislation; and
>
> (ii) any organ of state."

743. Section 56 of the Constitution provides:

> "The National Assembly or any of its committees may

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[640] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) at para 96

[641] Parliament's "Oversight and Accountability Model", which will be referred to below (the passage quoted is to be found in part 2.1 thereof)

> (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
>
> (b) require any person or institution to report to it;
>
> (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and
>
> (d) receive petitions, representations or submissions from any interested persons or institutions.

744. There are various other provisions of the Constitution which enhance Parliamentary oversight over the executive and the accountability of the executive to Parliament.[642] For example, Section 89(1) empowers the National Assembly ("NA"), by a resolution adopted with a supporting vote of at least two thirds of its members, to remove the President from office on specified grounds. Section 102 empowers the NA, by a vote supported by a majority of its members, to pass a vote of no confidence in the Cabinet excluding the President, or in the President. Section 92(2) provides that members of the Cabinet are "accountable" collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Section 92(3) provides that members of the cabinet must provide Parliament with full and regular reports concerning matters under their control.

745. In its "secret ballot" judgment [643], the Constitutional Court said that

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[642] A comprehensive summary of the relevant provisions is conveniently collected in part 2.3 of Parliament's "Oversight and Accountability Model" ("OVAC model") to be referred to below (annexure 3 to exhibit ZZ 9, PO-03-101 at pp 111 to 117). See also the helpful summary in the report to the Commission by the Council for the Advancement of the South African Constitution ("CASAC"), exhibit ZZ10, PO-03-204 ("the CASAC report) at pp 204 to 267.

[643] United Democratic Movement v Speaker, National Assembly and others 2017 (5) SA 300 (CC) at para's 33 to

> "…accountability is necessitated by the reality that constitutional office bearers occupy their positions of authority on behalf of and for the common good of the people. It is the people who put them there, directly or indirectly, and they, therefore have to account for the way they serve them.
>
> …
>
> Those who represent the people in Parliament have thus been given the constitutional responsibility of ensuring that members of the executive honour their obligations to the people. Parliament … not only passes legislation but also bears the added and crucial responsibility of 'scrutinising and overseeing executive action'
>
> …
>
> Members of Parliament have to ensure that the will or interests of the people find expression through what the state and its organs do."

746. The constitutional duties of oversight and ensuring accountability must be read together with prescribed oaths or solemn declarations required, by schedule 2 to the Constitution, to be sworn or affirmed when members of the NA and delegates to the National Council of Provinces (NCOP) assume office.

747. Item 4(1) of that schedule provides:

> "Members of the National Assembly, permanent delegates to the National Council of Provinces and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:
>
> I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic, and I solemnly promise to perform my functions as a member of the National Assembly/permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability. (In the case of an oath: So help me God.)" (Underlining supplied).

748. It needs to be noted that any member of the National Assembly would have sworn or solemnly affirmed, before commencing his or her duties, that he or she "will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic…".

The Corder Report

749. The first democratic Parliament (1994-1999) commissioned a report, by Hugh Corder, Saras Jagwanth and Fred Soltau, to advise it on how to exercise its oversight responsibilities. The report, entitled "Report on Parliamentary Oversight and Accountability" ("the Corder report")[644], was completed in July 1999.

750. As appears from its executive summary[645], the Corder report addressed the following main points:

750.1. the constitutional and theoretical values that underpin the concepts of oversight and accountability and the purposes they serve in a democracy;

750.2. the meaning of "oversight" and "accountability" in relation to the constitutional roles of the National Assembly (NA) and the National Council of Provinces (NCOP);

[644] PO-03-063

[645] PO-03-064

750.3. an overview of the problems with the existing procedures for dealing with reports submitted to Parliament;

750.4. recommendations about mechanisms and procedures that could be put in place to realise the constitutional obligation of parliamentary oversight of the executive. More specifically, the report looked at the nature of reporting to Parliament and made detailed recommendations on the content of reports and the manner in which reports should be dealt with upon their receipt by Parliament. It made recommendations dealing with both legislation and structures that it said needed to be put in place to give effect to Parliament's obligations under the Constitution; and

750.5. an analysis of the ways in which Parliament could ensure accountability of constitutional institutions while at the same time respecting their independence. Here, too, it recommended both legislation and the establishment of structures.

751. The report's recommendations were, in summary[646]

751.1. legislation in the form of an Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act;

751.2. amendment to the Rules of the NA and the NCOP, for the regulation of reporting to parliamentary committees; and

[646] PO-03-096.

751.3. the establishment of a Standing Committee on Constitutional Institutions.

The "Oversight and Accountability Model" adopted by Parliament

752. Some of the recommendations made in the Corder report were not implemented, including the legislation proposed. Instead, so it appears from a report submitted to the Commission by Associate Professor Richard Calland ("the Calland report")[647], Parliament commissioned further research. Several years then passed, after which a parliamentary joint committee established a "Task Team on Oversight and Accountability", whose objective was to develop a "model" for Parliament's oversight function. The task team proposed an "Oversight and Accountability ('OVAC') Model"[648], which was apparently adopted by the Joint Rules Committee and thereafter by the NA and NCOP in 2009[649] . The OVAC Model therefore at face value expresses Parliament's view of how it should go about implementing its constitutional oversight and accountability responsibilities.[650]

[647] See in particular part 2.3 of the report, annexure "A" to exhibit ZZ 9 (PO-03-007) at 013. See also the CASAC report (exhibit ZZ10, PO-03-204) at para's 7 to 19.

[648] PO-03-101

[649] See e.g. Frolick Day 338 p 153

[650] Modise, Day 377 p 22

753. The Calland report helpfully summarises[651] some of the principal recommendations contained in the OVAC model as follows:

753.1. the establishment of a Joint Parliamentary Oversight and Government Assurance Committee;

753.2. an Oversight and Advisory Section to "provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong";

753.3. development of rules to assist Parliament "further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly or the Chairperson of the Council based on a full explanation;

753.4. Improved reporting of committees to the House;

753.5. Ensuring sufficient and appropriate resourcing and capacity to develop specialised committees to deal with issues that cut across departments and ministries;

753.6. Splitting training between legislative and oversight work, and increasing training for members in core competencies, including use and application of the OVAC model and budget analysis, amongst several other competencies; and that

[651] At PO-03-015 to 016; see the footnotes there for the summarized recommendations

753.7. Parliament's public participation function be integrated within its overall oversight mechanism.

754. Some of these recommendations have not as yet been implemented. This will be dealt with later in this report. For the present it suffices to note that, both before and after the adoption of the OVAC report, the rules of the National Assembly[652] were adapted to facilitate oversight taking place, primarily in portfolio committees.

The importance of portfolio committees

755. The evidence before the Commission is overwhelmingly in support of the view that the institution that is key to the performance of parliamentary oversight over the executive in South Africa is the portfolio committee.[653] For example, the former Speaker of the National Assembly, Ms B Mbete, referred to the committee system as "the main instrument through which Parliament exercises oversight". Ms T Modise, who replaced Ms Mbete as the Speaker and who was the Speaker at the time of her evidence to the Commission, testified that committees are "actually where the bulk of the [oversight and accountability] work gets done"**.** Prof Calland expressed the view that the parliamentary committee system is "the most important institutional infrastructure for exercising meaningful executive oversight"[654]. Many commentators have referred to portfolio

[652] And of the NCOP and the Joint Rules – but the focus in this report will be on oversight by the NA and the focus will therefore be on the rules of the NA.
[653] E.g. Calland, Exhibit ZZ 9 at PO-03-17; Mbete Day 397 p 174; Modise p 101 lines 18- 20

[654] PO-03-017

committees as the “engine room” in relation to parliamentary oversight. Indeed, this descriptive phrase is used on Parliament’s own website.[655]

Relevant Rules of the National Assembly

756. The current version of the Rules of the National Assembly is the 9th edition, which was adopted on 26 May 2016. As regards the rules referred to in this report, which relate to accountability and oversight, there is no material difference from the preceding edition of the Rules[656], though the applicable rule numbers differ. For convenience, references in this report to the rules will be to the rules as presently numbered.

757. Rule 225 provides for the establishment by the Speaker of a range of portfolio committees and the assignment of a portfolio of government affairs to each such committee.

758. Rule 227(1) sets out the functions of portfolio committees as follows:

> “A portfolio committee —

[655] https://www.parliament.gov.za/what-parliament-does.

[656] Adopted in February 2014. The first edition of these rules was adopted in June 1999.

must deal with Bills and other matters falling within its portfolio as are referred to it in terms of the Constitution, legislation, these rules, the Joint Rules or by resolution of the Assembly;

must maintain oversight of —

(i) the exercise within its portfolio of national executive authority, including the implementation of legislation,

(ii) any executive organ of state falling within its portfolio,

(iii) any constitutional institution falling within its portfolio, and

(iv) any other body or institution in respect of which oversight was assigned to it;

(c) may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution;

(d) may consult and liaise with any executive organ of state or constitutional institution; and

(e) must perform any other functions, tasks or duties assigned to it in terms of the Constitution, legislation, these rules, the Joint Rules or resolutions of the Assembly, including functions, tasks and duties concerning parliamentary oversight or supervision of such executive organs of state, constitutional institutions or other bodies or institutions." (emphasis added)

759. Portfolio committees also have the general powers conferred on parliamentary committees by Rule 167. This rule provides:

"For the purposes of performing its functions **a committee may**, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly —

(a) summons any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) receive petitions, representations or submissions from interested persons or institutions;

(c) permit oral evidence on petitions, representations, submissions and any other matter before the committee;

(d) conduct public hearings;

(e) consult any Assembly or Council committee or subcommittee, or any joint committee or subcommittee;

(f) determine its own working arrangements;

(g) meet at a venue determined by it, which may be a venue beyond the seat of Parliament;

(h) meet on any day and at any time, including —

(i) on a day which is not a working day,

(ii) on a day on which the Assembly is not sitting,

(iii) at a time when the Assembly is sitting, or

(iv) during a recess; and

exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these rules or resolutions of the Assembly." (emphasis added)

760. When these provisions are read together with the provisions of the Constitution cited above, in particular section 56 [657], there can be no doubt that a portfolio committee:

760.1. is obliged to maintain oversight over the exercise of national executive authority within its portfolio and over any executive organ of state falling within its portfolio;

760.2. is entitled to monitor, investigate, inquire into and make recommendations concerning any such executive organ of state;

760.3. is entitled to conduct public hearings; and

[657] See para 10 above.

760.4. is entitled to summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

761. Though there is room for improvement, parliamentary committees have, throughout the period of concern to the Commission[658], enjoyed the essential powers required in order to exercise oversight over the executive and SOEs and to hold them accountable. As the then Speaker, Ms Modise, put it in her evidence:

> "…if you look at the powers of committees no committee actually has an excuse for not asking pointed questions, for not investigating, for not calling for witnesses, for not summonsing people." [659]

The official stance of the majority party on parliamentary oversight

762. Since the dawn of the democratic order in 1994, the African National Congress (ANC) has enjoyed majority representation in Parliament. This is a fact of fundamental importance when analysing the practical implementation of parliamentary oversight, since the ANC has, throughout the democratic era, had the power to determine the stance adopted by every structure of Parliament, including the National Assembly, portfolio committees, joint committees, and *ad hoc* committees.

[658] Which is primarily the period of the fourth (2009-2014) and fifth (2014-2019) parliaments.

[659] Day 377 p 16. Mr Frolick expressed the same view – Day 338 p203.

763. The official stance of the ANC, as articulated by its conference resolutions and statements by its leaders, has been to encourage vigorous parliamentary oversight. For example:

763.1. The ANC's then Secretary General, Mr G Mantashe, was reported in a newspaper article dated 22 May 2009 as having given the ANC's MP's strict instructions to be robust and not to be afraid of holding cabinet ministers to account for their actions. He was quoted as saying: "The committees were given a simple message: We are expecting an activist Parliament that is robust in its oversight role; a Parliament that will force the executive to account; a Parliament that will not wait for the opposition to raise issues." In his testimony to the Commission, Mr Mantashe confirmed that he had been correctly quoted.[660]

763.2. According to the testimony of President Ramaphosa, the ANC decided at its December 2012 conference (at which he was elected deputy president) "that we now need to get our parliamentary structures to be more activist, to be more alert when it comes to the issue of oversight, to exercise more accountability or to demand more accountability on the executive…".[661] He drew attention to paragraph 12 of the resolutions adopted at this conference[662], which he interpreted as meaning that "we needed to have our Parliament and legislatures to be more activist" and "to improve their oversight role."[663]

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[660] Day 374 p 180

[661] Day 385 p 23

[662] Exhibit BBB1 (CR-01-177) :"12.1 The Commission noted the challenges facing the legislatures in being more activist and developmental. 12.2 And resolved: 12.2.1 There should be a more activist people-centered model of legislatures should be developed….12.2.3 The legislatures oversight model and capacity should be improved."

[663] He did later say that it took four years for this to be "activated" – day 385 p 34. As will appear below, that would appear to be an under-estimate of the time it took for such "activism" to begin and, even once it began, it continued to meet serious resistance within the ANC's ranks.

763.3. According to an affidavit submitted to the Commission by the late Mr J Mthembu, who served as Chief Whip from March 2016 until May 2019, the ANC's National Executive Committee ("NEC") had decided at its meeting held from 18-20 March 2016 (the meeting at which he had been appointed as Chief Whip) that the allegations surrounding the Gupta family and its purported influence in the appointment of ministers and the like could have no place in the ANC. He continued as follows:

> "It was my view, after consultation with the Speaker and the team in parliament, that parliament as an institution must conduct oversight over the Executive through what would be presented to parliament in the various portfolio committees."[664]

764. However, as appears below, this official stance has all too often not been reflected by the ANC's representatives' conduct in practice. This pertains both to "ordinary" ANC Members of Parliament and to members of the executive, including cabinet ministers.

Did Parliament have a duty to investigate or enquire into allegations of state capture or corruption?

765. Parliament is not a law enforcement agency nor is it primarily an investigatory body. The question can therefore fairly be asked whether Parliament, or any of its committees, could properly have been expected to investigate or enquire into allegations in the public

[664] Exhibit ZZ1 PO-01-035 para 15

domain of state capture, corruption in the public sector or the like, where the facts were not uncontested.[665]

766. Parliament is plainly not obliged to investigate or enquire into every allegation of public-sector corruption or every allegation of malfeasance within the executive branch of government, particularly where the evidence available is scant. However, as referred to above, Parliament does have obligations under the Constitution to scrutinize and oversee executive action[666], to maintain oversight of the exercise of national executive authority and to ensure that all executive organs of state are accountable to it.[667] It and its committees have the power, both under the Constitution[668] and its own rules[669], to summons persons to appear before them; and, under its rules[670], portfolio committees are empowered to "monitor, investigate, enquire into and make recommendations concerning" the exercise within their portfolios of national executive authority and to conduct public hearings.

767. Parliament's duty to exercise oversight over the executive and to hold it to account includes, in the Commission's view, a duty to investigate or enquire (or to take other reasonable and appropriate measures) where there is reasonable cause to suspect

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[665] The stance of the former Speaker, Ms Mbete, in her evidence to the Commissions was that Parliament is entitled "*not just to go clutching at information that arrives*" particularly where the source of such information is anonymous. But she accepted that by the time of the so-called Gupta leaks, "*…there was enough to make even a person who was so fast asleep, to wake up and realise that no, there is something very, very wrong*", which needed to be investigated by Parliament (Day 397 p 209; see also pp 188-191)

[666] Section 42(3)

[667] Section 55(2)

[668] Section 56

[669] Rule 167(a)

[670] Rule 227(1)(c)

unconstitutional, unlawful or improper conduct on the part of a senior representative of the executive. The same applies where there is reasonable cause to suspect a failure by a senior representative of the executive to ensure that other persons reasonably suspected of such conduct are not themselves being appropriately dealt with. The oath of office by every Member of Parliament to "respect and uphold the Constitution and all other law of the Republic" (when read together with the obligation to oversee the executive and hold it to account) requires nothing less.

768. It is to the credit of several senior ANC representatives who testified before the Commission that they did not take issue with this.

769. President Ramaphosa, testifying in his capacity as the President of the ANC and former Deputy President of the ANC, accepted the proposition that, where there is information in the public domain which - if true - would implicate a president in conduct which is allegedly unconstitutional, illegal or improper, the National Assembly is obliged to do what it can, firstly to establish whether there is any merit in the allegations and, secondly, if it finds that there is, to take appropriate action. He accepted that the same principle applies to allegations concerning ministers, other senior representatives of government and senior officials of state-owned enterprises and the like.[671]

[671] Day 385 pp 10-11

770. Ms Modise (who served as Speaker of the NA and previously served as Chairperson of the NCOP), accepted the propositions that:

770.1. it is incumbent on responsible members of Parliament, when serious allegations of corruption have been made known to them within their respective portfolios, to satisfy themselves by repeated questioning and follow up, that these allegations have been appropriately disposed of;[672] and

770.2. when members of portfolio committees become aware of media reports that fall within their portfolios "they need to weigh them and if they are serious enough, they need to take steps using their powers and the rules of Parliament and the mechanisms of Parliament to do what they need to do".[673]

771. Likewise, Ms Mbete, the former Speaker, accepted that Parliament could not wait until a court of law had made a finding, provided enough grounds could be shown to justify Parliament investigating a matter.[674]

Parliamentary oversight in practice in relation to allegations of state capture and/or of improper influence by the Gupta brothers

[672] Day 377 p 82

[673] Day 377 pp 95-6

[674] Day 397 pp 189-191

Events in 2011

772. Allegations of state capture and/or of improper influence by the Gupta brothers have long been in the public domain. As will be referred to below, some degree of effective parliamentary oversight in relation to such allegations *commenced* in about mid-2017. Before that, the record is disturbing. Even after mid- 2017, the parliamentary oversight record was patchy.

773. Though allegations of an improper relationship between the Gupta and Zuma families had started to appear in the press earlier than this, it suffices to commence an examination of this issue from 2011. Articles appeared in the Sunday Times on 30 January 2011[675] and 27 February 2011[676] alleging improper influence by members of the Gupta family. The former article asserted that the issue at hand was what it labelled "the Guptarisation of South Africa". It asserted that, according to "decision-makers in government" it was becoming common to receive a directive from this family with a message that it came from "the very top", though the report disavowed alleging corruption. The latter article, headlined "Zuma faces revolt over Guptas" and sub-headlined "Ministers 'shiver' when summoned to family's home", was much more pointed. It alleged that the Guptas' role in influencing the appointment of chief executive officers and chairmen in key state-owned entities had been raised at a recent meeting of the ANC's National Working Committee (NWC). Some of the allegations it made about the Gupta brothers were the following:

[675] Annexure ZR 2 to exhibit ZZ6 (PO-02-564)

[676] Annexure ZR 1 to exhibit ZZ6 (PO-02-561)

773.1. "The Gupta brothers…are said to wield so much power that that they often summon cabinet ministers and senior government officials to their family compound in Saxonwold";

773.2. They telephoned at least three deputy ministers and told them that they were to be promoted days before President Zuma announced his cabinet reshuffle;

773.3. They "phoned several ministers to assure them that their jobs were secure ahead of Zuma's announcement";

773.4. They bragged about their influence, telling one ANC premier he was "fortunate" they went to his office to see him – as many public officials had to meet them at the Guptas' home;

773.5. They pressured several government officials at the government communications section, and directors of communications at various departments to place advertisements in their newspaper "The New Age";

773.6. A member of the NWC claimed ministers feared the family, believing they had too much influence over President Zuma. This source was quoted as saying "People are scared of them and they are called to their house all the time… (The Guptas) are known to be the president's people, and that is why even ministers will shiver".[677]

774. When asked about this report during his testimony before the Commission, President Ramaphosa accepted that, if these allegations were true, they revealed a subversion of our constitutional order. He said that the appointment of ministers and deputy ministers and the announcement thereof, should be the sole preserve of the President; no-one

[677] See also further press reports to similar effect on 27 February 2011 (PO-01-100.67 and PO-01-100.69); and 1 March 2011 (PO-01-100.72)

should go around offering positions like that or telling people that they would be fired. He also said that it would be a subversion if people who have no real role either in the executive or in the party have influence in the appointment of CEOs and chairmen of state-owned entities.[678]

775. Mr Mantashe, who served as Secretary General of the ANC at that time, initially claimed in his evidence that the press reports did not come to his attention[679], a stance which he later, quite correctly, retracted.[680] He, too, accepted that, if the allegations in the above reports were true, this would be a matter of extreme seriousness[681] and accepted that the allegations had needed to be investigated[682]. He said that they had been discussed and rejected at an NWC meeting, after which he had issued a statement dismissing criticism of the Gupta family's political influence as "racial prejudice".[683] This reaction, he said, had been based on "the analysis we did" and "the information at our disposal".[684]

776. President Ramaphosa said he accepted with the benefit of hindsight that there was no basis for the dismissal of the allegations as racist and said that they had been "blinded by the events of the time".[685]

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[678] Day 385 pp 48-9

[679] Day 374 p215 lines 9 to 22; p 216 lines 10-19; p 217 lines 3-9

[680] Day 374 p 220

[681] Day 374 p 221

[682] Day 374 p222

[683] Mail & Guardian report of 8 March 2011 - PO-01-100.77; Business Day report of 11 March 2011 – "ZR5"at PO-02-581

[684] Day 3374 p 221. He explained that the "we" referred to were personnel in the Secretary General's office - Day 374 p 223

[685] Day 385 p 51

777. In an NEC meeting in August 2011, Mr Fikile Mbalula made claims that should have prompted a reconsideration of the ANC leadership's rejection of the previously reported allegations. In an outburst in the presence of President Zuma, Mr Mbalula said that he had been informed by the Guptas of his imminent appointment as Minister before the official announcement thereof by President Zuma.[686] (According to a report in the Sunday World on 4 September 2011[687], he went as far as to accuse the President at this meeting "of allowing outside forces such as the Gupta family to run the ANC and the government on his behalf"; and "allegedly told Zuma he knew about his appointment as Minister of Sports and Recreation through the Gupta's two weeks before Zuma made the announcement.")

778. President Ramaphosa stated in an affidavit submitted to the Commission[688] that he recalled the incident but that at the time it did not "prompt any specific concerns about the capture of the state". In his oral evidence he conceded that, with the benefit of hindsight, "you will almost kick yourself in the foot and say these were the signs that we needed to pay attention to, the lights were flashing amber and we should have been more alert at looking at them, but we did not at the time".[689]

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[686] See e.g. Mr Mantashe's evidence - Day 374 pp 227 to 235; President Ramaphosa's evidence at Exh BBB 1 para 93 (CR-01-43) and Day 385 pp 54 and 70.

[687] See PO-01-100.91 (also "ZR 4b", PO-02-574), referring to a report in the Mail & Guardian. See also "ZR 4c" at PO-02-579 in which a different report, published on 31 October 2011, claimed that:" In a frank review of the state of the movement, some NEC members told, for example, how the Guptas had informed them who was going to be moved, and who wasn't several days before the reshuffle actually took place."

[688] Exhibit BBB1 CR-01- 41 para 93

[689] Day 385 p54

779. Mr Mantashe repeatedly made the point that the ANC, including the Secretary General's office, does not have investigatory powers which enable it to require persons to provide information to it. That may be correct but Parliament does have such investigatory powers and the allegations referred to above, including allegations as to what had transpired at the NEC meeting, were in the public eye. Many members of the NEC also serve as Members of Parliament. As Ms Modise accepted in her evidence, there was no reason why a Member of Parliament should not have questioned Mr Mbalula (in the National Assembly or in a portfolio committee meeting) about his reported allegations or should not have put the question to the President himself [690]. There is no evidence to show that the allegations referred to above were raised or probed in Parliament in 2011 or at any time thereafter. That is regrettable.

780. Ms Z. Rantho, who became a member of the ANC's Parliamentary caucus from mid-2009, gave evidence that the—

> "…prevailing ethos within the caucus was that allegations of improper influence, corruption or the like did not merit discussion within the caucus, unless or until they were either established by a court of law or had been proved by concrete evidence. Such allegations were, to my knowledge, therefore discussed by back-bench Members of Parliament (MP's) of the ruling party only privately and informally, if they were discussed by them at all."

781. She said that the 2011 press reports referred to above (e.g. the allegations that "Ministers shiver when summoned to family's home"; and that "(t)he concern is that these people (the Guptas) now have influence in the appointment of CEOs and chairmen

[690] Day 377 p97

of state-owned entities ... ") were not discussed in the caucus, nor between the party leadership and its MP's nor, to the best of her knowledge, in any portfolio committees. She said that she could not recall any indication in the ANC caucus of any intention to raise the Gupta issue before the Waterkloof incident of March 2013. [691]

Events in 2013

782. In 2013 further developments should have prompted closer and more effective parliamentary scrutiny or action than was the case.

783. From no later than 2013 it was openly acknowledged that public monies, including monies from state owned enterprises, were being directed towards the Gupta's media empire, including The New Age. The problem here was not Parliament's inability to ferret out the truth (questions put in the NA by opposition MPs elicited admissions in this regard), but the ANC's stance that there was nothing wrong with this. [692]

784. On 17 March 2013 the Sunday Times published a report alleging that, at a meeting at the Gupta's Saxonwold home on 29 October 2012, Mr Rajesh Gupta, in the presence of a number of named persons, offered a bribe of R100 000, later increased to R500 000, to the then chairperson and acting CEO of SAA, Mr V. Kona, and that this was rejected

[691] Exhibit ZZ6, PO-02-526 to 529, para's 5.5 to 5.9; day 336 pp 16-17

[692] See e.g. Mazzone, exhibit ZZ5, PO-02-009, para 6; Day 335 pp 125 to 126

by Mr Kona [693] This very serious and specific allegation prompted no parliamentary scrutiny.

785. The nationally notorious Waterkloof saga in late April 2013 once again raised in the public domain allegations of improper influence of the Guptas. Guests of the Gupta family travelling in a private jet to attend a wedding at Sun City made use of the Waterkloof air force base. Allegations were made that this had been approved – or was understood to have to have been approved - by President Zuma.

786. Before referring to the manner in which the Waterkloof incident was dealt with, it is appropriate to refer to a press report dated 3 May 2013[694] to the effect that Mr Mantashe had told some ministers to have the "*back-bone*" and to refuse to take instructions from the Guptas.[695] In his evidence Mr Mantashe confirmed the accuracy of this report. His evidence was that in 2013 he had "*had words*" with ministers to start resisting "*and that was the beginning of the process of appreciating that this must be stopped*".[696] This shows that it was already understood within ANC structures that there were indeed grounds for concern which needed to be addressed and that it was understood that the allegations in the press were not without substance.

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[693]Annexures ZR 6a and 6b to Ms Rantho's affidavit (exhibit ZZ6) PO-02-584 to 589.

[694] PO-01-100.104

[695] Day 374 pp 243 to 245

[696] Day 374 p 245

787. Mr Mantashe also revealed in his evidence that in 2013 the ANC's Integrity Commission[697] submitted a report, with reasons "connected to the Gupta influence", recommending that President Zuma should step down.[698] This speaks volumes. Mr Mantashe must be commended for having included this disclosure in his evidence because the Commission did not have any evidence to this effect.

788. No evidence was tendered as to why the ANC (e.g. through its NEC) failed to act on this recommendation of its Integrity Committee, or why it did not lead to any action in relation to President Zuma on the part of the National Assembly.

789. A report by a government team which investigated the Waterkloof incident placed most of the blame on Mr B Koloane and Lt Col C Anderson. The investigation did not even interview Mr Zuma about whether he knew the plans to land the jet in advance.

790. The resultant report was the subject of a debate in the National Assembly on 22 May 2013. ANC MPs supported the report's conclusions; opposition MP's were not convinced.[699]

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[697] Established by the ANC pursuant to a resolution adopted by the ANC at its 2012 conference

[698] Exhibit ZZ 1.10 PO-01-100.432, para 61; Day 374 pp 43 and 246 to 249; Day 377 pp160 to 166

[699] https://www.dailymaverick.co.za/article/2013-05-23-oh-what-a-circus-guptagate-comes-to-parliament/

791. No parliamentary inquiry into the allegations of improper Gupta influence took place, in 2013 or indeed before mid-2017.

792. If the problem was apparent to the ANC's Integrity Committee and to its Secretary General and if one has regard to the level of press reports on the problem, it is difficult to accept that Members of Parliament did not yet have sufficient cause to probe the veracity of the allegations of improper Gupta influence by 2013, at the latest.

Events in 2014-2015

793. Further reports alleging improper Gupta influence and enrichment continued to appear in the press in 2014 and 2015. Examples include a Mail and Guardian report of 4 July 2014 in relation to the R50 billion locomotive tender at Transnet[700]; and an AmaBhungane report dated 31 July 2015 under the headline "'Kickback scandal engulfs Transnet"[701]. Reports also started to appear alleging undue influence by the Guptas in their companies' dealings with Eskom, which prompted opposition parties, the DA in particular, to start asking questions about the Gupta's dealings with Eskom.

794. As will be referred to below, section 102 of the Constitution empowers the National Assembly, by a majority vote, to adopt a motion of no confidence in the President. During President Zuma's term of office as President, eight motions of no confidence in him were

[700] Annexure NM 12 at PO-02-130

[701] Annexure NM13 at PO- 02-137

proposed by opposition parties. None succeeded. All ANC MPs were instructed by their party to vote against these motions and by and large they did so.

795. An early instance was a motion of no confidence proposed by the leader of the Democratic Alliance, Mr Mmusi Maimane, on 17 March 2015, based *inter alia* on the alleged politicisation and weakening of state institutions and allegations of corruption. The ANC opposed the motion and it was defeated.

796. On the 9th December 2015 President Zuma announced the dismissal of Mr Nhlanhla Nene as minister of finance and the appointment of Mr Des Van Rooyen as his replacement. This caused turmoil on the financial markets, including a significant fall of the Rand[702], and enormous public controversy. Allegations were reported that Mr Nene's removal was linked to his unwillingness to take illegal instructions from President Zuma and his friends in both business and state-owned enterprises.[703] So intense was the adverse reaction that President Zuma was prevailed upon within days to revoke the appointment of Mr Van Rooyen and to appoint Mr Gordhan in his place.

797. Parliament still did not inquire into the allegations of state capture.

Events in January to March 2016

798. Widely publicised allegations of state capture came to a head in early 2016. In January of that year, Mr Mantashe was quoted in a report in the Sowetan as saying that the Guptas had "captured" individual ANC leaders but not the party itself. He confirmed in his evidence that he said this.[704] He said that by that time "there were quite a few reports

[702] Testimony of Mr P Gordhan, on day 25 (19 November 2018) e.g. at p15

[703] See e.g. Mail and Guardian "Nhanhla Nene removed as finance minister" 9 December 2015.

[704] Day 374 pp 266-7

about this leader and that leader" and "stories that certain individuals were captured"[705]. He said that "(s)tories about a number of leaders of the ANC captured were flying all over, okay, more worrying was the story about the closeness of that family to the President…".[706]

799. On 14 February 2016 then Deputy President Ramaphosa said in an interview with a journalist from the Sunday Times that an ongoing review of the performance of state-owned enterprises which he had recently been appointed to lead would go a long way "in rooting out the capture of government institutions by politically connected individuals for personal gain". [707] In his evidence to the Commission, he acknowledged that he had been correctly quoted.[708] He, for one, clearly believed by this time that politically connected people had been involved in the "capture" of government institutions.

800. On 1 March 2016 another motion of no confidence was proposed by Mr Maimane of the DA, based inter *alia* on Mr Zuma's alleged "irrational, irresponsible and reckless leadership". Once again the motion failed, essentially because of ANC opposition.

801. On or about 8 March 2016 the then deputy finance minister, Mr Mcebisi Jonas, made a public statement alleging that he had been offered the position of finance minister by the Guptas, coupled with an offer of a bribe if he would work with them. This was, of course, an extremely serious and disturbing allegation. President Ramaphosa said in his evidence to the Commission that he had no reason at the time to doubt the credibility of Mr Jonas's statement.[709]

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[705] Day 374 p 268-9

[706] Day 374 p 269

[707] CR-02 -613; Day 385 pp 56-7

[708] Day 385 p 57

[709] Day 385 p57

802. It was quickly followed by an allegation by Mr Themba Maseko that he had been forced to resign from the Government Communication and Information Service after a threat from Mr Ajay Gupta and pressure to place government advertisements in the New Age.[710]

803. Shortly thereafter Ms Vytjie Mentor alleged that the Guptas had once offered her the position of minister of public enterprises on condition that she would drop the SAA route to India and give it to Jet Airways instead. Ms Barbara Hogan, former minister of public enterprises, made an allegation that when she was minister of public enterprises she too had been placed under pressure in respect of allowing Jet Airways to replace SAA on the Johannesburg to Mumbai route.[711]

804. These events prompted the DA's shadow minister of public enterprises, Ms N Mazzone, to push on 8 March 2016 for an inquiry by the Portfolio Committee on Public Enterprises (PCPE). She wrote to the then chairperson of the PCPE, Ms Dipuo Letsatsi-Duba, requesting that the Gupta brothers be summoned to answer for what appeared to be undue influence that they enjoyed over President Zuma, the government and its officials.

805. She followed up with another letter to Ms Letsatsi-Duba requesting that the PCPE conduct an inquiry "into the capture of SOE's by the Guptas". She proposed that the committee should:

> "Immediately summon the Guptas to appear before it to answer these allegations, as per my previous letter to you in this regard.
>
> Call former Ministers of Public Enterprises, Barbara Hogan and Malusi Gigaba, to provide full details of their relationship with the Gupta family. Mr Gigaba, in particular, must account for allegations of preferential treatment of the Guptas for state contracts during his tenure.

[710] PO-02-019

[711] PO-02-020 to 021

> Summon the CEOs and Chairpersons of the largest SOEs to appear before it to answer questions about their ties to the Guptas."[712]

806. At that time, Dr Ben Ngubane was the Chairperson of the Eskom Board, Mr DL Mantsha, the Chairperson of the Denel Board, Ms Linda Mabaso, Chairperson of the Transnet Board, Ms Dudu Myeni, the Chairperson of the SAA Board, Dr Ben Ngubane had links to the Guptas or their associates. Mr Mantsha had such links as well. Ms Mabaso also had such links. Ms Myeni is close to Mr Zuma.

807. On 20 March 2016, after an NEC meeting of 18-20 March 2016, the ANC issued a statement[713] which, in so far as it is relevant, read as follows:

> "Alleged Business Influence on the State
>
> The ANC NEC had frank and robust discussions on the serious allegations surrounding the Gupta family and its purported influence in the appointment of ministers, their deputies and other positions in key state-owned entities in their interests. Such actions can have no place in the ANC or its government as they have the potential to undermine and erode the credibility and confidence of our people in the leadership of their organization, the ANC and its government. We reject the notion of any business or family group seeking such influences over the ANC with the contempt it deserves while also recognizing the need to act to protect the integrity of our government and our organisation.
>
> The appointment of ministers and deputy ministers is the sole prerogative of the President of the Republic, in line with the Constitution. To this end, the ANC continues to confirm its full confidence in our President. The ANC NEC mandated the Officials and the NWC to gather all pertinent information about the allegations to enable the ANC to take appropriate action on this matter. The ANC calls on all members who have information to approach the Secretary General's Office. The NEC will development a Code of Conduct for ANC members doing business with the state."

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[712] PO-02-020 para 13.5 of the affidavit of Ms Mazzone, exhibit ZZ 5

[713] Annexure CR17 to the affidavit of President Ramaphosa

808. The following features of this statement bear emphasis:

808.1. The allegations surrounding the Gupta family and its purported influence in the appointment of ministers, their deputies and other positions in key state-owned entities were recognized as “serious”.

808.2. The NEC mandated the Officials and the NWC to “gather all pertinent information about the allegations” to enable the ANC to take appropriate action.

808.3. No attention appears to have been given to supporting an inquiry by Parliament or any of its committees into the allegations.

808.4. Despite the seriousness of the allegations the ANC continued to confirm its full confidence in its President, Mr Jacob Zuma.

809. On 29 March 2016 the Mail & Guardian carried a report[714] quoting the office of the newly appointed chief whip, Mr Jackson Mthembu, as saying that it was a "delusional misapprehension" that he supported a parliamentary investigation into alleged state influence by the Gupta family. He was reported to be of the view that these allegations should be left to be investigated by the Hawks and the Public Protector.

810. On 31 March 2016 the Constitutional Court handed down its "Nkandla" judgment.[715] This case concerned the constitutional obligations of the President and the National Assembly to implement remedial action taken against the President by the Public Protector. The Public Protector had found that President Zuma and his family had been unduly enriched by an upgrade of his private residence and ordered that the President

[714] Annexure NM 36, PO-02-212
[715] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC).

repay a to-be-determined percentage of the undue enrichment. The National Assembly, having conducted its own investigation of the matter, adopted a resolution absolving the President from all liability.

811. The Constitutional Court referred[716] to the constitutional obligation of the National Assembly to scrutinise and oversee executive action and to hold the President, as a member of the executive, accountable. As referred to above, it held that to "scrutinise" means to "subject to scrutiny" and "scrutiny" implies a careful and thorough examination or a penetrating or searching reflection. The National Assembly had been entitled to apply to a court to challenge the Public Protector's remedial action. Absent such a challenge, however, it had been duty bound to hold the President accountable by facilitating his compliance with the remedial action. One of the orders made by the court was that the resolution of the National Assembly absolving President Zuma from compliance with the remedial action taken by the Public Protector was inconsistent with the Constitution, invalid and set aside.

812. The Constitutional Court's finding that the National Assembly had failed to comply with its constitutional obligation to hold the executive accountable attracted considerable attention, including from Members of Parliament, but it did not cause the National Assembly to change its approach in respect of the allegations of state capture and corruption.

813. On 5 April 2016 another DA-proposed motion of no confidence, this time based *inter alia* on President Zuma's failure to comply with the Public Protector's "Secure in Comfort "(Nkandla) report), was opposed by the ANC and consequently failed to attract majority support.

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[716] at paragraph 96

Refusal of request for an enquiry by the PCPE

814. On 06 April 2016 Ms Letsatsi-Duba, the chair of the PCPE, replied[717] to Ms Mazzone's request for an enquiry by that committee, stating that, according to the legal advice that she obtained from the Parliamentary Legal Service:

814.1. National Assembly Rule 138 "requires a House resolution to initiate an investigation";

814.2. The PCPE "is not authorised by law to initiate such a parliamentary inquiry on its own";

814.3. Any member of the Assembly may move a motion to have a draft resolution pertaining to a parliamentary inquiry put before the Assembly for approval as a resolution of the Assembly in terms of rule 94.

815. Ms Mazzone replied in writing on 6 April 2016, disputing the above legal advice and pointing out that National Assembly Rules 138 and 201, read with section 56 of the Constitution, empowered the committee to summon members of the Gupta family to give evidence and to produce documents, without any requirement of a resolution of the National Assembly.[718]

816. In her evidence to the Commission Ms Letsatsi-Duba said that:

[717] see Annexure "NM37", PO-02-219

[718] Exhibit ZZ9, PO-02-025 para 13.19

816.1. she had been of the view that it was necessary to hold an inquiry of the type that Ms Mazzone had requested[719];

816.2. she knew that the PCPE had the power to summon whoever it wished, even members of the public[720]

816.3. she thought that she had been misunderstood by the legal advisors[721];

816.4. she did not agree with the legal advice she had received[722];

816.5. she should have reverted to the legal advisors to point out why she thought they were wrong[723]; and that

816.6. she agreed with Ms Mazzone that the inquiry she had requested did not happen because the majority of members on the PCPE did not support it[724]. (It must of course be borne in mind that the majority of the PCPE, like the majority of every parliamentary committee, comprise ANC MPs.)

817. It may be noted in passing that all witnesses asked about the legal advice to the effect that the PCPE was not empowered to decide to conduct the inquiry requested without a House resolution were in agreement that this was clearly wrong,[725] which is undoubtedly so.

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[719] Day 349 p 240 lines 9 to 14

[720] Day 349 p 242 lines 14-17

[721] Day 349 p239 lines 211-23

[722] Day 349 p 243 lines 6-7

[723] Day 349 p 243 line 22 to p 244 line 2

[724] Day 349 p 249 line 23 to p 250 line 4

[725] In addition to Ms Mazzone and Ms Letsatsi-Duba, see e.g. Modise day 337 pp 68-70 (p68 line 23 “clearly wrong”); Frolick day 338 pp 203-5 and 209-210; and President Ramaphosa referred to the decision as “ill advised” – day 385 p 61

818. Ms Letsatsi-Duba served as chairperson of the PCPE from May 2014 to March 2017. The following exchange between the Commission's evidence leader and her, during her evidence, is telling:

> **"ADV FREUND SC:** Yes, because I take it, Ms Letsatsi-Duba that you, as a citizen, like me as a citizen, had been reading in the newspapers for years from 2011 onwards a series of quite serious allegations about the manner in which the SOEs were being run and the series of allegations that there was improper influence being exercised over the leadership of those SOEs. Am I correct? You were aware of those allegations
>
> **MS LETSATSI-DUBA:** We were aware of those allegations.
>
> **ADV FREUND SC:** And would it be correct to say that in your own opinion the Portfolio Committee on Public Enterprises did not effectively exercise its oversight powers with a view to trying to probe those allegations and trying to ensure that the appropriate necessary remedial measures were taken?
>
> **MS LETSATSI-DUBA:** That I fully agree with that statement. We failed to exercise our oversight."[726]

819. To similar effect, Ms Rantho said in her affidavit that, from the time that she joined the PCPE in 2014 until May 2017 (when that committee decided to embark upon its Eskom enquiry)—

> "…whilst there were quite a few oversight engagements and whilst in some of these engagements legitimate oversight concerns were expressed, the issue of state capture was not really addressed and little effective oversight took place in respect of allegations of fraud or corruption or other comparable misconduct." [727]

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[726] Day 349 pp 226-7

[727] PO-02-538 para 8.4

820. What emerges from the evidence as a whole is that the ANC members of the PCPE had no willingness or desire to conduct an inquiry as requested by Ms Mazzone.

821. It seems to be no coincidence that their stance is consistent with the recently reported statement by the Chief Whip that it was a "delusional misapprehension" that he supported a parliamentary investigation into alleged state influence by the Gupta family. As will be referred to below, ANC MPs' acted in accordance with what was or may have been decided in party structures.

822. The ANC's attempt at an internal investigation subsequent to its March 2016 NEC meeting failed. It received eight submissions but only one of those who came forward, Mr Themba Maseko, was willing to put his evidence in writing. Mr Mantashe's evidence was there was "suspicion in the ANC people do not want to do anything that is career limiting, they fear being persecuted."[728]

823. By 31 May 2016 the investigation had been called off. This still did not move the ANC to support any type of parliamentary inquiry into the allegations of state capture, corruption or the like.

[728] Day 374 p 289

Rejection of the DA motion in September 2016 to establish an *ad hoc* committee

824. Having failed in its attempt to bring about a portfolio committee inquiry, the Democratic Alliance attempted to get support from the National Assembly for a resolution appointing an *ad hoc* committee to investigate the alleged capture of state resources and undue influence over the government.

825. On 8 September 2016 the following motion was proposed by Mr D Maynier (a DA MP):

> "That the House-
>
> (1) notes the allegations of state capture by certain individuals and their alleged undue influence over the government;
>
> (2) establishes an ad hoc committee in terms of Rule 253(1)(a), the committee to -
>
> (a) investigate the alleged capture of state resources and undue influence over the government;
>
> (b) recommend measures in line with the Assembly's oversight constitutional mandate, to prevent such incidents from occurring;
>
> (c) consist of 11 members, as follows: ANC 6, DA 3, EFF 1 and other parties 1;
>
> (d) exercise the powers in rule 167 as it may deem necessary for the performance of its task; and
>
> (e) report to the Assembly by no later than 30 October 2016." 729

826. The Chief Whip sought to move an amendment to replace paragraph 2 of the above motion as follows:

> "(2) refers all such allegations of state capture to the SA Police Service or Chapter 9 institutions for investigation, including the Public Protector;

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729 PO-02-360

> (3) notes that all parties and individual Members of Parliament with evidence of such alleged state capture should make available such evidence to the Police Service or a Chapter 9 institution;
>
> (4) further notes that such investigations by either the Police Service or a Chapter 9 institution should culminate in prosecutions of all individuals or companies engaged in such state capture if such is proved as a criminal activity."730

827. The amendment was disallowed by the Deputy Speaker on the basis that it fell outside the scope of the motion. The DA's motion was put to the vote and was defeated by 160 to 103, all ANC members present voting against the motion.[731] They regarded themselves as bound by the ANC caucus decision in this regard.[732]

828. As appears from the above-quoted proposed amendment to the draft resolution, the ANC adopted the stance that it was not for Parliament but for the SA Police Service or the Chapter 9 institutions to investigate the allegations of state capture and undue influence over the government. There is, of course, no reason why persons with the relevant evidence should not have been encouraged to make it available to the SAPS or to Chapter 9 institutions. The question is: was that an adequate basis for Parliament not also to enquire into, and, if necessary to take measures to address, such serious allegations?

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730 PO-02-361

731 PO-02-030 para 14.7.

732 See e.g. Magadzi, Day 339 pp 60-64, including p 62: "you cannot deviate from the route the party has indicated…"

829. Pressed on this point when testifying before the Commission, President Ramaphosa conceded that "…if you look at it with hindsight, I would say the two would not be mutually exclusive and if anything, both checks could easily have been followed".[733]

830. The Commission agrees. In issue were serious and plausible allegations which, if found to be substantiated, revealed a threat to our constitutional democracy. Parliament is constitutionally obliged to oversee and hold the executive to account. Members of Parliament are all bound by their oath of office or affirmation to be "faithful to the Republic" and "obey, respect and uphold the Constitution and all other law of the Republic". Leaving it exclusively to other agencies to investigate and, if necessary, to take action regarding these allegations at this time, was not, in the Commission's view consistent with Parliament's constitutional responsibilities.

Events up to May 2017

831. Allegations of state capture had been made to the Public Protector, Ms Thuli Madonsela, by several persons in March 2016. On 14 October 2016 she signed her report entitled "State of Capture". On 2 November 2016 this report was made public. Though the Public Protector made no final and definitive findings, she made multiple "observations" which indicated that there could well be merit in allegations of state capture. Amongst the issues on which she made such observations were the following: possible involvement of the Guptas in the removal and replacement of the finance minister in December 2015; apparent failures to investigate the well-publicised allegations which had been made by

[733] Day 385 p 67

Mr Jonas, Ms Mentor and Mr Maseko and Mr Jonas and allegations of an allegedly cosy relationship between Mr Brian Molefe and the Gupta family; possible improprieties in the award of state contracts or tenders to Gupta linked companies or persons; and possible improper interference by President Zuma or members of his cabinet in the relationship between banks and Gupta owned companies.

832. The remedial action that the Public Protector took included (inter alia) directing that President Zuma should, within 30 days, appoint a commission of inquiry headed by a judge, solely selected by the Chief Justice. She directed that the commission of inquiry should complete its task within 180 days.

833. If these time periods had been complied with, the commission would have been appointed in late 2016 and completed its report by mid-2017. The present Commission was ultimately only appointed on 23 January 2018, long after what had been decided by the Public Protector. Though President Zuma did not refuse to appoint a commission, he brought judicial review proceedings challenging the right of the Public Protector to direct that the commission be headed by a judge selected by the Chief Justice. The obvious and foreseeable result was a substantial delay in the intended speedy process to get to the bottom of the state capture allegations.[734] On 13 December 2017 - more than a year after the release of the Public Protector's report - a full bench of the High

[734] Ms Modise accepted, correctly in the Commission's view, that the existence of the recommendation to establish a commission of inquiry was not a good reason for Parliament not to do its own oversight work. As she said: "I agree that within the powers and responsibilities of Parliament, any matter could have been investigated. If the Judicial Commission was then established, then all the committees would have needed to do is, is to hand over the work that they had done so that there is no duplication." – Day 377 p 86

Court dismissed President Zuma's application.[735] A little over a month later, the Commission was appointed.

834. On 3 November 2016 the National Assembly resolved to establish an *ad hoc* committee into the fitness of the SABC board and related matters. This followed widespread concern about the SABC's ability to exercise its mandate as the public broadcaster. The committee's terms of reference included considering the SABC's financial status and sustainability; its response to a report by the Public Protector entitled "When Governance and Ethics Fail"; its response to recent judgments affecting it; the SABC board's ability to take legally binding decisions following the resignation of a number of its non-executive board members; the SABC's adherence to the Broadcasting Charter; and its ability to carry out is duties under its governing legislation.

835. The committee held public hearings in which numerous witnesses gave evidence and were questioned. In due course the committee made a number of critical findings, including that there was *prima facie* evidence that the SABC's primary mandate as a national public broadcaster had been compromised by a lapse of governance and that the board had not discharged its fiduciary duties. [736] This serves as an example of appropriate parliamentary oversight and shows that, where there was a will, there was a way.

[735] President of the Republic of South Africa v Office of the Public Protector and others 2018 (2) SA 100 (GP)

[736] Khoza PO-01-748 , 750-2

836. In the meantime, further allegations of state capture and corruption in the public sector continued to mount. Opposition parties continued to attempt to hold the executive to account in Parliament.

837. On or about 6 November 2016 Ms Mazzone attempted to have Mr Brian Molefe summoned to testify before the PCPE concerning developments at Eskom, without success.[737]

838. On 10 November 2016 a DA-proposed vote of no confidence in President Zuma (based *inter alia* on the contention that under Mr Zuma's allegedly irrational, irresponsible and reckless leadership "important institutions of state had been captured by private interest…") was defeated.[738]

839. On 31 March 2017 there was a cabinet reshuffle. Amongst other changes made, Mr Pravin Gordhan, the then Finance Minister, was removed from the cabinet and replaced by Mr Malusi Gigaba. [739]

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[737] PO-02-037 para 17.3

[738] PO-02-037 para 17.4

[739] PO-02-040 para 17.12

840. Public allegations of malfeasance at Eskom mounted, including several allegations pertaining to Mr Brian Molefe, its former CEO.

841. On 12 May 2017 Ms Mazzone addressed a letter to Mr Cedric Frolick, the House Chairperson of the National Assembly in which she motivated, and asked him to approve, the launch of a full-scale parliamentary inquiry by the PCPE into Eskom.[740]

PCPE's decision on 23 May 2017 to conduct an enquiry

842. Significant developments took place within the Portfolio Committee on Public Enterprises (PCPE) in May 2017. The former chair of that committee had been redeployed elsewhere and Ms Zukiswa Rantho was appointed as acting chair. Mr Gordhan, now a back-bench MP, joined the PCPE. On 17 May Ms Rantho acceded to a request by Ms Mazzone that the Minister of Public Enterprises, Ms Lynne Brown and the Eskom board be required to attend a PCPE meeting which was held at the Town House Hotel on 23 May.[741] At this meeting the minister and board members were invited to explain the circumstances of Mr Molefe's resignation, retirement, pension, leave, and re-appointment.

[740] PO-02-041 para 17.16; annexure MN 58 PO-02-461

[741] PO-02-464

843. All members of the PCPE (including, notably, the ANC members) found the explanations offered at considerable length to be unsatisfactory. As Mr Gordhan saw it, the public was "*connecting the dots*" and there was awareness that the board of Eskom was wittingly or unwittingly capturing Eskom for the benefit of a few.[742] The PCPE took a decision at the meeting in favour of conducting an inquiry. Its members decided to invoke the power under the rules of the National Assembly to summon witnesses and documents. This amounted to a complete *volte face* by the PCPE from its previous position and a welcome development.

844. Ms Mazzone made the following observation about the decision taken at this meeting:

> "When the decision by the members of the PCPE on this occasion to conduct an enquiry is contrasted with the decision a little over a year before not to support an enquiry, it is self-evident that there had been a change of view on the part of the representatives of the ANC on the Committee. In my view the explanation for this lies in the shifting balance of factional forces within the ANC. The faction opposed to President Zuma seized this opportunity to expose the corruption and impropriety that they knew to be going on, believing that they finally had enough support to carry this off."[743]

845. She testified that one of the ANC members on the PCPE said to her that they:

> "…were well aware that this is a Kamikaze[744] mission".[745]

846. She also stated in her affidavit[746]:

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[742] PO-02-042 para 18.2

[743] PO-02-043 para 18.5

[744] The word "kamikaze" from the name of Japanese aircraft in the Second World War that were loaded with explosives and made deliberate, suicidal crashes into enemy targets. Its usage was extended to mean reckless or potentially self-destructive behaviour.

[745] Day 335 p 220 lines 20-2. This seems to have been prescient. Most ANC members on the PCPE, including Ms Rantho, were not returned to Parliament after the next election.

[746] PO-02-045 para 18.10

> "The tension between these two factions in Parliament was obvious to seasoned members of Parliament. For example, when members of one faction spoke they would sometimes be heckled by members of the other faction or subjected to other forms of visible or audible criticism."

847. About ANC members of Parliament, Ms Mazzone said:[747]

> "…we could see groupings of people together who were no longer sitting in their seats that they were allocated to. They had moved to sit in clusters. And when a member who was either pro- Zuma or pro-Ramaphosa would speak, a cluster would often heckle, sometimes turn their back, many a time walk out and not listen to the Speaker; and the divisions were just highly visible."

848. The correctness or otherwise of Ms Mazzone's view that the shifting balance of forces within the ANC explains the change in stance in relation to an inquiry by the PCPE will be considered shortly.

The "Gupta leaks" and the "Frolick letters

849. A further turning point was reached soon thereafter with the publication in the press, from the last weekend of May 2017 onwards[748], of what were claimed to be a voluminous set of Gupta-linked emails (the so-called "Gupta leaks"). It was asserted, at least by some, that these emails substantiated allegations of state capture which had long been in the public domain.

850. This led to the DA once again calling for the establishment of an *ad hoc* committee to probe the relations of the Gupta family and ministers, officials and the President who

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[747] Day 335 p 216

[748] https://www.dailymaverick.co.za/article/2017-06-01-editorial-the-guptaleaks-revealed/

had allegedly been “captured”. This option was explored informally behind the scenes but did not find favour with the ANC.[749]

851. Instead, and importantly, a decision was taken by senior ANC representatives in Parliament that four portfolio committees should be directed to enquire into the allegations insofar as they pertained to their portfolios.

852. On or about 15 June 2017 Mr Cedric Frolick, the House Chairperson of Committees, addressed letters (“the Frolick letters”) to the chairpersons of four portfolio committees, namely the Portfolio Committees on Public Enterprises, Transport (in relation to PRASA), Home Affairs and Mineral Resources.[750] The letters were in substantially similar terms.

853. The letter to the acting Chair of the PCPE[751] serves as an illustrative example. It stated as follows:

> “Dear Ms Rantho
>
> ALLEGATIONS OF STATE CAPTURE IN ORGANS OF STATE
>
> I am sure that you are aware of numerous allegations of state capture that have appeared in the media in recent weeks. Some of these allegations involve members of the Executive and officials in a variety of state-owned enterprises such as Denel, Eskom, South African Airways (SAA) and Transnet. I would like to request that your committee investigate the allegations within the parameters of the Rules and report any findings, where applicable, to the National Assembly as a matter of urgency
>
> Yours sincerely
>
> C T FROLICK MP
>
> HOUSE CHAIRPERSON: COMMITTEES."

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[749] Mazzone PO-02-47 para 18.8 and footnote 6 thereto.

[750] See annexure “NM62” at PO-02-486 to 494

[751] PO-02-490

854. On Monday 19 June 2017 the following announcement was made on the parliamentary website[752]:

> "In the light of the recent accusations of state capture linked to alleged emails involving a number of Ministers, parliamentary committees have been directed to urgently probe the allegations and report back to the National Assembly.
>
> The House Chairperson of Committees, Mr Cedric Frolick, on Thursday wrote to the Chairpersons of Portfolio Committees on Home Affairs, Mineral Resources, Public Enterprises and Transport advising them to, within the parameters of the Assembly Rules governing the business of committees **and consistent with the Constitutionally enshrined oversight function of Parliament**, ensure **immediate engagement** with the concerned Ministers to ensure that Parliament gets to the bottom of the allegations.
>
> While no specific deadline has been set for the submission of the outcome of these investigations, the committees have been urged to begin with the work and report their recommendations to the House **urgently**.
>
> Parliament, as a representative body of the people of South Africa, shoulders the Constitutional responsibility of ensuring that matters of major public interest are dealt with as expected by the people.
>
> ISSUED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA" (emphasis added)

<u>What explains the shift in stance?</u>

855. It is striking that this announcement invoked the "Constitutionally enshrined oversight function of Parliament". The question which needs to be considered is why this was only invoked in June 2017 and not much earlier.

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[752] PO-06-409

856. The publication of the “Gupta leaks” provides an obvious, but only partial, explanation for this change of stance. They placed in the public domain a trove of evidence which was said to substantiate allegations of state capture. This assisted those who wanted the truth as to the long-festering allegations of state capture and corruption to be revealed, to justify the need for inquiries into these allegations.

857. Evidence suggesting state capture and/or large-scale public sector corruption had long been in the public domain. By March 2016, if not by 2013 or earlier, no sensible Member of Parliament could have disputed that there were serious allegations for which there appeared to be plausible evidence which pointed to state capture or similar malfeasance and which required to be investigated and addressed.

858. As referred to above, the ANC’s NEC recognized by March 2016 (if not by 2013, when its Integrity Committee called for President Zuma to step down for reasons “connected to the Gupta influence”) that the allegations surrounding the Gupta family and its purported improper influence were serious and needed to be investigated. When its internal investigation failed a couple of months after it commenced, the ANC and its Members of Parliament took no steps to invoke the “Constitutionally enshrined oversight function of Parliament”, or to use the powers conferred on Parliament by the Constitution and the NA rules, to probe the allegations.

859. The truth of the matter, it seems, is that the ANC as an organisation (and therefore - because of the ANC’s internal rules and practices - its Members of Parliament) was unwilling before mid-2017 to initiate or to support a parliamentary inquiry or inquiries into the allegations concerned. The allegations implicated senior ANC leaders, right up to the President, as well as others regarded by the ANC as its cadres and deployees. The leadership of the ANC remained committed to support President Zuma and these cadres

or deployees and was unwilling to expose the allegations of malfeasance to transparent public scrutiny.

860. The ANC had for some time been divided between those allegedly implicated together with their supporters, on the one hand, and those who would be more inclined to support proper parliamentary oversight but who lacked sufficient support within party structures, on the other hand. Those who supported proper parliamentary investigation of the allegations may, not unreasonably, have feared the personal and political consequences to them if they should deviate from the "party line".

861. The evidence of the then Speaker, Ms Mbete, was to the effect that the Gupta leaks emboldened those with the necessary strength of will to support the probes, whilst others remained "frightened". She said:

> ''By the time the noise increases and in fact there is the Gupta Leaks and all of these things all over the place, indeed they were already on the way having decided for themselves that they are going to do this work because also, people have different strengths. While others will be more easily frightened to think about if we do this, what happens to us. Others are actually strengthened by the very fact that there is something that looks smelly here and I think we should pursue it.
>
> Most people, I want to say, that I was aware of, were the type that would not hesitate to pursue things just because, you know, of political considerations, for instance, but that is a factor because parliament is a political environment." (emphasis added)

862. Asked what some people might be frightened of, she answered:

> "Of whatever fears they might have for themselves, for political careers, you know, but that is always a consideration in a parliamentary setup because, remember, you are not elected by people, you are elected by the party…"[753]

[753] Day pp191-2

863. In his written submission to the Commission[754] and in literature annexed thereto,[755] Prof Calland drew attention to the attempt made by the Standing Committee on Public Accounts (SCOPA) to investigate the arms deal in 1999 and the political interventions "which gradually snuffed out the flame of non-partisan independence"[756]. He referred to the ANC's rejection of an investigation of the arms deal, its removal of Mr Andrew Feinstein as chair of its study group within SCOPA[757] and its successful neutralisation of the SCOPA investigation. He commented as follows:

> "This incident provided an early, but revealing, demonstration of the inherent tension between party loyalty and parliamentary oversight - in simple terms, it served to teach a 'lesson' to any MPs who might be minded to step out of line and offer such an independent-minded challenge to the political dominance of their superiors in the leadership of the party and in the executive branch of government."

864. In his oral evidence Prof Calland expanded on this in some detail.[758] He relayed that he had been told by Mr Feinstein that the pressure brought to bear on the ANC members of SCOPA had been "excruciating" and that Mr Feinstein had been "pushed out". He said that he was told by Mr Feinstein and some of his colleagues that s 47(3) of the Constitution[759]:

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[754] Exhibit ZZ9 PO-03-007 to 036, particularly at 028

[755] In particular, as annexure 1 thereto (PO-03-038 and ff),Danwood M Chirwa and Phindile Ntliziyiwana "Political Parties and their Capacity to Conduct Oversight", chapter 7 in "Political Parties in South Africa", Heather Thuynsma (ed), African Books Collective, 2017, at PO-03-051

[756] Chirwa and Ntliziyiwana quoting J February in a 2006 chapter entitled "More than a law-making production line: Parliament and its Oversight Role"

[757] See also Mr J Selfe's observation that "This framework does not lend itself to independence by individual members, but if there was any doubt about the need to keep ranks, one needs only reflect on what happened to Andrew Feinstein or Makhosi Khoza. Both individuals spoke out publicly and/or opposed the organisation; both were worked out of it. I assume that these are not the only cases. But they show very clearly what the price is for backbencher independence, and this causes a chill wind to blow on those who might wish too volubly to express a contrary personal opinion." (PO-02-743)

[758] Day 340 p 193

[759] Section 47(3)(c) provides that a person loses membership of the National Assembly if that person ceases to be a member of the party which nominated that person as a member of the Assembly.

> "…was used as a pressure point and it was used to say basically, do you want to remain a member of Parliament with all of the benefits that come with that or are you willing to risk that and risk the reputation of the ANC by continuing to exercise the oversight that you are in asking, the difficult questions that SCOPA at that point was trying to ask, in relation to the arms deal.
>
> …
>
> So several members or colleagues of Mr Feinstein in the end backed down – they backed down from their initially quite strong positions because they feared losing their position in Parliament and they could not afford to lose their position in Parliament."[760]

865. As regards "the prevailing climate in the fifth parliament from 2009 onwards"; Prof Calland testified:

> "There is no doubt that there was throughout the body politic and the ruling party a climate of fear. I experienced many occasions where individual members of parliament expressed - ANC members of parliament expressed that to me, people I had known for a long time who were anxious about even talking to me, who refused to discuss matters on cell phone, who, when one met them for tea, removed the battery of their cell phone. I do not want to be melodramatic about it but the point is that during that period it became increasingly difficult even for thick-skinned, experienced politically savvy politicians within the ruling party to operate in a way that even begun to suggest that they were taking a stand or resisting the leadership and in any way threatening the new political economy that was building up around the President of the ANC."[761]

866. The proposition that Members of Parliament are susceptible to political pressure from above and are vulnerable if they rock the boat and fail to follow the "party line" must be acknowledged as a political reality. As referred to above ANC members of the PCPE referred to themselves as on "a Kamikaze mission" and Ms Rantho, who bravely led the

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[760] Day 340 pp 5-6

[761] Day 340 p44

PCPE's Eskom enquiry, felt at the time that this "would probably be a career limiting move".[762]

867. Ms Rantho said in her affidavit[763]:

> "Political and leadership pressures can inhibit portfolio committee members from probing certain politically sensitive issues. Members of Parliament who refuse to toe the line can end up being removed from Parliament by their party. As I will refer to below, when the PCPE decided in June 2017 to conduct its public hearing, its ANC members came under considerable pressure to toe the line. I believe that the fact that I am no longer a Member of Parliament - and that only two of the ANC's 2014-2019 PCPE study group are still Members- may illustrate the point."

868. In addition to fear of personal consequences, other political considerations led to opposition within the ANC to effective parliamentary scrutiny. The balance of power between competing factions within the ANC was, in the Commission's view, a significant factor.

869. Ms Rantho said in her affidavit:

> "Whilst members of the ANC's PCPE "study group" supported the idea of instituting an inquiry, there was a push to scupper the inquiry from a substantial number of members in the ANC parliamentary caucus, who argued that the inquiry would cause divisions and would taint the integrity of the ANC. Of particular concern to

[762] PO-02-557 to 558

[763] PO-02-454 to 455 para 8.18.3

> some members of the caucus was the risk to the reputation of the party. These views were openly communicated to me in clear and emphatic terms."[764]

870. In her oral evidence she said[765]:

> "Chairperson the – the issue of the inquiry was taken to the caucus of the ANC and in that caucus it was discussed and therefore there were members that felt that it is not necessary to have an inquiry in the Portfolio Committee because if this inquiry continues they – members of the ANC might be implicated in the inquiry and that will mean the ANC will be divided. Not divided maybe into two it will be divided altogether."

871. In her evidence before the Commission Dr Makhosi Khoza, an ANC MP at the relevant time, referred to repeated instances when she had been criticized for making comments during portfolio committee oversight meetings seen to be critical of ANC comrades.[766] This will be referred to further below, but particularly striking is the culture described by her of actively discouraging "*bringing the name of the ANC into disrepute*"[767] by asking difficult questions of a minister or other ANC comrades.

872. Ms Dipuo Letsatsi-Duba, a former chair of the PCPE, and, later, a minister, testified as follows:

> "So in most cases you will find there is these imbalances in the committees, especially from our side in the ruling party where people have a different understanding and once you speak to that, there will be others who will be saying

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[764] PO-02-550 para 9.17

[765] Day 336 p 74

[766] Day 337 at pp 12-13, 19-20, 28, 51-52, 85-8.

[767] Day 337 p 87 lines 4 to 8

> we are not – how do I put it, we are ill-disciplined, this is the minister of the ruling party, you cannot behave like you are in an opposition. It is like that."[768]

873. She also said:

> "For instance I will give an example, that there were issues around the issue of the Chief Executive Officer of Eskom being a member of the ANC himself and when we are supposed to really dig deeper into the issues, there will be some who will be soft on those issues precisely because of the political allegiance they hold."[769]

874. The following exchange which occurred between Ms Letsatsi-Dube and the Commission's evidence leader[770] is revealing:

> **"ADV FREUND SC:** Thank you, Chair. Ms Letsatsi-Duba, when I listen to you, I get the impression, but you must correct me if I am wrong, that when you were in Parliament in the period that we are talking about, there must have been within the ANC caucus two conflicting points of view, some who felt that it was appropriate to effect this oversight in parliament to expose and address allegations of corruption, some who felt that it was the wrong thing to do strategically. Am I understanding that correctly, there were two different points of view?
>
> **MS LETSATSI-DUBE:** Yes, there were two different points in that regard, that there will be some to say we cannot hang the linen in front of the opposition and our argument with others, with the committee, will be saying it is not about hanging dirty linen, it is about correcting the wrong."

875. Asked why making the decision to conduct inquiries in Parliament took so long (i.e. until June 2017), Ms Letsatsi-Duba said[771]:

> "It took long because you will remember we belong to a caucus where issues are being debated and agreed upon. Now on this particular issue of having the inquiry,

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[768] Day 349 p 229

[769] Day 349 p 230

[770] Day 349 pp 233-4

[771] Day 349 p 235

> there was some resistance, if I put it in that way, that it should not happen and most of the reasons which were put forward was that already the Public Protector is dealing with the matter but our argument was that well it is fine, she is also doing – it was Thuli Madonsela then, she is doing her job but us, as Parliament, especially us from the ruling party, we cannot ignore such damning allegations."

876. President Ramaphosa was asked whether he accepted that the allegations in the public domain in 2011 were such that Parliament ought to have investigated their veracity at the time. He initially suggested that it was only when the Gupta leaks occurred that there was sufficient evidence to justify initiating an inquiry:

> **"PRESIDENT RAMAPHOSA:** I do agree that parliament has a role and when it comes to allegations of this nature, I would say it is the governing party that should activate its own processes and I guess where it fails, it then needs to yes, rely on parliamentary processes or structures. That would need to go beyond just newspaper articles, they would need to have much more substantive information which is why the Gupta emails saga presented much more weighty information that needed to be followed up, so it was no longer just an allegation, there was real substance with documents and what amounted – or adhered to the real evidence that could be followed through. So whilst I agree that yes, parliament structures should – they need to do so based on more substantive information such as they did when they started their activist process."

877. Quite appropriately, President Ramaphosa thereafter shifted his stance. It was pointed out to him that the Gupta leaks were more than five years after the 2011 articles referred to above and that articles making allegations of this character continued to be published throughout those years. He conceded this. It was then put to him that, as a matter of fact, Parliament did not investigate, hold inquiries or do what was appropriate to investigate the veracity of these allegations and was asked whether he accepted this. He replied:

> "I accept that and I concede that and it is for that reason that in 2012, the decision that I referred you to which you gladly showed me the relevant passages of the resolutions of – was then taken because, Chairperson, it was realised that we now need to activate another arm to go into this much more deeply than the ANC itself could and that was the parliamentary process and yes, as you said earlier, there was a dropping of the ball, if I may say so, at that level. That will be conceded."

878. He said[772]:

> "I think where you could say there was fault Chairperson was the delay in having it done and I would be the first to concede that, that there was a delay, which should have been done a lot earlier.

879. The following exchange took place:

> **"CHAIRPERSON:**…I do not know whether you want to comment on that Mr President, I just think 2017 was too far and there seems to have been enough that had happened for the ANC and Portfolio Committees and Parliament to have acted much earlier and if they had done so, it may well be that some of the damage that happened in the meantime may have been avoided.
>
> **PRESIDENT RAMAPHOSA:** Chairperson, I did say in my opening statement that I am not here to make any excuses.
>
> **CHAIRPERSON:** Yes, you did Mr President.
>
> **PRESIDENT RAMAPHOSA:** And I also said that I am not here to defend the indefensible. I also said that, yes, I am also here to explain.
>
> CHAIRPERSON: Yes."[773]

[772] Day 385 p 69

[773] Day 385 pp70-71

880. President Ramaphosa was referred to the following statement that he had made in his affidavit to the Commission[774]:

> "The ability of any organisation, but especially a political formation to act on allegations of malfeasance relies not only on its formal rules and procedures, but also on the balance of power within its structures."

881. He was asked whether he accepted that the balance of power within ANC structures was the true explanation for the delays which he now said were regrettable. His reply[775] commenced as follows:

> "Yes, I would say so, this is precisely the point I was making to you, Chairperson…"

882. In the Commission's view that is, compelling and important evidence on the relevance of the shifting balance of power as an explanation for the delay.

Who took the decision to issue the Frolick letters?

883. The sequence of events which led to the issuing of the Frolick letters and who actually took the decision in this regard is not entirely clear.

884. Reference has already been made to Ms Mazzone's evidence that the Gupta leaks prompted the DA once again to press informally for the establishment of an *ad hoc* committee to inquire into the state capture allegations.

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[774] Exhibit BBB1, CR-01-074 para 167.2

[775] Day 385 p 73

885. Mr Frolick states in his affidavit[776] that the Gupta leaks prompted some opposition parties to raise the allegations in the Gupta leaks at a meeting of the Chief Whips Forum[777] and to write to the Speaker to consider the establishment of an *ad hoc* committee to look into the allegations. He said that the matter was discussed in a meeting of the National Assembly Programming Committee on 15 June 2017, which he did not attend because of official engagements in his constituency. Upon his return to Parliament that day, he was called to a meeting of the Speaker (Ms B Mbete) and the Chief Whip (Mr J Mthembu) where they discussed the matter of such an *ad hoc* committee. He said that they were "mindful" that "Parliament had a responsibility" to look into the allegations of state capture and they agreed that the best approach would be for the relevant line-function committees to look into the matter and report to the House. He was requested by the Speaker to write to the chairs of the four committees referred to above.

886. The late Mr J Mthembu furnished an affidavit to the Commission before he tragically passed away, but that affidavit is entirely unspecific as to what led to the decision reflected in the Frolick letters. He says merely that the Eskom inquiry (i.e. the inquiry which the PCPE had decided on 23 May 2017 to commence) "then gave way to other parliamentary committees conducting similar inquiries into allegations of malfeasance and state capture".

887. Ms Mbete had no clear recollection when she testified on this issue ("I will not lie to say I remember crisply"[778]), but she said that "we would have been talking as presiding officers, we would have been talking in the Political Committee".[779]

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[776] Exh. ZZ 1.3, PO-01-053, paragraphs 25-30

[777] He made clear in his oral testimony that this was in the week preceding 15 June – Day :347 p239 line 6

[778] Day 397 p 193 lines 17-18

[779] Day 397 p194

The part played by ANC's Political Committee

888. The Political Committee is a sub-committee of the ANC's NEC, "responsible", according to an official ANC document[780], "for the overall political guidance of the organization's parliamentary caucus and the office of the chief whip".[781] It is chaired by the Deputy President and comprises senior parliamentary representatives of the ANC, including the Speaker, the Chair of the NCOP and other senior leaders. (In the fifth parliament it was chaired by Deputy President Ramaphosa, had 8 full members and 3 alternate members. Mr Frolick was not a member.)

889. It appears from Ms Mbete's evidence and from the probabilities as a whole that so important a decision as the decision – contrary to all that had gone before – to direct a series of portfolio committee to inquire into allegations of state capture was preceded by, or at least endorsed by, a decision of the Political Committee.

890. The evidence most directly in point is reflected in the following exchange between the Commission's evidence leader and Ms Mbete when the latter testified before this Commission:[782]

> "**ADV FREUND SC**: Is it fair to say that you believe that this decision to facilitate portfolio committees becoming more active in relation to these specific allegations of state capture and corruption, would have been preceded by some discussion in the Political Committee?
>
> **MS MBETE**: I suspect so because it is exactly this kind of moment that would have been a very difficult moment in the country generally that your leadership must be ready to come together quickly, share information and therefore empower themselves collectively to be able to get back to their leadership roles in the different

[780] The authenticity of which was confirmed by President Ramaphosa in his testimony – Day 385 p 36

[781] CR-02-602

[782] Day 397 p 195

> offices that they were playing a role in and therefore be able to lead with better understanding…"

891. Ms Mbete also said:[783]

> "Because that moment was a moment of great concern and noise and a lot of agitation and scary news in the public domain and as individual leaders and collectively whenever we had an opportunity, we would put our heads together to say: what is going on?"

892. President Ramaphosa who, as Deputy President at the time, chaired the Political Committee but did not attend all its meetings, was asked when he first became aware of the directive to portfolio committees in the Frolick letters. He answered as follows[784]:

> "Well Chairperson once these Gupta Leak emails came out it became clear to many of us that there needed to be a response of one sort or another. The ANC itself without having the investigative powers clearly knew that it would need to really to get to the bottom of this on a number of other structures and indeed Parliament would be one of those. So, when the Chair of Chairs, Cedric Frolick MP, issued this, this, in our view, would have been in line with what Parliament needed to do at that time because a flood of evidence was now becoming evident and available. Personally whether I became aware of the move by Frolick I would not be able to put my finger on but once this instruction is noted and letter had been issued, I was quite relaxed and happy that this process had started".

893. If regard is had to President Ramaphosa's evidence that the balance of power within the ANC is the true explanation for the delays in parliamentary inquiries, this tends to suggest that the decision to direct portfolio committees to inquire into the state capture allegations was a matter of no small political moment. It seems unlikely, to say the least,

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[783] Day 397 p 206

[784] Day 385 pp 21-2

that such a decision would have been taken without political support at a high level. If the delay in Parliament taking the decision to institute inquiries into allegations of state capture was attributable to the balance of power within the ANC, then it must mean that the balance of power initially favoured those in the ANC who did not want such inquiries to be held and that there was a change in the balance of power in the ANC in 2017 which favoured those who wanted such inquiries to be held. The two views were held, respectively, by those within the ANC who supported Mr Jacob Zuma and those who supported Mr Ramaphosa. While the Gupta leaks may have been an important factor in the shift in the balance of power, another important factor was probably that it was known that at the end of 2017 the ANC was going to hold its elective conference in which a new president of the organization would be elected and Mr Ramaphosa, being the Deputy President of the ANC, then would be a candidate. That was enough for many within the ANC to seek to position themselves favourably on Mr Ramaphosa's side.

894. As will appear below, the struggle as to whether to support or suppress parliamentary inquiries and effective oversight over the executive continued even after mid-2017. This is demonstrated by the way in which the four committees to whose chairs Mr Frolick addressed his letters dealt with his requests.

The PCPE's Eskom inquiry

895. The PCPE had already decided to commence an inquiry on 23 May 2017, before it received its "Frolick letter" of 15 June 2017. On 21 June 2017 it met again to discuss

and agree on the terms of reference for its proposed inquiry, required documentation and a proposed list of witnesses. A preliminary hearing took place on 25 July 2007. In that hearing presentations were made by several NGO's. Thereafter problems regarding resources had to be addressed. An evidence leader was appointed and a decision was taken that the inquiry would focus on Eskom, Transnet and Denel, starting with Eskom. The inquiry proper commenced on 17 October.[785]

896. The inquiry, though in large measure a success, faced formidable obstacles. As Ms Rantho put it in her affidavit[786]:

> "Uncovering state capture and investigating the mismanagement of state funds was no easy feat. It was a difficult task that required considerable research capacity. Much to my regret, Parliament did not in my view allocate adequate resources. In addition, the researchers that the Committee had, conducted research that barely went beyond their normal practice of only assessing material volunteered to them by the overseen entities. This lack of adequate research support resulted in the Committee struggling immensely."

897. There was considerable resistance to the inquiry, both from within the ranks of the ANC caucus[787] and from those under scrutiny[788]. Notwithstanding the divisions in the caucus, the Chief Whip, Mr Mthembu, supported the inquiry, told PCPE members that there was support for the inquiry from influential members of the ANC's leadership and gave what assistance he could.[789]

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[785] Rantho PO-02-550 and ff para's 10.1 to 10.6; Mazzone PO-02-o46 and ff, para's 18.14 to 18.27

[786] PO-02-551 para 10.6

[787] PO-02-553 para's 11.5 and 11/.7

[788] PO-02-050 para's 18.28 to 18.30

[789] PO-02- 550 para 9.18

898. Ms Rantho states the following in her affidavit in relation to a report she received from the evidence leader of the PCPE inquiry, Adv Vanara:

> "Shortly before the PCPE inquiry started its hearings, I received a call from Adv. Vanara, who requested that we meet at a safe place as he wanted to inform me of intimidation that he had been subjected to. I recall very vividly that when we met, Adv. Vanara was moved to tears. He told me that then State Security Minister, Bongani Bongo, had approached him and demanded that he step down as the evidence leader and collapse the probe into the inquiry. This incident was brought to the Speaker's attention."[790]

899. Committee members, in particular Ms Rantho and her family, were subjected to (overt and covert) threats and intimidation.[791]

900. Despite the difficulties, the inquiry heard evidence from numerous witnesses and considered numerous documents. Because the present Commission had been established and was well under way, it was eventually decided not to proceed with the intended inquiries in relation to Transnet and Denel. On 28 November 2018 the PCPE unanimously adopted, with amendments, its final report. The report was made available to the Commission and has been of considerable assistance to it.

901. Ms Rantho stated in her affidavit[792]:

> "Perhaps it suffices to say that, in 2018, the report found possible contraventions of legislation, regulations and processes. It found (in paragraph 2.9) that it was "patently clear that there was undue influence by private individuals and companies over the appointment of Eskom Board members as well as some procurement decisions". It thereby vindicated, to an extent, allegations which had (as referred to above) first been made in the press from as early as 2011. It is in my view regrettable

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[790] PO-02-552 para 11.2

[791] PO-02-551 and ff (Rantho); PO_02-050 para 18.31(Mazzone)

[792] PO-02-554 to 555

that these allegations were not properly investigated by Parliament at an earlier stage."

902. Mention should also be made of the following observations in the report:

"1.5 Conditions that the Committee worked under

1.5 .1 Parliament and by extension the Committee, have both the power and the duty to hold the Executive and State organs to account and to ensure that their constitutional and statutory obligations are properly executed. This responsibility is an incident of the rule of law and the constitutional values of accountability, responsiveness and openness.

1.5.2 The Committee has carried out its oversight work despite facing some hostility and attempts aimed at obstructing it.

1.5.3 There were several attempts by persons and organisations to undermine the authority and function of the Committee. These attempts included baseless legal challenges, attempts to delay and subvert investigations by providing irrelevant or incorrect information, public smear campaigns targeting the Committee and its members and threats to the personal security of Committee members, witnesses and their families.

1.5 .4 Letters to this effect were received from: Black First Land First (2) (who called the Inquiry a "witch hunt"), Mr Brian Molefe's lawyers (1), Eskom (3), Gupta family's lawyers (2), Mr Atul Gupta's Lawyers (1), Dr Baldwin "Ben" Ngubane (1), Mr Ouduzane Zuma (1), Mr Matshela Koko's Lawyers (1), Minister Lynne Brown (2), Minister Malusi Gigaba (1).

1.5 .5 Threats to personal safety and security were made by anonymous parties against:

1.5.6 Witnesses appearing before the Committee, including Ms Suzanne Daniels and Mr Abram Masango, also testified to having been intimidated.

• Inquiry Chairperson, Ms Zukiswa Rantho, including an anonymous threat made to her child that "your mother is making life difficult for us;

• Committee member, Ms Natasha Mazzone, whose car and documents were tampered with;

and

• Evidence leader Advocate Ntuthuzelo Vanara.

> 1.5.7 Attempts were allegedly also made by the erstwhile State Security Minister Bongani Bongo to offer a bribe to Advocate Vanara with a blank cheque to try to derail the work of this Committee.
>
> 1.5 .8 Despite the fact that invitations were duly served on the following persons requesting them to testify in the Inquiry, Ms Dudu Myeni, and Messrs Duduzane Zuma, Rajesh "Tony" Gupta, Atul Gupta and Ajay Gupta failed to appear in Parliament without sufficient cause."

Failure by the PC on Transport to act on its "Frolick letter"

903. Like other chairpersons, the chairperson of the Portfolio Committee on Transport (PCT), Ms P D Magadzi, received a letter dated 15 June 2017 from Mr Frolick. The letter asserted that some of the allegations of state capture that had appeared in the media of state capture involved members of the board of the Passenger Rail Agency of South Africa (PRASA). It requested the committee to investigate these allegations and report back to the NA as a matter of urgency.

904. Mr M S F de Freitas was at the time the Shadow Minister of Transport and a DA member of the PCT. According to his evidence, Ms Magadzi, did not table Mr Frolick's letter before the Committee, not even when he raised with her in August 2017 that he had heard that there was such a letter. His evidence was that, when he raised the question of the letter with her, she said that PRASA was undertaking their own inquiry and that other agencies such as the Hawks were also involved and expressed the view that this precluded the Committee from launching an inquiry. He argued to the contrary. [793]

905. In her evidence before the Commission Ms Magadzi denied that she had not tabled Mr Frolick's letter before the Portfolio Committee and claimed that she tabled it in July

[793] PO-03-74

2017[794]. She also denied that she had said to Mr De Freitas that, because the Hawks or PRASA were investigating these allegations, the PCT was precluded from doing so.[795] She said that the decision of the PCT was "to investigate as per the instruction from the House Chairperson".[796] She was asked to produce any evidence which would support this[797] but failed to do so.[798] The Commission is not aware of any such evidence.

906. Ms Magadzi appeared to acknowledge that the investigation which she said had been decided on had not ensued. She appeared to justify this on the basis that the Committee had more pressing priorities, primarily a busy legislative schedule.[799] Pressed on the issue of why she had not seen fit to prioritise repeated allegations of malfeasance within PRASA and the House Chairperson's request for an investigation, she offered no defence.[800]

907. The Parliamentary Monitoring Group (PMG) submitted as evidence to the Commission a lengthy and detailed report on parliamentary oversight over PRASA.[801] It reports (*inter alia*) on what are said to be all the meetings of the PCT relevant to oversight over PRASA. The report does not bear out Ms Magadzi's version, in that there is no reference in it to any meeting at which Mr Frolick's letter was tabled or discussed and no record of a decision to investigate in accordance with Mr Frolick's directive.

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[794] Day 339 pp 85-88

[795] Day 339 pp96-7

[796] Day 339 p 88

[797] Day 339 p87

[798] It is striking that in the affidavit dated 21 October 2020 furnished to the Commission by Ms Magadzi on oversight by the PCT in respect of PRASA (exhibit ZZ1.9 From PO-01-090) she makes no mention at all of the letter of 15 June 2017 from Mr Frolick or anything done pursuant thereto.

[799] Day 339 pp 89-92

[800] Day 339 p 235 lines 16-19

[801] Annexure "A" to exhibit ZZ8.2, PO-02-283 and ff

908. It also bears mention that there is on record a further letter of relevance from Mr Frolick to Ms Magadzi.[802] It is dated 27 August 2017. It refers to a discussion between Mr Frolick and Ms Magadzi when they had discussed his letter of 15 June 2017. It reiterated the need for the portfolio committee to exercise oversight over the executive in respect of serious allegations which had been made in the media concerning state capture. The letter continued as follows:

> "Allegations against a Member of the Executive, the line function Department and/or entities under his/her jurisdiction warrants the attention of the relevant committee to clarify issues under contestation. The relevant Member of the Executive must be provided with a fair opportunity and platform to respond and where possible clarify allegations in the public domain. This should be the point of departure before the committee determine its next course of action. The Portfolio Committee is also reminded of the report of the Public Protector Into the affairs of PRASA and must avoid re-opening Investigations that have been concluded. Furthermore, the committee must perform Its functions in terms of Rule 167 of the Rules of the National Assembly.
>
> Finally, the committee must determine the resources required and communicate the needs to my office."

909. The PMG report says that it does not appear that this letter was discussed with the Committee.[803]

910. On a conspectus of the evidence as a whole it appears doubtful, to say the least, that Ms Magadzi tabled the letters of 15 June 2017 or 27 August 2017 before the PCT.

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[802] PO-02-486.

[803] PO-02-859

911. Mr Frolick says in his affidavit[804] that the PCT "failed to implement" the decision conveyed in his letter of 15 June 2017.

912. This seems, even on the evidence of Ms Magadzi, to be correct. It illustrates, in the Commission's view, the extent to which there continued to be resistance to the proper performance of parliamentary oversight in relation to the allegations of state capture and corruption.

913. A discussion of the general inadequacy and ineffectiveness of oversight exercised by the PCS in relation to PRASA (as distinct from the manner in which it dealt with Mr Frolick's letters) will follow later in this report.

Portfolio Committee on Minerals

914. The chairperson of the Portfolio Committee on Minerals (PCM), Mr S Lusipo, also received his "Frolick letter".

915. Like the PCT, the PCM ultimately failed to inquire effectively into the allegations of state capture referred to it for investigation, though it made a considerably better attempt than did the PCT.

916. The PCM considered the letter of 15 June 2017 at its meeting on 16 August 2017. Several ANC members expressed concerns regarding what the committee was being asked to do but the chairperson said that there was broad agreement within the government that there had to be an investigation.[805] The matter was discussed again at

[804] Exhibit ZZ1.3 PO-01-054 para 35.

[805] PO-01-269, affidavit of M Johnston para 5.8.24; annexure 4.7.c, from PO-01-537

a meeting on 23 August 2017 at which it was decided that the Minister of Mineral Resources, Mr M Zwane, should be called to attend a meeting to be arranged to allow him to give his perspective.[806]

917. Minister Zwane attended a meeting with the PCM on 18 October 2017 where he was questioned at some length on various issues and gave his perspective.[807]

918. However, after this the Minister was evasive. A further meeting with him was scheduled for 1 November 2017, but at the last minute he said that he could not make this meeting.[808] Another meeting was arranged for 28 and 29 November but, once again, the Minister cried off at the last minute, claiming that he was ill.[809] Opposition MP's expressed scepticism about this claim. A press report at the time stated that he was seen looking "jovial" and "joking with ANC comrades" at an ANC Free State provincial general council meeting on the evening of 28 November.[810]

919. Another meeting was arranged with the Minister for 21 February 2018 (a date that he had proposed) to question him about his possible involvement in state capture. (It may be noted that this was shortly after President Ramaphosa had been elected as President of the country) He gave two successive excuses for why he could not make the meeting. The first was that he had to attend a meeting at the NCOP. When it was pointed out to him that there was no NCOP sitting that week, he claimed that he had to attend a select committee meeting and then a cabinet committee meeting. Members of the PCM expressed their frustration and discussed their options. They decided to invite the

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[806] PO-01-270 para's 5.8.26 to5.8.27

[807] PO-01-270 para 5.8.33 to 5.8.51

[808] PO-01-282 para 5.8.55

[809] PO-02-283 para's 5.8.63 to 5.8.64.

[810] PO-02-285 para 5.8.70

Minster once again but also simultaneously to commence preparing for a formal inquiry.[811]

920. Terms of reference for this inquiry were finalized at a meeting on 25 April 2018. It was agreed that the inquiry would focus, *inter alia*, on the role of Minster Zwane and the Department of Mineral Resources (DMR) in facilitating the sale of Glencore assets; non-compliance with the PFMA resulting in fruitless and wasteful expenditure; an alleged conflict of interest on the part of the Minister; and whether officials had been subject to outside influence.[812]

921. This inquiry never got off the ground. There was no budget for support staff to travel to interview witnesses. According to a report from the chairperson of the committee on 30 May 2018 to the committee, Mr Frolick had indicated that no money had been allocated for issues of oversight.[813]

922. Subsequently, a draft budget for an inquiry was prepared but, by the next meeting on 12 September 2018, there was still no indication that the budget had been approved. So, no preparation had proceeded. It was noted at this meeting that the work of the present Commission was already under way; and there was discussion as to whether it made sense to continue with the intended portfolio committee inquiry. There was some discussion about proceeding with "normal" oversight without requiring additional funding.[814]

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[811] PO-02-285 para's 5.8.71 t 5.8.79

[812] PO-02-287 para 5.8.80; annexure 5.3 PO-02-584

[813] PO-02-288 para 5.8.84

[814] PO-02-289 para 5.8.86

923. Mr Frolick stated in his affidavit that—

> "…the Portfolio Committees on Transport **and Minerals** cited reasons such as the legislative programme and lack of clarity on how to proceed with the implementation of the decision, for not doing so" and that "(t)he end result was that both these Portfolio Committees (Transport **and Minerals**) failed to implement the decision" (emphasis added).[815]

924. In his oral evidence Mr Frolick said that it was not correct that his conduct in refusing to make necessary funds available ultimately prevented the PCM's intended inquiry from taking place.[816] He accepted that on 22 February 2018 the committee chair had written to him indicating that the committee had got to the point where it would require resources. He said he had asked the chair to quantify the resources required. On 26 February 2018 there was a cabinet reshuffle. After this he was informed by the chair that the committee wanted to "have an overall inquiry over everything associated with Mineral Resources in (*sic*) the company". This led, according to Mr Frolick to a further exchange of correspondence and a discussion between him, the new minister and chief whip and "it was agreed that the scope of this inquiry that they want to have must be looked at" because of the time it would take.[817] He also referred to the fact that the present Commission was under way and to the undertaking that had been given by the Speaker to pass on to the Commission information and documents pertaining to state capture inquiries conducted by parliament through its committees.

925. Whilst much of this may be correct, it does appear to the Commission that, by the time that the PCM lost patience with the minister's evasiveness and decided to commence a formal inquiry, the reason for its failure to proceed was that the resources required and requested were not made available. This raises a concern about the extent of resources

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[815] PO-01-054

[816] Day 347 p 289

[817] Day 347 p 292

available for necessary parliamentary oversight. It also raises a concern as to how committed Mr Frolick and the ANC's parliamentary leadership really were to the investigative process sought in Mr Frolick's letters of June 2017.

926. Be that as it may, the "bottom line" is that very little of substance occurred within the PCM by way of parliamentary oversight as a consequence of the letter of 15 June 2017.

Portfolio Committee on Home Affairs

927. The letter of 15 June 2017 from Mr Frolick to the chairperson of the Portfolio Committee on Home Affairs (PCHA), Mr B Mashile, requested the PCHA to investigate allegations involving the former Minister of Home Affairs, Mr Malusi Gigaba in the granting of citizenship to non-South Africans and to report its findings to the NA "as a matter of urgency"[818].

928. The PCHA discussed the letter on 20 June 2017[819] and wrote (*inter alia*) to the former minister, Mr M Gigaba, and the then minister, Ms H B Mkhize, requesting that they attend a meeting with the committee on 22 June. On that day both ministers failed to attend but the director-general presented an overview of the processes with respect to applications for naturalization by the Gupta families.[820]

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[818] The same request was made in all these letters.

[819] Affidavit of Mr M Johnston, exhibit ZZ3, PO-01-260 para 5.7.24 and ff, and annexure 4.3 to that affidavit, PO-03- 492 and ff

[820] Report of the PCHA, annexure "C" to exhibit ZZ 15, at PO-06-507

929. As the report on the issue from the PCHA tabled before the NA on 14 March 2019 makes clear, things thereafter progressed exceedingly slowly. On 8 September 2017 the PCHA sent a letter to the Department requesting certain information. On 7 February 2018 the Department submitted 97 pages of support documents. So much for investigating and reporting back to the NA "as a matter of urgency".

930. On 28 February 2018 (after Mr Ramaphosa had assumed office as President of the country) the PCHA decided to solicit the support of research and legal services to engage with the documentation submitted to the committee. On 6 March 2018 Mr Gigaba made a presentation to the committee. Thereafter, more information was gathered, and on 27 March 2018 the committee decided to broaden the scope of its investigation. Formal inquiry hearings commenced on 12 September 2018. On 13 March 2019 the PCHA discussed and adopted its final report.[821] Amongst its concluding "observations" was that the approval of the early naturalisation application of Mr Ajay Gupta's family by Mr Gigaba was "incorrect" and that criminal charges should be laid against Mr Ashu Chawla and members of the Gupta family relating to false information submitted in their early naturalization applications. [822]

931. Ms Modise, the Speaker of the National Assembly since May 2019, was asked whether the delay in conducting and finalizing this inquiry was unacceptable. She answered:

> "If I was to give any failure, I would have said the head of committees Mr Frolick himself, having written this letter to the committees, bringing these matters to the

[821] PO-06-507 to 514.See also Ms Modise's evidence on this issue at Day 377 pp 50-58

[822] PO-06-556 para 3 and PO-06-557 para 2.

> attention of committees on the importance and urgency, should have kept his tabs on these committees.
>
> In other words, before I hit this committee, I would hit the person who has direct responsibility to ensure that work happens there. So, I would, I would say that perhaps Mr Frolick should have cracked the whip, should have been if the Chair and the membership of the committees was removed because he was carrying on, should have been the person who brings that memory back and say but this was important. Carry on here. Here are the documents that come from wherever so you do not have to start all over."[823]

932. She also stated in an affidavit that Mr Frolick's letters of 15 June 2017 were "in line with the role of the House Chairperson to ensure that committees conduct oversight of the executive and report to the National Assembly on their findings."[824] Her view was that the House Chair of Committees is responsible for committees, though he serves as a delegate for the Speaker and as an intermediary between committees and the Speaker.[825]

933. The following exchange reflects her view:

> **"ADV FREUND SC:** Yes, but now I am particularly interested in the situation as it was in the middle of 2017 and your evidence was before that Mr Frolick as a delegate of the speaker, had the responsibility then, in his capacity then, to monitor and ensure that the instruction that the portfolio committee should exercise its oversight was carried out. You stand by that evidence?
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> **MS MODISE:** I stand by that. …"[826]

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[823] Day 337 p

[824] PO-06-407; see also Day 377 p 59

[825] Day 377 pp 59-61

[826] Day 377 p 65

934. It is not obvious that that view is reflected in the rules, but it may be observed in passing that it may be prudent to spell out in the rules where accountability lies to ensure that appropriate oversight is being carried out.

Conclusions in relation to impact of the "Frolick letters

935. For the moment it suffices to note that the new approach to parliamentary oversight apparently heralded by the Frolick letters was not as successful as one might have hoped:

935.1. The PCPE showed courage and determination and did manage to conduct an effective enquiry into the allegations relating to Eskom. However, essentially because of the time taken by its Eskom enquiry and because of the establishment of the present Commission in 2018, its inquiry did not, as it had intended, reach the issues relating to Transnet and Denel.

935.2. The PCT failed to conduct any inquiry. It may not even have been informed by its chairperson of Mr Frolick's letter.

935.3. The PCM failed to hold an adequate inquiry, initially due to evasive conduct on the part of Minister Zwane and, thereafter, because of (i) a failure to provide required resources when the committee finally decided that it wanted to hold a formal inquiry and (ii) the establishment of the present Commission.

935.4. The PCHA did not demonstrate much willingness to proceed with due expedition. Although it did ultimately conduct an effective enquiry, it acted far too slowly.

936. There continued to be resistance from within the ANC to the enquiry process proposed by Mr Frolick's letters which also accounts, in part, for the limited progress made. This view is supported in the following exchange:

> "**ADV FREUND SC:** And you would have been aware, I assume, that there was a very limited and belated inquiry by the Home Affairs Portfolio Committee, into the issue of whether there was anything improper in the manner in which the former Minister of Home Affairs had dealt with the question of naturalisation of members of the Gupta family. Do you agree?
>
> MS LETSATSI-DUBA: Yes, I aware.
>
> **ADV FREUND SC:** And you were also aware that the Transport Portfolio Committee failed to investigate the allegations of State Capture, as had been requested by Mr Frolick and that the Portfolio Committee on Mineral and Energy, likewise really never got to grips and never investigated. Were you aware of that as well?
>
> **MS LETSATSI-DUBA:** I was aware of that.
>
> **ADV FREUND SC:** Now what I am interested in is what light you can cast, if any, on why those other committees did not proceed, and I want to put to you a hypothesis and see whether my guess is correct. I want to put to you that there continued to be very considerable resistance by important members of the ANC caucus, who continued to oppose this type of investigation. Would that be a reasonable guess?
>
> **MS LETSATSI-DUBA:** That would be a reasonable guess, yes.**…**So it relates to the point I raised earlier on to say we are at a different level. Other people will think by so doing we are trying to protect the ruling party and yet on the other hand, they do not know they are inflicting the pain on the ruling party itself. So it is all about that, but I was aware two committees, did not want to do the inquiry"[827]

Other evidence of inadequate parliamentary oversight

[827] Day 349 pp 262-3

Introduction

937. The problem of inadequate Parliamentary oversight has not been confined to the manner in which Parliament dealt, or failed to deal, with the relatively recent allegations of state capture and corruption.

938. Mention has already been made of the impact on MPs - who might otherwise have been inclined to exercise diligent oversight - of the manner in which the SCOPA arms deal investigation was allegedly handled.

939. Another long-standing failure as regards parliamentary oversight, which will be reverted to shortly, relates to multiple allegedly corruptly-procured contracts between the Bosasa group of companies and (amongst others) the Department of Correctional Services (DCS), despite evidence of corruption which appeared in the press from 2006 onwards, the apparent veracity of which was confirmed by an SIU investigation reported on to Parliament in November 2009.

940. A further example is the Nkandla affair. As referred to above, the Constitutional Court found that the National Assembly's resolution in 2015 absolving President Zuma from liability for any of the expenditure incurred in relation to Nkandla, notwithstanding the opposite conclusion reached by the Public Protector in her report, was inconsistent with the Constitution and unlawful. It is doubtful that this failure on the part of the National

Assembly was unconnected to a fear on the part of at least some majority-party MPs' of the consequences to them should they step out of line.

941. Leaving aside for the moment the fallout of her stance as regards the vote of no confidence, the evidence of Dr Khoza on her experience in relation to the prevailing culture on parliamentary oversight is also disturbing and will be referred to below.

942. These instances of a regrettable political culture fall to be distinguished from those instances where there is a *genuine will* to exercise oversight but difficulties are experienced in making such oversight *effective*. That is a separate topic which will be dealt with at a later stage.

Pressure to "look the other way" regarding Bosasa corruption allegations

943. Mr A Agrizzi testified about extensive corruption involving the Bosasa group of companies and the DCS[828] which commenced in or about 2004 and continued over many years. Allegations in this regard were widely reported, over a period of years in the press. Some of these allegations were eventually investigated by the SIU which – as it made clear to the Portfolio Committee for Correctional Services (PCCS) at a hearing on 16 November 2009[829] - found them to be well founded and recommended prosecution. Mr

[828] He ultimately asserted that" …*every single contract* [between BOSASA companies and state departments] *was tainted with bribes and corruption*" – day 35 pp72-3

[829] Selfe PO-02-734, para's 6.29- 6.30; PMS's "Bosasa" report PO-02-788-9

Agrizzi also testified that he had been party to the payment of bribes to MPs on the PCCS to look the other way, an issue which will be reverted to below.

944. For the moment, however, the focus is not on this alleged bribery but on pressure on the PCCS and its chairperson by a former minister and chief whip not to scrutinise the Bosasa allegations, despite well-founded suspicions of corruption on the part of members of the PCCS.

945. The Chairperson of the PCCS from 2004-9 was Mr Dennis Bloem, then an ANC MP.[830] His evidence[831] was to the effect that he and certain other members of the PCCS were concerned about the corruption allegations concerning Bosasa and the DCS but that he came under pressure from both the then minister[832] and the then chief whip[833], not to pursue these. He testified that he personally raised his concerns in meetings with the minister but was told not to "interfere".[834] Here is a relevant exchange between the Chairperson of the Commission and Mr Bloem when the latter testified regarding the minister:

> "**CHAIRPERSON**: When you, when you used to have discussions with, with him did he also acknowledge that there were serious problems, but did not want to do anything about them or did he deny that there were problems?

[830] He later joined COPE.

[831] Day 45

[832] Mr N Balfour

[833]Apparently, though this is not entirely clear, a reference to Mr N Goniwe.

[834] Day 45 p 27

> **MR DENNIS VICTOR BLOEM**: Chairperson his attitude was no, let us leave the department to sort out those problems. Let us not interfere in the operations of the Department of Correctional Services. That was his attitude.
>
> **CHAIRPERSON**: Even when the [indistinct] include corruption?
>
> **MR DENNIS VICTOR BLOEM**: Chairperson even that."

946. Mr Bloem testified that the concerns were also raised in the ANC's PCCS study group in the presence of the minister and chief whip. They were told "Do not fight, because this is an ANC Government. Do not fight Comrades."[835] He said it was quite clear to him that Mr Mti, the then Commissioner of the DCS, had the support and protection of the minister.[836]

947. At one stage the PCCS threatened, not to approve the DCS budget because it took the view that it was being undermined. Mr Bloem was called to the Chief Whip's office and reprimanded by the Chief Whip and told that "…this is an ANC government. You cannot do this because you are putting the ANC in a bad light outside".[837]

948. Mr Bloem stated that such sentiments were expressed to him by the Chief Whip repeatedly. He said that, after each meeting of the portfolio committee which dealt with Bosasa and its tenders the chief whip would reprimand him and tell him that what they

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[835] Day 45 p30

[836] Day 45 p 66

[837] Day 45 p 30

were doing was wrong because they were dealing with deployees of the ANC. He was told "you must know you are a deployee of the ANC. You are not your own boss."[838]

949. Pressure arose for him to be removed as chairperson of the PCCS. Asked on what basis this arose, he replied:

> "Chairperson I was being labelled as an opposition in the ANC, because I was asking these questions and doing my work."[839]

950. Mr Bloem's evidence was, to some extent, confirmed by the testimony of Mr J Selfe, a DA MP who served for many years on the PCCS with Mr Bloem. Mr Selfe testified that Mr Bloem would telephone him from time to time to tell him about the difficulties he had with his own organisation and to pass on certain information and to encourage him to ask certain questions and to pursue certain issues in the committee of which he presumably had knowledge from discussions in his study group but about which Mr Selfe knew nothing.[840] If Mr Bloem was not being placed under pressure within his own party not to pursue these allegations, why – the Commission asks itself - would he request an MP from an opposition party to ask the questions?

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[838] Day 45 p 78

[839] Day 45 p 32

[840] Day 336 p 101

Bribing of PCCS members by Bosasa

951. Mr Agrizzi's also testified about outright bribes he said were paid by Bosasa to Mr Vincent Smith[841], Ms Winnie Ngwenya[842] and Mr V.V. Magagula[843], all ANC MPs on the PCCS at the time of the payment of the bribes, as well as to Mr C Frolick, to whom much reference has been made above.

952. Mr Bloem was replaced as chairperson of the PCCS by Mr Smith with effect from mid-2009. According to Mr Agrizzi, Mr Smith was initially hostile to the Bosasa companies and this became a matter of concern to Bosasa at about the time of an SIU presentation to the PCCS regarding its investigation into the allegations against Bosasa[844] . By that time, according to Mr Agrizzi, Mr Frolick was already receiving bribes from Bosasa.[845] Mr Frolick denies this.

953. Mr Agrizzi testified that an initial attempt in his presence by Mr Frolick to assist Bosasa to ingratiate itself with Mr Smith did not go well[846]. However, he later learned that on a subsequent occasion, when he (Mr Agrizzi) had not been present, a corrupt

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[841] Days 37 and 76

[842] Mr Bloem's evidence suggests that a corrupt relationship between Ms Ngwenya and Bosasa probably commenced whilst Mr Bloem was still chair of the PCCS and that she attempted to encourage him to take a bribe from Bosasa– see day 45 pp 71-5

[843] Mr Agrizzi only ever identified him as "Magagula" but made clear he was an ANC MP on the PCCS. Mr Vuselelo Vincent Magagula was an ANC MP from 2009 to 2014 and a member of the PCCS. He must be the person to whom Mr Agrizzi was referring.

[844] From the affidavit of Mr Selfe (exhibit ZZ7, PO-02-734, para 6.29) it is apparent that this presentation took place on 16 November 2009

[845] Day 76 pp 13-14

[846] Day 76 p30

arrangement involving Mr Smith, Mr Magagula and Ms Ngwenya had been concluded. According to Mr Agrizzi he (amongst others representing Bosasa) subsequently met with Mr Smith, Mr Magagula and Ms Ngwenya. Discussion took place at that subsequent meeting about the monthly bribes to be paid to them; and the MPs concerned agreed to make sure that the PCCS would be managed in such a manner that the adverse publicity about Bosasa would not stop it getting new business.[847] According to Mr Agrizzi monthly bribes of R45 000 were paid to Mr Smith, R30 000 to Mr Magagula and R20 000 to Ms Ngwenya. When the latter two ceased to be members of the PCCS their payments stopped but the payments to Mr Smith increased to R100 000 per month (and he also received other corrupt benefits).

954. Mr Smith is currently facing criminal charges in respect of the bribes allegedly paid to him by or on behalf of Bosasa and it would therefore be inappropriate to deal here with the further evidence specifically related to him. It suffices for present purposes to say that there is sufficient evidence suggesting that Bosasa and associated persons paid bribes to ANC MPs on the PCCS to warrant the NDPP considering pressing charges, not only against Mr Smith, but also against Mr Frolick, Mr Magagula and Ms Ngwenya.

955. It goes without saying that a Member of Parliament who takes a bribe to influence the manner in which a portfolio committee discharges its duties, not only commits a serious criminal offence but is also guilty of a gross dereliction of his or her constitutional oversight responsibilities as an MP. It is also goes without saying that such conduct has

[847] Day 76 pp 44 and 102; day 37 pp 82 to 86

the potential to obstruct Parliament from discharging one of its primary constitutional functions.

Evidence of Dr M Khoza on the culture on oversight and accountability

956. Dr Makhosi Khoza was an ANC MP from May 2014 to September 2017. During that time she served on (amongst others) the Standing Committee on Finance ("the SCOF") from June 2014 to February 2017, the Ad Hoc Committee on the South African Broadcasting Corporation Board Inquiry into the Fitness of the SABC Board ("the SABC inquiry") and as chairperson of the Portfolio Committee on Public Service Administration from February to September 2017.

957. Dr Khoza testified that, as a member of the SCOF, she asked some pointed questions of Ms Dudu Myeni, then chairperson of the SABC board of directors, and that she was thereafter criticised by the then committee whip, Mr Des van Rooyen, for attacking a comrade.[848] She testified that during the SABC inquiry she also asked pointed questions of, or made critical comments about, the then Minister of Communications, Ms Faith Muthambi, Dr Ben Ngubane (who had been chairperson of the SABC board) and certain others who appeared before the inquiry. Her criticisms concerned issues relating to

[848] Exhibit ZZ 3 PO-01-749 para 6.2.3. Mr van Rooyen filed an affidavit denying this.

accountability, good corporate governance and the like.[849] She said that, whilst she received some support from Mr J Mthembu for her stance during this inquiry—

> "…I also received a lot of criticism for this within the ANC. In particular, staunch supporters in Parliament of President Zuma, like Nomvula Mokonyane, Sizani Dlamini-Dubazana and Dorries Dlakude expressed the view that I had displayed ill-discipline by being critical in Parliament of ANC comrades. I was also criticised for questioning the credentials of persons appointed to positions by the ANC's Deployment Committee."[850]

958. Dr Khoza fell out with the ANC over the stance it adopted in relation to a motion of no confidence in President Zuma on 8 August 2017. By this time, she had been moved from the SCOF to chair the Portfolio Committee on Public Service Administration. As fate would have it, Ms Faith Muthambi, whom Dr Khoza had criticised when she was Minister of Communications, had by this time been made Minister of Public Service Administration.

959. A meeting of the Portfolio Committee on Public Service Administration was scheduled, to be chaired by Dr Khoza, for 15 August 2017. The agenda for that meeting included an item when Minister Muthambi was required to respond to the Committee in respect of recent allegations against her in the press.[851]

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[849] Ibid para 6.4.4

[850] Ibid para 6.4.8

[851] These allegations were that she had abused her position by enabling personal connections of hers to fly at public expense – see Dr Khoza's affidavit at para 11.1

960. As with all portfolio committees, the ANC has a "study group" to caucus on the position to be adopted by its members at meetings of the Portfolio Committee on Public Administration. The minister who is to appear at the committee meeting also usually attends the study group meeting and is therefore party to the ANC MPs' preparation for the committee meeting.

961. According to Dr Khoza, when she arrived at this study group meeting on this occasion, she found that Ms Muthambi and other members of the study group had already met and had been discussing her (Dr Khoza). They read out to her a “charge sheet” which related, in part, to her stance in respect of the recent vote of no confidence but also related to the way she had conducted herself in portfolio committees. It was asserted that she had brought the name of the ANC into disrepute by her questioning of Ms Dudu Myeni in the SCOF; by a remark she had made in the SABC inquiry about Dr Ben Ngubane and "recycling failure"; by her criticisms in the SABC inquiry of Ms Faith Muthambi and Mr Hlaudi Motsoeneng. She was told that she should not have attacked “those comrades”. She was also criticised for requiring Ms Muthambi to come to account to the portfolio committee about the recent allegations against her. It was alleged that it was unacceptable for her to call "our own ANC minister" to account in this way. Ms Muthambi nodded her approval of this criticism. All the ANC MP’s present endorsed this view.[852] She was also told that those present had decided to remove her as chairperson of the portfolio committee.

[852] Ibid para’s 11.8 to 11. 10

962. It will be noted that this incident occurred a month after Mr Frolick's letters of 15 June had been sent to the chairpersons of four portfolio committees. It supports the views already alluded to above (i) that there was serious factional division within the majority party regarding the approach to be adopted in relation to parliamentary oversight and holding the executive accountable and (ii) that this persisted after the distribution of the Frolick letters.

Abuse of study groups

963. Political parties represented in Parliament are entitled to establish their own "study groups" including, if they so wish, study groups linked to portfolio committees to inform themselves as to matters of which they need a better understanding in order to discharge their functions properly. That applies equally to the ruling party. In principle there is no reason why a minister should not be invited to attend a study group of the ruling party. This would include a meeting of the study group which is to consider a matter expected to come before an anticipated meeting of the portfolio committee concerned.

964. It is however quite another matter if the minister attends such a meeting and then colludes in planning how proper oversight over the executive, as represented by the minister, will be frustrated or obstructed at a portfolio committee meeting. On the evidence of Dr Khoza referred to above[853], that is precisely what occurred. In any event

[853] See also para 13.8 of her affidavit – PO-01-773. This allegation was not put to Ms Muthambi for her version and can therefore not be regarded as having been proved.

care should be taken to avoid causing an impression that a portfolio committee's oversight responsibilities have been fettered by decisions taken at a study group.

965. It seems doubtful that this was an entirely isolated case.

966. Ms Letsatsi-Duba said that the main aim of a study group is to "hear from the leadership of the department" what the issues are.[854] She said that it was the norm for the ANC's PCPE study group to decide in advance of PCPE meetings how issues would be dealt with in the meetings. She also said that, once decided in the study group, there would be no deviation from the agreed approach by ANC members in the committee.[855] She expressed the view that this practice was actually inappropriate. For example, she was asked the following question:

> **"**Now given that the purpose of the Portfolio Committee is to exercise oversight over the Executive, is there not something in your view a little inappropriate about, as it were, caucusing before the Portfolio Committee meetings with the Minister or other representatives of the Executive … should not that type of oversight really been taking place in the Portfolio Committee itself?

967. Her answer was:

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[854] Day 349 p 212

[855] Day 349 pp 219-220. She also expressed concern that Minister Brown did not always attend these meetings, being of the view that she should have one so- Day 349 p 212-3. Others confirmed that the study group decides what stance is to be adopted in portfolio committee meetings – see e.g. Frolick Day 347 p252

> "Well, at first, myself I was a little bit uncomfortable with the approach. Rightfully so as you indicated, it might appear like we are trying to caucus before the portfolio but when we arrived there in 2014, it has been the practice all along. So we just followed suit."[856]

968. She was asked whether, where members of a particular party have attended a study group meeting with a minister who is supposed to be held to account at a subsequent meeting of a portfolio committee, this "promotes the idea" that they and the minister come from the same party and "were yesterday together discussing the issues that are going to come up here". She replied:

> No, if I understand you Chair. The reason why I felt uncomfortable is precisely what you are saying."[857]

969. She confirmed, that as a former chair of a portfolio committee and a former minister she thought that the existing study group system is problematic and needs to be rethought.[858]

970. Ms J. Rault-Smith, an experienced observer of portfolio committee meetings, said the following in relation to the impact of study group decisions on portfolio committee meetings:

> "In some cases, members are given prepared questions during the study group meeting, which they themselves do not fully understand and so cannot determine whether a question has been satisfactorily answered or not." [859]

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[856] Day 349 p 213

[857] Day 349 p 215

[858] Day 349 p 217.See also Selfe Day 336 p 101 and Day 338 pp18-20; Modise Day 377 p123-8.

[859] Day 345 p 191

971. Mr Selfe, a highly experienced DA MP, said with reference to what had emerged from a study group decision:

> "… I do know that on occasions the ANC colleagues would simply block a topic - for example, when I tried to raise [in the PCCS] the topic of the award of a fencing contract to SA Fence and Gate."[860]

972. Ms Modise, the Speaker at the time that she gave evidence, accepted that decisions taken at a study group should not interfere with the proper discharge of a portfolio committee's oversight functions:

> **"CHAIRPERSON**: Would it be correct to summarise your response in this way in regard to this question, that you are saying in principle there is nothing wrong with different people attending a study group, depending on what the issues are to be looked at, but you would say nothing should be done or decided there which means that a member of Portfolio Committee who was in that meeting cannot do his or her job in the Portfolio Committee properly the way she or he is expected to do? Would that be a fair summary of what your position is?
>
> **MS MODISE**: Chair, it would be a fair summary."[861]

Party discipline

973. Political parties are legitimate vehicles for engaging in our democratic system of government. Indeed, our Constitution is based on a party-list, proportional representation system. [862]

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[860] PO-02-744 para 7.3.1.5

[861] Day 377 p 127-8

[862] See the section of President Ramaphosa's first affidavit, exhibit BBB 1, CR-01- 001 headed "Role of the political party in South Africa's Constitutional dispensation", para's 10 to 21

974. Political parties are voluntary associations and are governed, at least primarily, by their own constitutions. Persons wishing to join them may, as a matter of general principle, legitimately be expected to adhere to the provisions of their party's constitutions.

975. The ANC's constitution[863] serves as a convenient example, though the issues of principle being considered at this point apply generally to other political parties, too.

976. The ANC's constitution provides (in clause 4.16) for persons, on being accepted in the ANC, to make a solemn declaration to

> "… abide by the aims and objectives of the African National Congress as set out in the Constitution, the Freedom Charter and other duly adopted policy positions…and to defend the unity and integrity of the Organisation and its principles, and combat any tendency towards disruption and factionalism."

977. Clause 5.2 spells out the duties of a member, which in terms of clause 5.2.7 include to

> "(o)bserve discipline, behave honestly and carry out loyally the decisions of the majority and decisions of higher bodies".

[863] "ANCCR1", CR-01-080 and ff

978. Clause 25.17 lists various acts of misconduct in respect of which disciplinary proceedings may be invoked, including "acting in breach of the membership oath"[864], "failing, refusing or neglecting to execute or comply with any ANC Policy…or Resolution"[865] and "behaving in a manner which provokes or is likely to provoke or has the potential to provoke division or impact negatively on the unity of the ANC".[866]

979. Party discipline is a legitimate and indispensable feature of a party-based democratic system. Persons who choose to become members of a party can be expected to adhere to the duly adopted policies of that party. In general, MPs representing a party in Parliament can be expected and required to adhere to party decisions, in particular decisions democratically made within its parliamentary caucus.

980. However, other obligations also come into play, including in terms of our national Constitution and the oath of office taken in terms of thereof by all Members of Parliament. There can be a tension between party discipline, on the one hand, and the oversight obligations of MPs under the national Constitution, on the other hand. This has been recognised by the Constitutional Court.

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[864] Clause 25.17.1

[865] Clause 25.17.3

[866] Clause 25.17.5

981. In a judgment of the Constitutional Court sometimes referred to as the "secret ballot" judgment, the Constitutional Court had this to say in this regard: [867]

> "Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme**. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail.** This is so not only because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution." (emphasis added)

982. Similarly, it was held by the Constitutional Court, per Chief Justice Mogoeng Mogoeng, in a case brought by the EFF[868]:

> "The fact that members of the Assembly assume office through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. **Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives**. For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution." (emphasis added)

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[867] United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017)

[868] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017) at para 144

983. Having regard to the applicable provisions of the Constitution and above judgments of the Constitutional Court the Commission is of the view that:

983.1. Corruption is the antithesis of the Constitutional values that every Member of Parliament takes an oath or solemn affirmation to uphold. So too is conduct which may be described as “state capture”.

983.2. Promoting, facilitating, or conniving with corruption or state capture cannot be a lawfully adopted policy a political party.

983.3. It follows that party discipline may not legitimately be directed at obstructing Members of Parliament from doing what they believe, in good faith and on reasonable grounds, to be appropriate in order to address concerns as to allegations of corruption or state capture.

983.4. It is also unacceptable for a minister or fellow party members to castigate a member of Parliament for attempting to hold a minister to account, or for asking difficult questions of persons regarded as comrades or deployees of the same party.

983.5. It is inappropriate for a party caucus to resolve not to permit, or to discourage, conduct amounting to legitimate parliamentary oversight over the executive.

983.6. It is also inappropriate for members of Parliament not to enquire into allegations of misconduct for which there appears to be plausible evidence, on the basis that to do so could cause embarrassment to, or divisions within, a political party.

984. The question as to how these principles have application where a motion of no confidence is under consideration by Parliament, will be dealt with separately below.

Holding the President accountable

An overview

985. Parliament is obliged to exercise oversight over the executive and hold it accountable. The President is the head of the national executive.[869]

986. There are various constitutional mechanisms for holding the President accountable.

987. The President may, by a resolution adopted with a supporting vote of at least two-thirds of its members, be removed from office by the National Assembly on certain specified grounds.[870] Alternatively, the National Assembly can, by a vote of a majority of its members, pass a vote of no confidence in the President; if it does this, the President and the other member of the Cabinet must resign.[871]

988. Another way of holding the President accountable to Parliament is by the putting to him or her questions for written or oral reply.[872] In terms of NA rule 140(1)(a) questions to

[869] Sections 83 and 85 of the Constitution.

[870] Section 89 of the Constitution.

[871] Section 102 of the Constitution.

[872] Chapter 10 of the Rules of the National Assembly, particularly rule 140

the President must be scheduled for a question day at least once a quarter during session time within the annual programme.

989. There is, however, no portfolio or other parliamentary committee whose function is, or includes, oversight over the President.

Instructions not to support a vote of no confidence

990. During the presidency of President Zuma eight votes of no confidence were proposed by opposition parties in the NA. None succeeded. The ANC instructed its members to vote against them and, in general, they complied.

991. Amongst the motions of no confidence in President Zuma which failed were motions proposed by the leader of the DA, Mr Mmusi Maimane, of 17 March 2015 (based *inter alia* on the alleged politicisation and weakening of state institutions and allegations of corruption); of 1 March 2016 (based *inter alia* on President Zuma's alleged "irrational, irresponsible and reckless leadership"); of 5 April 2016 (based *inter alia* on President Zuma's failure to comply with the Public Protector's "Secure in Comfort "(Nkandla) report); and of 10 November 2016 (based *inter alia* on the contention that under President Zuma's alleged irrational, irresponsible and reckless leadership "important institutions of state had been captured by private interest…").[873]

[873] https://ewn.co.za/2017/06/29/fact-sheet-how-many-motions-of-no-confidence-has-zuma-faced

992. However, the eighth vote of no confidence in President Zuma, held on 8 August 2017, was somewhat different. Following from the decision of the Constitutional Court referred to above, the Speaker determined that the vote would this time be by secret ballot. She also issued a statement in which she said:

> "The Constitutional Court indicated that the electorate is at times entitled to know how their representatives carry out even some of their most sensitive obligations and this includes voting in a motion of no confidence. However, this reality may not always be possible where there are instances of intimidation. In terms of the Constitutional Court judgment if Members are constitutionally obliged to vote according to their conscience it follows that no Member can suffer any harm, hardship or punitive action if they comply with the Constitution and vote according to their conscience. A reading of the Constitutional Court judgment suggests that any action of a political party against a public representative who voted in accordance with their conscience may be struck down for violating the Constitution."[874]

993. It is evident that a number of ANC MPs acted in breach of the instruction received from the party and supported the motion.[875] Most did so without disclosing their identities. One ANC MP who made no attempt to conceal that she had voted in support of the motion was Dr M Khoza. As she explained to the Commission, she was greatly moved by a groundswell of public opinion which had developed by April 2017 that President Zuma should step down. She felt that the marches that took place:

> "…demonstrated that the ANC seemed to have lost its way and was at risk of losing public support. Instead of the ANC serving as the parliament of the people, as it had

[874] PO-01-764

[875] The motion was defeated by 198 votes to 177, with nine abstentions. The ANC then held 249 of the 400 seats in the NA.

> in my view traditionally done, it was becoming a party unwilling or unable to confront corruption and inadequate performance in high places.
>
> When I returned to Parliament I expected that there would be support in the ANC for the removal of President Zuma, but that is not what I found. The ANC seemed intent on supporting the president at all costs, no matter the evidence against him or public sentiment."[876]

994. Dr Khoza had made clear that she intended to follow her conscience in the pending vote of no confidence. At a conference she said "I am here to defend the ANC mission and not a dishonourable and disgraceful leader." For expressing her views in this regard, she came under sustained attack from within the ANC. Even before the vote of no confidence, she was served with disciplinary charges. She and her family faced threats and intimidation. Her vote in support of the motion of no confidence placed her under such intolerable pressure within the ANC that she resigned from the party and thereby lost her seat in Parliament.

Conflict between MP's oath/affirmation and party instructions

995. The Commission heard evidence as to the views of numerous persons on the legitimacy of party instructions by the ANC, as the majority party, to its MPs not to support an opposition-proposed vote of no confidence in a President of the country as well as a leader of the ANC. On the whole members of the ANC defended the right of the party to

[876] PO-01-174-5, para's 7.2 and 7.2

issue such an instruction and its right to expect compliance with such an instruction by its MPs.

996. The difficulty is that MPs can find themselves in a situation where, in their own judgement, their loyalty to their party – and their duty to comply with decisions by the party - conflicts with their duty, in terms of their oath or affirmation of office, to "be faithful to the Republic of South Africa" and to "obey, respect and uphold the Constitution and all other law of the Republic". As has been referred to above, the Constitutional Court has held[877] that," in the event of conflict between upholding constitutional values and party loyalty", the MP's oath or affirmation of faithfulness to the Republic and obedience to the Constitution and laws must take precedence.[878]

997. In the Commission's view there has to be some limit to the power of a political party to discipline an MP, where the MP in good faith takes the view that the duty of Parliament to oversee the executive and to hold it to account compels him or her to act in a manner not favoured by the party leadership or a decision by a party structure. Can the party direct its MPs to collude in or cover up illegal or unconstitutional conduct? Can it issue instructions based on the personal interests of one or more of its leaders, where those interests manifestly conflict with the interests of the citizens of the Republic? Surely not.

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[877] United Democratic Movement v Speaker of the National Assembly and Others 2017 (5) SA 300 (CC)

[878] Mr Mantashe referred to this as a "typical example of where politics and law are in conflict", implying – so it seemed – that the ANC would act in accordance with "politics", unless and until ordered otherwise by a court. Day 377 pp 213-6 ("sometimes political decisions that are taken are in conflict with the law and we end up in court and sometimes the court rules us that no, listen, thou shall do as follows and every time that happens to us we comply…"

998. President Ramaphosa, a strong defender of the right of a party to "insist on party discipline and insist that we vote together"[879] was constrained to concede that there must be limits to this:

> "**CHAIRPERSON:** And you would accept too would you not that the provisions relating to the vote of no confidence in the constitution constitute part of the mechanisms that the constitution makes available to Parliament in order to hold the executive accountable.
>
> **PRESIDENT RAMAPHOSA:** I have – I accept and I agree.
>
> **CHAIRPERSON:** Yes. Would you also accept that the oath of office to which Mr Freund referred earlier on means that the members of Parliament have got to put the interests of the people of South Africa first?
>
> **PRESIDENT RAMAPHOSA:** I accept and I agree to that."[880]
>
> **CHAIRPERSON:** You agree to that?
>
> PRESIDENT RAMAPHOSA: Ja.
>
> **CHAIRPERSON:** Now when there is a motion of no confidence placed before members of Parliament my understanding is this and I just want you to comment whether you agree with my understanding. My understanding is that what each member of Parliament is called upon to do is to ask himself the question or herself the question do I still have confidence in this President?
>
> PRESIDENT RAMAPHOSA: Yes."[881]

999. President Ramaphosa also said:

> "And in exceptional circumstances for instance where there is a major risk to democracy, where it is clear that the conscience of a particular or particular members is driving them towards saying we have got to defend democracy and one of the ways we can defend democracy is to go against what the herd believes

[879] Day 385 p 76

[880] Day 385 p 80

[881] Day 385 pp 80-1

should be the direction. So I would argue yes that is allowable but it is an exception because the general rule of thumb is party discipline."

A parliamentary committee to exercise oversight over the President?

1000. The Commission heard the views of several witnesses on whether there would be merit in Parliament establishing a committee whose function would be, or would include, oversight over the President. It became apparent that this is an issue that has been, and continues to be, debated.

1001. There is a view held by some that there is little need for such a committee, as all executive functions are delegated by the President to a department led by a minister, which is overseen by a portfolio committee.[882]

1002. One must also bear in mind that questions put to the President at question time in the National Assembly serve as an important and useful method of exercising oversight and holding to account. Parliament also has the power to remove the President from office under sections 89 and 102 of the Constitution.

[882] Modise - Day 377 pp 105-117; Mantashe – Day 377 pp191-7; Mbete – day 397 pp 175ff

1003. However, in the Commission's view, it would probably be a good idea for Parliament to establish a committee to exercise oversight over acts or omissions by the President (and the Presidency) which are not in any event subject to adequate oversight by other portfolio committees. It is not correct that everything for which the President is responsible is delegated to a minister or department outside of the Presidency. Our recent history also shows that the President's conduct is not always subjected to adequate oversight by the existing portfolio committees. A process to enable the President's and Presidency's conduct to be subjected to more probing scrutiny than is feasible in a plenary session of the National Assembly would therefore appear to be beneficial.

1004. It is therefore recommended that Parliament should consider whether it is appropriate for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency, which are not overseen by existing portfolio committees. If it supports this in principle, it will need to determine the details as to how this is to be done. It may well be that it need not operate in the same manner as the existing portfolio committees.

Electoral reform?

1005. Under our party-list system of proportional representation, Members of Parliament do not represent a particular constituency. Their election and re-election prospects turn on whether and where they are placed on a party list and the proportion of support enjoyed in an election by that party. A Member of Parliament belonging to a party who enjoys considerable personal respect and support from a particular constituency has little or no

prospect of election without the support of those within the party who compile the party list.

1006. The degree of support for the stance taken by the Member, by persons resident in a particular geographical constituency plays no role. Members also have no ability to marshal the views of their constituents to influence decisions within their party, including decisions relating to proper oversight in respect of alleged abuses.

1007. There is a view that a move to a constituency-based system of proportional representation would have several advantages, one of which would be to empower MPs within a party to be more responsive to the political views and interests of their constituents and, therefore, less beholden to “party bosses” with the power to determine party lists. This – it is thought – would strengthen the capacity and resolve of MPs accountable to a constituency to exercise better oversight over the executive where this is what their constituents favour, rather than kowtowing to the “party bosses”.

1008. In a constituency-based system, an MP has the democratic mandate to represent constituents' concerns and is accountable to them. In a non-constituency based proportional representation system, an MP does not have that same direct, intimate

connection accountability to a set of constituents, but is rather accountable to the party.[883]

1009. CASAC puts it this way:

> "The closed-list system of proportional representation means that there are no direct lines of political accountability between voters and parliamentarians. Linked to this are sections 47(3)(c) and 106(3)(c) which make party political membership a prerequisite for one to be and remain as a member of Parliament. Loss of membership of a party on whose list a member was elected, will result in the loss of the seat. The net effect is that **Members of Parliament are accountable and beholden to their party bosses primarily**, rather than to the electorate." (emphasis added)

1010. A system in which "Members of Parliament are accountable and beholden to their party bosses" is not well suited to securing Parliamentary oversight of the executive comprising, as it generally does, "party bosses".

1011. Our Constitution requires an electoral system which "results in general in proportional representation"[884]. This is not necessarily incompatible with a constituency-based system, as is apparent from the majority report of the Electoral Task Team chaired by Dr Van Zyl Slabbert in 2003.[885] The 2017 High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change also recommended that

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[883] Calland PO-03-031

[884] Section 46(1)(d)

[885] Annexure 5 to Calland's submission, PO-03-160 ff, referred to at PO-03-030. Also discussed in para 110 of the submission to the commission from CASAC, annexure 1 to exhibit ZZ 10

Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections. [886]

1012. The Constitutional Court's recent judgment in the *New Nation Movement* case[887] requires legislative amendment to existing electoral law in any event. It may also be noted that in that judgment the Court held:

> "The entrenchment of proportional representation, and its achievement through the vehicle of political parties, flows from the prioritisation of equality in political voice (every vote counts equally) over the accountability that might be better secured through a constituency-based system or a mixed system." [888]

1013. On the other hand, there appears to be merit in the following view:

> "But, despite the real opportunity that the New Nation Movement judgment presents, my view is that a change in the electoral system is unlikely to be a panacea. There is no guarantee that direct election via a constituency-based system will result in more accountability or will serve to loosen the shackles of party managers sufficient to enable individual MPs to act more independently in asserting parliamentary oversight over the executive. It will not be the proverbial silver bullet, but it is likely to help."[889]

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[886] Para 111 of the CASAC submission.

[887] New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCTl10/19) [2020] ZACC 11 (11 June 2020).

[888] At para 221

[889] Prof Calland, at PO-03-032

1014. Taking all the above into consideration, it is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system have this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages of, this advantage justifies amending the existing electoral system.

Section 47(3)(c) of the Constitution

1015. As previously noted, section 47(3) (c) of the Constitution has the effect that a person loses membership of the National Assembly if that person ceases to be a member of the party that nominated him or her as a member of the Assembly.

1016. Given our party-based, proportional representation electoral system, the existence of such a provision is understandable.

1017. The provision does however have the potential to undermine effective parliamentary oversight over the executive branch of government, particularly if there are insufficient constraints against expulsion of members of parliament from the parties they represent. This applies in particular – though not exclusively - to a ruling party. The leadership of

a ruling party dominates the executive branch of government; which Parliament is meant to hold accountable. If the leadership of the executive branch is - as may well be the case - in a position to jeopardise the party membership of members of Parliament who exercise (or threaten to exercise) necessary and appropriate oversight over the executive, including its leadership, this has the potential to suppress or diminish the effectiveness of such oversight.

1018. What seems to the Commission to be essential is some form of legal protection against members of Parliament losing their party membership, and therefore their seats in Parliament, merely for exercising their oversight duties responsibly and in good faith.

1019. The Commission recommends that Parliament should consider whether it would be desirable to enact legislation which protects members of Parliament from losing their party membership (and therefore their seats in Parliament) merely for exercising their oversight duties reasonably and in good faith. If this is thought to be desirable, consideration would have to be given to whether such protection is feasible for longer than the duration of the Parliament to which a member has been elected.[890]

The problem of ineffectiveness where genuine attempts are made to conduct parliamentary oversight

[890] The Commission would think that this is probably doubtful.

Introduction

1020. As appears above, some of the lapses in parliamentary oversight as revealed in the evidence heard by the Commission were due to *unwillingness*[891] by the ANC members of certain Portfolio Committees or ANC members of Parliament to do what should have been done. However, what also became apparent from a conspectus of the evidence is that even where *the will* has existed, parliamentary oversight has not infrequently proved to be *ineffective.*[892] It is to that issue the problem of ineffectiveness, even where the will to oversee exists, that this report now turns.

SCOPA's inability to resolve serious failures of financial control

1021. In recent years the Standing Committee on Public Accounts (SCOPA) has come to be seen as one of the better-performing parliamentary oversight committees. It is required by rule 245 of the rules of the National Assembly to consider the financial statements of (*inter alia)* all organs of state, any audit reports issued on those statements and any reports issued by the Auditor-General ("the AGSA") on the affairs of any organ of state. It may report on any of these financial statements or reports to the Assembly and may initiate an inquiry in its area of competence. It is traditionally chaired by an opposition MP.

[891] Whether because of illegitimate pressure on them or otherwise

[892] Of course, the same set of events, e.g. within a portfolio committee, may display a combination of these two conceptually different problems.

1022. The chairperson of SCOPA from November 2005 to May 2019 was Mr N T Godi, who testified before the Commission. His view is that, in both the fourth and fifth parliaments, SCOPA discharged its assigned functions.[893]

1023. Yet, Mr Godi himself was of the view that - as reflected in repeated clear and emphatic reports from both the AGSA and SCOPA itself - a widespread breakdown in financial controls continued over this period.[894]

1024. Indeed, according to him, the problem of "(a) disturbingly high number of cases of unauthorised expenditure, irregular expenditure, fruitless and wasteful expenditure in other material non-compliance"[895] progressively deteriorated: the reports from the AGSA moved year in and year out "in a negative direction".[896] He described the increase of irregular, fruitless and wasteful expenditure as "exponential".[897]

[893] PO-01-107 para 6.2; Day 335 pp 34-5

[894] PO-01-107 para 6.3; Day 335 p 36;

[895] Day 335 p 4

[896] Day 335 p36

[897] Day 335 p 48

1025. He also said that he had been aware of "the rise in levels of corruption"[898] but that what should have been Government's spearhead in fighting corruption was "a very disorganised and dysfunctional structure". [899] He commented[900]:

> "So if government had managed that system well, probably we would not be sitting here and, if we did, it would be under very different conditions. So, for me, that is what I call the lack of political will, that [you] either do nothing or you take correct decisions but then you do not implement it properly."

1026. His views are spelt out in the chairperson's foreword to SCOPA's "legacy report" he wrote on SCOPA's activities during the 5th Parliament". He wrote:

> "The fact that annually we have seen a continuing rise in irregular, fruitless, wasteful expenditure is no reflection on the effectiveness of the Committee than it is about the failure of the Executive and its accounting officers to live up to their responsibilities as enshrined in the Constitution and the Public Finance Management Act (PFMA). The Executive branch is not responsive to the recommendations from Parliament. There is not sufficient political and administrative will to do what is right for the country to stop the looting of public funds. That is why as Scopa we were actively involved in pushing the Public Audit Amendment Bill, to give the Auditor-General (AGSA) additional powers to follow up on cases of financial mismanagement. This was, unfortunately, an acceptance that the Executive is failing to follow the law and simple political morality...We consistently called out on the malfeasance at SABC, SAA, Eskom, Compensation Fund, Correctional Services, Water and Sanitation, Public Works, Transnet, SAPS, PIC, etc to no avail.
>
> Besides the fact that the AG will now have enhanced powers, as Scopa we believe that Parliament must take a deep look at its relations with the Executive. What and

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[898] Day 335 p 38

[899] Day 335 p 38

[900] Day 335 p39

> how is the enforcement aspect of the Constitutional imperative of 'holding to account'. The PFMA allows managers to manage and then to account. The critical question is 'what is Parliament's recourse' if there is no accountability for Public resources spent.' It is a critical question, without whose answer oversight might be reduced to a mere ritual." (emphasis added)

1027. Mr Godi's evidence on the scale of breaches of financial controls was confirmed by evidence made available to the Commission by the office of the AGSA. The late Auditor General, Mr K Makwetu, together with senior AGSA staff members, assisted the Commission considerably. A lengthy draft affidavit prepared in accordance with instructions furnished by Mr Makwetu[901], was furnished to the Commission. It focuses primarily on PRASA to illustrate the scale of known financial mismanagement and the ineffectiveness of oversight mechanisms, including Parliamentary oversight, to resolve this. Though Mr Makwetu unfortunately passed away before he could depose to the affidavit, the Commission is satisfied by confirmatory affidavits from Ms MM Bezuidenhout[902] and Mr P Sokombela[903], both of the office of the AGSA, that the information in the draft affidavit may be regarded as reliable. The information in the affidavit was also confirmed in significant respects by Mr Godi.[904]

1028. Mr Makwethu's unsigned affidavit reveals that the exponential increase in irregular expenditure on the part of PRASA revealed in reports submitted (*inter alia)* to Parliament was as follows[905]:

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[901] Exhibit ZZ 13, PO-04-837 to 963 and PO-05-001 to 963.

[902] PO-04-837-841

[903] PO-04-843-845

[904] See e.g. day 335 pp 90-109

[905] PO-04-871 para 61, read with pp 876 to 958; see also Godi day 335 pp 77 to 81

Financial Year	Irregular Expenditure
2013/2014	R0,01 billion
2014/2015	R0,55 billion
2015/2016	R15,3 billion
2016/2017	R20, 3 billion
2017/2018	R24, 2 billion

1029. This is a staggering and manifestly unacceptable state of affairs.

1030. Mr Makwetu made the following comments in his draft affidavit:

> "48. During this five (5) year period, the entity's preventative controls were of particular concern. I wish to point the Commission's attention to the following in particular –
>
> 48.1 the lack of oversight by both the Board and senior management, which was mainly due to the instability at these levels;
>
> 48.2 the failure of senior management to address repeat findings over the years due to ineffective consequence management; and
>
> 48.3 ineffective year-end reporting processes, including the lack of reconciliations for significant account balances to the underlying supporting records, incorrect application of accounting standards and ineffective reviews of the financial statements due to poor financial reporting discipline. These resulted in material misstatements and poor record keeping systems that resulted in a number of limitations that were imposed on the auditors.

> 49. The combined effect of the lack of these preventative controls resulted in a regression in the audit outcome over the five-year period".

1031. Mr Godi said that SCOPA had noted the irregular expenditure:

> "Not just at PRASA but overall on an annual basis there was an increase in irregular expenditure. And what this tells you is that the compliance – the rules and regulations - they were not being followed. And it tells you that there is a progressive deterioration in financial controls and operational controls. And that is at the heart of it all because as much as Chair, we say that irregular expenditure does not mean that there was corruption but what it means is that the rules that have been put in place and the process that has been put in place have not been followed. And we always argued that those rules are not for deliberation. They are there to be followed. And whatever reason is there for not following the rules. And also taking into account that the people who are supposed to implement these rules are not just common idiots picked up in the street. These are professionals who are actually specialist in financial management.
>
> So if you find instances where there is no compliance, surely, it is a red flag. It is a warning sign." [906]

1032. It is undoubtedly correct that an exponential increase in irregular expenditure serves as a "red flag" and as a "warning sign". Yet despite this being well understood by the AGSA and SCOPA, amongst others, Parliamentary oversight proved to be unable to resolve this problem.

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[906] Day 335 pp 78-79

1033. As Mr Godi said in his evidence, SCOPA *speaks* chiefly through its reports, which are tabled before and, in the ordinary course, are adopted by, Parliament. Those reports contain recommendations as regards corrective action. For example, they request ministers to report to Parliament on specified steps taken to address particular issues within a given period.

1034. Mr Godi testified[907]:

> "Chair if you - if one looks at our resolutions, you hardly find a resolution where we are not calling for action to be taken against officials who have not complied with legislation. Because how then do you get things right, if there are no consequences? I am talking here about the accounting officer in the first instance but also the executive authority, that is the Ministers because they get all these reports and if you find that there is persistent non-compliance, surely it should be interested in what action is taken.
>
> And as has been the bane of the public sector that the people who do not comply, and action is not taken against them, or who resign from this department and then they just go to the next department as if nothing has happened, or move to a municipality or to provincial departments and that I believe, that sense of impunity, is what emboldened the looters to continue as if they have a democratic right to be corrupt."

[907] Day 335 p 42

1035. He said that non-implementation by the executive of remedial measures required by SCOPA reports remained a significant problem, right up to the end of his tenure as chair of SCOPA.[908] He said the following:

> "I believe that the lack of progress in this regard can be attributed to political dynamics, more specifically a lack of political will, within the structures of the governing party at the time, to resolve the serious problems of financial mismanagement raised both by the AGSA and SCOPA." [909]

1036. On a broad conspectus of the evidence heard by the Commission, there does seem to be merit in the view that the executive all too frequently (i) failed to ensure adherence to financial controls in the first place and (ii) was also not sufficiently responsive to Parliament's recommendations to address such concerns when they came to light.

1037. This is extremely disturbing. It implies that our country's system of financial control in respect of public expenditure became untenably ineffective.

1038. It is self-evident that an absence of such control and oversight opens the door to corruption, irregular, fruitless and wasteful expenditure and, indeed, to the possibility of another episode of state capture.

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[908] PO-01-115 to 116

[909] PO-01-117 para 6.35

1039. Regrettably it also seems clear that Parliamentary oversight, whether via SCOPA or via the portfolio committees, did not manage to resolve this problem.

PCT's ineffectiveness in addressing PRASA's seriously inadequate financial controls

1040. It is opportune to digress at this stage to refer to the Portfolio Committee on Transport's (PCT's) failure to exercise effective and constructive oversight in relation to (i) the absence of appropriate financial controls over PRASA and (ii) a multiplicity of allegations of corruption or impropriety there, going well beyond the allegations which prompted the letter from Mr Frolick to the committee's chairperson of 15 June 2017.[910]

1041. In 2012 a trade union filed a set of complaints concerning certain tenders at PRASA with the Public Protector. The essence of the complaints appears in the following excerpt of the Public Protector's report, issued in August 2015 and entitled "Derailed":

> "The essence of the complaints was that Mr. Montana, then Group Chief Executive Officer (GCEO) of PRASA, and/ or PRASA, improperly awarded tenders; appointed service providers without following proper tender processes and allowed maladministration, corruption, conflict of interest and financial mismanagement, in the procurement of goods and services and managed human resources irregularly, including nepotism and the improper handling of whistle-blowers."

[910] Addressed in para's 160 to 170 above.

1042. The report was a devastating indictment. Many of the complaints were found to have merit by the Public Protector. This much is clear from the following observations made by her:

> "The transactions investigated and related findings reveal a culture of systemic failure to comply with the SCM[911] policy, particularly involving failure to plan for bulk procurement, test the market appropriately for competitive pricing and to manage contracts, which culture may have cost PRASA millions in avoidable expenditure and preventable disruption of services.
>
> There also seems to be a culture of either poor information management or hiding of information that could provide evidence of maladministration and other forms of improper conduct. If the pattern is not arrested, it has the potential to derail the effective and efficient procurement of goods and services to support PRASA operations and consequently service delivery by this important national asset. Poor financial management also has implications for the national revenue as it may mean frequent yet preventable rescue funding."

1043. She also found it appropriate to state:

> "I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in drips and drabs and was incomplete. Despite the fact that the means used to obtain information and documents from PRASA included a subpoena issued in terms of section 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding."

1044. Some of the allegations had not yet been adequately investigated by the time of the Public Protector's 2015 "Derailed" report and a process for their investigation was

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[911] i.e Supply Chain Management

determined by her. Some of these were to be dealt with in a second report to be issued by her office. However, she directed that certain other concerns needed to be addressed by other processes. This included her direction that that the National Treasury's Chief Procurement Officer, in consultation with the PRASA board, consider commissioning a forensic investigation on all PRASA contracts or tenders above R10 million issued between 1 April 2012 and 30 June 2015.

1045. The Auditor General's report for 2014/2015, released at about the same time as the "Derailed" report[912], also raised concerns about the financial controls in place at PRASA.

1046. A new PRASA board, chaired by Mr Popo Molefe had been appointed with effect from 1 August 2014. Mr Montana ceased to be the GCEO of PRASA with effect from 15 July 2015. [913] After receipt of the Public Protector's report, the new board appointed Werksmans' attorneys to conduct a forensic investigation[914]. That investigation revealed substantial alleged malfeasance and resulted in large claims being instituted.

1047. On 8 July 2016 Mr De Freitas (who, it will be recalled, was a DA member of the PCT) referred in a letter to Ms Magadzi (the chair of that committee) to allegations in the press that the Gupta family and Mr Duduzane Zuma had attempted to rig a R51 billion PRASA tender to purchase 20 locomotives and allegedly wanted their associates to sit on the

[912] Discussed by the PCT with the AGSA on 13 October 2015 as revealing irregular expenditure in excess of R500 million – AGSA's affidavit, PO-04-871 para 61 and PO-04-884 para 91.

[913] PO-04-872

[914] Exhibit SS6 p 9 para 32

PRASA board. Mr De Freitas requested that the PCT launch an inquiry into this tender process (which he referred to as his "first attempt"). He contended that the Gupta brothers and Mr D Zuma should be called to account. (It will be noted that this was shortly after the PCPE had rejected Ms Mazzone's request to the PCPE that the Guptas (amongst others) should be summoned by that committee.)

1048. According to Mr De Freitas, Ms Magadzi failed to respond to this request, other than by saying that she would address it in due course, which she did not do.

1049. Ms Magadzi testified that she had tabled Mr de Freitas's letter before the PCT, which felt that there was no need to engage with the Gupta brothers at that particular moment. She was evasive in response to repeated questions as to whether, if the allegations in the press were true, they should have been of concern to the PCT and, if so, why the committee had not acceded to Mr De Freitas's request.[915] This culminated in the following exchange[916]:

> "**CHAIRPERSON**: Based on what you are saying, it seems to me – and I want you to comment on this – it seems to me that you would not be able to challenge a proposition that the committee had no good reasons not to take this matter up and try and establish whether these allegations were true. What do you say?
>
> **MS MAGADZI:** Chairperson, I think you are correct, probably the committee – at hindsight I would say that the committee should have done out of what was there in the newspapers but we decided to say that this, for us, we cannot be able to do and that is why I am saying at hindsight, for sure we could have done better."

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[915] Day 339 pp 43-7

[916] Day 337 pp 46-7

1050. On 11 October 2016 the committee was briefed by the AGSA *inter alia* on a mushrooming of irregular expenditure by PRASA.[917] Irregular expenditure of R4 billion had been detected in respect of 2015/2016 financial year and a further R9,8 billion in respect of earlier years.[918] It does not appear that much of value was achieved by this meeting. The PMG's note of the meeting states:

> "Members continued to complain that reports and documents had not been submitted, and that, once again, the entire Board was not present…
>
> Mr Sibande expressed concern about the low level of compliance within the leadership of PRASA as there are indeed recurring problems that had been identified by the AGSA. The Committee had requested PRASA in 2014 to provide a written plan of the Turnaround Strategy to address the AGSA recommendations and the plan on introducing the new rolling stock, but that had not been received. Again, the Committee had requested PRASA in 2015 to report quarterly on the progress that had been made in the implementation of the rolling stock, but that had also not been received. It was quite clear from the Auditor-General's Report that the problem of irregular expenditure was going up instead of going down.
>
> Dr Molefe stated that the Investigation by Hawks was linked to the Treasury but there was no estimation of the final amount to be paid for the investigators. The R100 million for Werksman's was not budgeted for and could be considered as an irregular expenditure. There had been irregular expenditure of about R14 billion over the past few years. He explained that PRASA had had a meeting with the Minister of Transport and the DG of the Department of Transport and Treasury before the start of all the investigations. Investigations that were current would be channelled through PRASA. The Hawks came into the picture as a result of the realisation that there was a criminal element in some of the cases that were being investigated. PRASA had provided the Hawks with all the required information but the Hawks had allocated only one officer to do the work. He understood the concerns of the Committee but the irregular expenditure that they were tracing was worth about R14 billion."

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[917] AGSA's affidavit, PO-04-917 para 162

[918] AGSA's affidavit, PO-04-903 para 135; PMG's PRASA report PO-02-854, which indicates that the total irregular expenditure by PRASA reported on this occasion was "R16.15 billion in 2015/6 compared to R22.231 billion in 2014/5", which included R3.211 billion to Siyangena Technologies".

1051. Multiple long-standing allegations of procurement related irregularities associated with the former CEO's term of office remained unresolved. At the same time a counter-narrative also emerged, alleging malfeasance by the new board, particularly in respect of the manner in which Werksmans' attorneys had been appointed, Werksmans' fees and the fees paid to board members for their services.

1052. According to Mr Molefe, the committee focussed on trying to find wrong-doing with the investigations commissioned by the board and gave the impression that the looting of the public purse and holding those responsible for such looting accountable was not important to them.[919] This view seems to be borne out, at least to some extent by the PMG's report[920] and de Freitas's report, for example, his summaries of the meetings of the committee on 11 September 2015, 8 March 2016, 18 July 2016 and 7 to 8 March 2017.[921]

1053. On a conspectus of the evidence[922] it seems fair to say that the ANC members of the PCT showed most concern about the "counter narrative" allegations; as well as what they saw as an unfounded allegation allegedly made by Mr Molefe that R80 million paid by PRASA to a contractor had found its way to the ANC's coffers.[923] More emphasis

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[919] Exhibit SS6 para 111

[920] PO-02-845-7, 850-1, 852-5,856-859

[921] PO-03-374-5;,378-9, 381-4 and 387-392.

[922] See e.g. the PMG's "PRASA" report, exhibit ZZ8.2, PO-02-833 and ff, particularly from pp 845 to 867; De Freitas's submission, exhibit ZZ12, PO-03-306 and ff, particularly from pp 372 to 421; affidavit of Mr P Molefe, exhibit SS6, para's 101 to 112, particularly para's 108 to 111

[923] See the newspaper report at dated 26 August 2016 at PO-02-849, raised (inter alia) at the PCT's meeting of 31 August 2016 – PO-02-853

was placed on this than on the massive irregular expenditure, the findings of the Public Protector and the progress of the Werksmans' forensic investigation.

1054. A second attempt by Mr De Freitas to get the committee to launch an enquiry regarding PRASA (it will be recalled that he had made a first attempt in this regard on 8 July 2016) seemed initially to be more successful. At a meeting of the committee on 8 to 9 March 2017, in which the hostility of committee members to Mr Molefe's board came to a head but at which other concerns about PRASA were also expressed, the committee at last resolved to conduct an inquiry into the affairs of PRASA.[924] However, the Minister had immediately after that meeting dismissed the PRASA board and, according to Mr De Freitas, the committee at its next meeting, on 14 March 2017, reversed its decision to conduct an inquiry.[925]

1055. Ms Magadzi testified that Mr De Freitas's evidence that the committee reversed its decision at its next meeting was not correct and that the committee still believed that it needed to continue with the inquiry.[926] She said that the reason why the inquiry had not proceeded was that the committee had had to deal with three pieces of legislation as well. In other words, she was saying that the Committee was too busy with the three pieces of legislation.

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[924] Day 337 pp 159-60 (De Freitas); Day 339 p 65 (Magadzi)

[925] Day 337 pp 161-6

[926] Day 339 p 71

1056. The detailed notes of the meeting of 14 March 2017 produced by the Parliamentary Monitoring Group (PMG)[927] record at least three ANC members asserting that the inquiry was no longer required in view of the Minister's decision to dismiss the board. The notes reflect Ms Magadzi as recommending that the committee suspend the inquiry until members had heard from the Minister. The notes do not show that the committee ever reverted to a discussion of the inquiry or proceeded with the inquiry previously agreed upon.

1057. In any event, it is clear on all the evidence that the enquiry agreed upon at the meeting of 7-8 March 2017 did not, as a matter of fact, take place.

1058. It will be recalled that Mr Frolick's letter to Ms Magadzi requesting an inquiry by the PCT into state capture allegations related to PRASA was dated 15 June 2017. The commission has already found that that letter did not result in any inquiry.

1059. However, the committee was persuaded at a meeting held on 20 February 2018 (pursuant to what Mr De Freitas referred to as his "third attempt"). At that meeting it resolved to conduct an enquiry into malfeasance at PRASA, in terms of NA rule 227(1)(c).[928] Terms of reference were agreed. They included the following:

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[927] PO-02-857

[928] Day 337 pp 179-181

> "1. The inquiry will investigate governance, procurement and the financial sustainability of PRASA. The inquiry will look into amongst others:
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> PRASA
>
> i. Appointment of permanent Board members and executive management;
>
> ii. Alleged procurement irregularities as indicated in the Public Protector Report (Derailed929), as well as allegations made of procurement
>
> irregularities with regard to the Modernisation, as well as Rolling Stock Projects dating back to 2012;
>
> iii. Allegations of impropriety regarding PRASA's current Acting Group CEO, as well as past Group CEOs dating back to 2012;
>
> iv. Financial stability of PRASA;
>
> v. Allegations of interference, irregular conclusion of agreements with labour and mismanagement by the National Executive of PRASA in the operations and management of Regional Offices;
>
> vi. Review the role of Department of Transport in accordance with section 38 of PFMA: …
>
> vii. Consider Werksman appointment process and scope feasibility
>
> viii. Any other related matters."

1060. A programme of dates for the hearings was subsequently agreed, the intention being to start the hearings on 1 May 2018 and conclude them on 26 October.

1061. Yet again, nothing came of this. The agreed dates for the commencement of the hearings came and went without, for a considerable period, any indication to opposition-party members of the PCT like Mr de Freitas as to what had become of the agreed-upon

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[929] The Public Protector had issued a report entitled "Derailed" in 2015 which found large-scale procurement malfeasance within PRASA.

inquiry. Eventually, so he testified, he was told that the busy legislative program was the reason for not proceeding.

1062. It will be recalled that's Ms Magadzi invoked the legislative program as an excuse for not having proceeded with the enquiry she admitted had been decided upon in March 2017. The evidence as a whole, including the that of Mr De Freitas and the PMG's report, seems to show that that excuse was not proffered until well after the decision to conduct an inquiry taken on 20 February 2018, i.e. almost a year later.

1063. It is hard not to conclude that the truth of the matter is that the majority of committee members simply had no wish to conduct an enquiry, nor any will to get to the bottom of serious allegations concerning PRASA, despite the dire state of PRASA's affairs. They had an adequate opportunity to do so, if they wished to do so, even if one gives due regard to their other responsibilities.

1064. Even if it should be thought they did have *the will* to exercise due oversight, it is indisputable that the PCT proved itself to be ineffective in holding the executive to account as regards addressing PRASA's manifold problems.

1065. In this regard, two further aspects need to be noted:

1065.1. First, despite the ever-accelerating irregular expenditure at PRASA, the Portfolio Committee never managed to implement measures – or cause measures to be implemented - which resulted in a stemming of this flow. As referred to earlier, PRASA's irregular expenditure increased, according to the draft affidavit from the AGSA and evidence referred to therein, from R15,3 billion in the 2015/2016 financial year to R20,3 billion in the 2016/2017 financial year to R24,2 billion in the 2017/2018 financial year.

1065.2. Second, this failure was linked to (amongst other things) the Minister's failure to have a quorate board in place at PRASA for extended periods[930] – a matter of obvious and fundamental concern, about which the Portfolio Committee took no effective steps. In consequence, PRASA was unable even to produce annual financial statements in respect of the 2016/2017 financial year, these only being made available to Parliament on 17 October 2018. The Portfolio Committee had been informed at its meeting on 24 November 2017 that the non-existence of a quorate board had precluded the finalisation of the required financial statements and yet it seems not to have taken any steps to have this issue addressed.[931]

1066. The PCT failed to exercise effective oversight in respect of PRASA, notwithstanding the manifest ongoing crises within PRASA. Its attempt to justify this on the basis of its heavy legislative work cannot be accepted. [932]

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[930] See e.g PO-04-923 to 925 table 5

[931] PO-04-974 para's 196-7 (AGSA). The 2017-8 report and the 2016-7 report were discussed with the committee on 10 October 2018. The Parliamentary Oversight workstream of the Commission did not focus much on events subsequent to the commencement of hearings by the Commission and the Commission has accordingly not applied its mind to the adequacy of the committee's reaction to the increases in irregular expenditure revealed to it in October 2018.

[932] In relation to the Road Accident Benefit Scheme, which on the evidence of Mr De Freitas should not have been the priority (the legislation concerned has since been scrapped). See e.g.PO-03-424 and 430. Ms Magadzi's evidence to the contrary was not convincing.

1067. In fact, the failure by that Committee to do its job is completely unacceptable.

The Joint Standing Committee on Intelligence

Legislative background

1068. Section 198(8) of the Constitution provides:

> "To give effect to the principles of transparency and accountability[933], multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament."

1069. The Intelligence Services Oversight Act 40 of 1994 (the Oversight Act) is national legislation which establishes a parliamentary committee, to be known as the Joint Standing Committee on Intelligence (JSCI) and determines the manner in which it is to have oversight over the security services. The JSCI is required to perform the oversight functions set out in that Act in relation to the intelligence and counter-intelligence functions of the State Security Agency (SSA), the National Defence Force (SADF) and the South African Police Service (SAPS) and to report thereon to Parliament.[934]

1070. The Oversight Act also provides for the appointment of an Inspector-General of Intelligence (IGI), accountable to, and required to report to, the JSCI.[935] The IGI's

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[933] Section 1(d) of the Constitution entrenches as foundational values "(u)niversal adult suffrage, a national common voters role, regular elections and a multi-party system of government, to ensure accountability, responsiveness and openness".

[934] Section 2

[935] Sections 7(1) and (6).

functions in terms of the Oversight Act include to monitor compliance by the security services with the Constitution, applicable laws and relevant policies[936] and to submit certain "certificates" to relevant ministers. [937]

1071. These certificates are central to the scheme of the Oversight Act to address unlawful activities which may occur within the intelligence services.

1072. Section 7(11)(b) of the Oversight Act provides as follows:

> "
>
> (i) Each Head of a Service shall report to the Inspector-General regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure.
>
> (ii) Each Head of a Service shall submit the report referred to in subparagraph (i) to the Inspector-General within a reasonable period after such unlawful intelligence activity or significant intelligence failure came to his or her attention."

1073. Section 7(11)(c) provides as follows:

> "As soon as practicable after receiving a copy of a report referred to in paragraph (a), the Inspector-General shall submit to the Minister responsible for the Service in question, a certificate stating the extent to which the Inspector-General is satisfied with the report and whether anything done by that Service in the course of its

[936] Section 7(7) (a),

[937] Section 7(7)(d)

activities during the period to which the report relates, in the opinion of the Inspector-General-

(i) is unlawful or contravenes any directions issued by the Minister responsible for that Service; or

(ii) involves an unreasonable or unnecessary exercise by that Service of any of its powers."

1074. Section 7(11)(d) provides as follows:

"As soon as practicable after receiving a report referred to in paragraph (a) and a certificate of the Inspector-General referred to in paragraph (c), the Minister responsible for the Service in question shall, subject to section (4) (2)[938], cause the report and certificate to be transmitted to the Committee."

1075. The oversight functions which section 3 of the Oversight Act requires the JSCI to perform include to consider and make recommendations on the report and certificate from the IGI transmitted to it in terms of s 7(7)(d)[939].

1076. The oversight functions of the JSCI also include:

[938] Which provides that a Service shall not be obliged to disclose to the Committee certain information including the name or identity of any person or body engaged in intelligence or counter-intelligence activities, information which could reveal the identity of the source of intelligence and any intelligence or counterintelligence method which could reveal the aforegoing.

[939] Section 3(b). Section 7(7)(d) includes amongst the functions of the IGI to submit the certificates contemplated in section 7(11)(c) to the relevant ministers.

1076.1. to obtain and consider audit reports from the Auditor General and to report thereon to Parliament [940];

1076.2. to deliberate upon, hold hearings, subpoena witnesses and make recommendations on any aspect relating to intelligence and the national security, including administration and financial expenditure [941]; and

1076.3. to report to Parliament (within five months after its first appointment, and thereafter within two months after 31 March in each year) on its activities during the preceding year, together with the findings made by it and the recommendations it deems appropriate.[942]

1077. The statutory scheme as regards unlawful conduct by the intelligence services is therefore as follows:

1077.1. The head of service is obliged to report to the IGI regarding (*inter alia)* any unlawful intelligence activity, as well as corrective action taken or to be taken in respect thereof.

1077.2. The IGI is obliged to furnish a certificate to the minister concerned disclosing his/her satisfaction or dissatisfaction with the above report as well as whether anything unlawful (*inter alia)* has taken place.

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[940] section 3(a)

[941] Section 3(j)

[942] Section 6(1)

1077.3. The minister must convey both the head of service's report and the IGI's certificate to the JSCI.

1077.4. The JSCI must consider and make recommendations on the report and certificate.

1078. Whilst there is no reason why the JSCI should not furnish its recommendations to the head of the service or minister concerned, its primary duty is to serve as a watchdog on behalf of Parliament. It should report its concerns and recommendations to Parliament. It must however do so in compliance with the secrecy provisions in the Act, which include sections 5 and 6(3).

1079. Section 5 provides:

> "(1) The Committee shall discharge its function in a manner consistent with national security.
>
> (2) No person shall disclose any intelligence, information or document the publication of which is restricted by law and which is obtained by that person in the performance of his or her functions in terms of this Act, except
>
> (a) to the extent to which it may be necessary for the proper administration of any provision of this Act;
>
> (b) to any person who of necessity requires it for the performance of any function in terms of this Act;
>
> (c) with the written permission of the chairperson, which permission may be given only with the concurrence of the Head of a Service and the Inspector General;
>
> (d) as prescribed by regulation."

1080. Section 6(3) provides:

> "Nothing shall be included in any report of the Committee, the inclusion of which will be more harmful to the national security than its exclusion will be to the national interest."

The issue of concern: has the JSCI been ineffective?

1081. As appears elsewhere in this report, there is evidence of abuse of the intelligence services, both financially and politically.

1082. The issue presently of concern to the Commission is whether the JSCI has been shown to be ineffective in performing its oversight duties in respect of such abuse.

1083. In summary the Commission has concluded that, whist the evidence available to it is limited and incomplete, there is nonetheless reason to be concerned that it has not been effective.

Dr Dintwe's evidence

1084. Dr Setlhomamaru Issac Dintwe was appointed by the National Assembly as IGI in November 2016 and assumed office in March 2017.

1085. He made available to the Commission redacted versions of (amongst others) certificates which had been made available to the JSCI in respect of the SSA, the SADF (Defence Intelligence) and the SAPS (Crime intelligence) for the years 2017/17, 2017/18 and 2018/19.[943]

1086. The first set of certificates he issued in terms of section 7(7) of the Oversight Act related to the year ending March 2017 (2016/17). The certificate pertaining to the SSA for that period made clear that it also catered for certain "current issues" and "raises concerns which were prevalent at the date of its completion, more particularly, matters pertinent to compliance with the regulatory framework".[944] It appears from events referred to (and not referred to) in this certificate, that it was only finalised in or about February 2018. It is not clear when it was first drawn to the attention of the JSCI and/or its chairperson but this would probably have been between February and April 2018.

1087. One concern raised in this certificate stands out. It is summarised as follows:

> "In a nutshell, the SSA resisted oversight and denied me access to information as prescribed by our establishing Act. … The main culprit is the Cover Support Unit that never availed any requested information. To date, I do not have the appreciation of what is happening in that Unit…. In general, the SSA is undermining the OIGI and consequently the Constitution of this country…. In a nutshell, the DG of the SSA has made it impossible for the OIGI to fulfil its legislative mandate."[945]

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[943] Annexures SD 20 to 22 to his affidavit, exhibit YY 15, which Dr Dintwe caused to be declassified to enable this evidence to be produced to the Commission.

[944] Page 2 of Annexure SD 21 to Dr Dintwe's affidavit (exhibit YY 15.1, SSA-02-774 and ff)

[945] pp 47-8 of the 2016/17 certificate referred to above

1088. Matters deteriorated to the extent that, in April 2018, Mr Fraser revoked Dr Dintwe's security clearance. He brought an urgent court application for reinstatement of his security clearance. The Minister[946] intervened and the security clearance was reinstated.

1089. In the IGI's certificate in respect of the SSA for 2017/2018, he stated that that year "was the most trying for the OIGI"[947] in which "my Office and I were under constant attack from the SSA. These attacks included having members of my Office being followed and receiving threats. Some of these threats were made against me in meetings." Examples were then given.[948]

1090. Dr Dintwe told the Commission in his evidence about the improper use of cash[949]; unimplemented recommendations made by his predecessor in earlier certificates[950]; unaddressed concerns expressed about PAN 1 referred in certificates[951]; concerns about unimplemented control measure recommendations[952], theft of monies from the intelligence services (in some instances used to fund parallel intelligence capacities and to achieve political ends and/or to fight factional battles)[953], inadequate accounting for

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[946] Ms Dipuo Letsatsi- Duba was the Minister at the time, having been appointed to this position by newly appointed President Ramaphosa on 26 February 2018.

[947] Office of the Inspector General of Intelligence

[948] Dintwe affidavit, annexure SD 20 at p 366

[949] Dintwe day 393 pp 36, 51, 53

[950] Dintwe day 393 pp 41-2

[951] Dintwe day 393 pp42-3

[952] Dintwe day 393 p 51

[953] Dintwe day 393 p 99

monies, looting, improper use of monies for factional purposes, all of which he said were referred to in his certificates[954] and none of which, so he said, the JSCI did anything about.[955]

1091. According to Dr Dintwe, he could "confidently say" that oversight by the JSCI (during the 2014-2019 parliament) was "never adequate".[956] He said that "our recommendations are just being ignored willy nilly".[957] He said that he did not think that any legislature would intend to put so much money into an organisation like his office and then to have its recommendations just ignored.[958]

1092. The following exchange summarises his evidence:

> "**CHAIRPERSON**: But somehow it seems that even though different members of that committee may be aware including members of opposition parties serving on that committee, may be aware of the problem, it looks like they cannot get action to be taken by the committee because, from what you have said, it looks like no action seems to have been evident or seems to be taken that is effective. At least, if anything has been done, it seems not to have been effective, but you cannot tell what it is that may have been done.
>
> **DR DINTWE:** That is my submission, Chairperson."[959]

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[954] Dintwe day 393 p 57. In this context the terms "certificates" and "reports" are used interchangeably

[955] Dintwe day 378 pp 352-3; day 393.

[956] Dintwe day 393 p 37.

[957] Dintwe day 393 p 42

[958] Dintwe day 393 p 45.

[959] Dintwe day 393 p 56

1093. He said that recommendations made and reports produced by the OIGI are largely ignored by the Ministry, the Directors General of the intelligence services and the JSCI.[960] He made the point that, where the accounting officers concerned have not implemented the IGI's recommendations and reports, the JSCI ought to exercise oversight, in addition to the Ministers' superintendence role.[961]

Mr Jafta's evidence

1094. Mr Loyiso Jafta, who served as Acting Director General of the SSA from 17 April 2018, expressed the view that oversight by the JSCI had been "uneven and ineffective"[962] and that it lacks necessary research capacity.[963] He was not pressed to go into much detail regarding this when testifying.

The High-Level Review Panel's report

1095. In June 2018 President Ramaphosa set up a High-Level Review Panel on the State Security Agency (HLRP), chaired by Dr Sydney Mufamadi. The key objective for the establishment of the panel was to enable the reconstruction of a professional national

[960] Dintwe day 393 pp 102-3

[961] Dintwe day 393 p 104

[962] Jafta day 331 p 68

[963] Jafta day 331 p 97.

intelligence capability for South Africa that would respect and uphold the Constitution and the relevant legislative prescripts.[964]

1096. The Panel completed its work in December 2018. Its report made the following observations (amongst others):

> "...The Panel did have sight of a number of IGI reports on abuses, such as the report on the Principal Agent Network and others which did indeed identify problems and recommended corrective action. But as far as the Panel could ascertain, no action of consequence management took place in response to the IGI's reports.
>
> ...
>
> However, it did seem to the Panel that the JSCI played little role in recent years in curbing the infractions of the SSA and that no effective oversight on its part was carried out. In fact it would seem that the Committee, with an ANC majority, was itself affected by the politicisation and factionalisation seen in the ANC, in Parliament, in the intelligence community and in the other arms of government.
>
> The JSCI over the past few years has been largely ineffective and impacted by the factionalism of the ANC.
>
> …
>
> The Committee is divided and unable to articulate a coherent collective response on the state of intelligence in the country.
>
> …
>
> The absence of / changes to the Chair of the Committee coupled with a lack of institutional memory has contributed to the dysfunctionality of the JSCI." [965]

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[964] As noted at page 1 of its report

[965] Pages 94 -97

Responding affidavits from members of the JSCI

1097. Dr Dintwe's evidence was heard at a late stage of the Commission's oral hearings[966] and at a time when the Commission was trying to curtail the hearing of further oral evidence. The Chairperson of the Commission therefore issued notices, under Reg 10(6) of its Regulations, to several former members of the JSCI, directing them to furnish affidavits responding to the above allegations.

1098. Affidavits were received from Ms Cornelia ("Connie") Carol September, an ANC MP who, according to her affidavit, served as chairperson of the committee from August 2014 to "about May 2016", after which she ceased to be a member of the committee; Mr Charles Nqakula, an ANC MP who served as a member of the committee from 14 August 2014 and as chairperson thereof from 14 September 2016 until he left Parliament to assume other duties on 15 June 2018[967]; Mr Dennis Dumisani Gamede (an ANC member of the committee from 2014 to 2019) and Mr Hendrik Cornelius Schmidt (a DA member of the committee from 2014 to 2019).

<u>Reports of the JSCI to Parliament</u>

[966] On 20 and 21 April 2021

[967] Affidavits received state that Mr Amos Masondo was appointed as chairperson sometime after Mr Nqakula ceased to hold that position, though the date on which he was appointed was not disclosed. It appears however that there was a substantial period before his appointment in which there was no chairperson.

1099. Section 6(1) of the Oversight Act provides that the JSCI must report to Parliament within five months after its appointment and thereafter within two months after 31 March in each year.

1100. The above affidavits and an affidavit from the former Speaker, Ms Mbete[968], show that, during the Fifth Parliament, the JSCI tabled its initial report to Parliament on 25 February 2015, followed by reports (generally produced well out of time required by the Oversight Act) in respect of the years ending 31 March 2015, 2016, 2017 and 2018.[969].

1101. No report at all was submitted in respect of the year ending 31 March 2019. Ms Mbete, who was the Speaker at the time, gave evidence that she had been advised that this was due to the transition from the Fifth Parliament to the Sixth Parliament.[970] The Commission notes that the report was due by the end of May 2019 and that the 2019 general elections were held on 8 May 2019. It may therefore be that the failure to report on this year by the end of May 2019 is attributable to the transition between Parliaments. On the other hand, the very fact that the election was known to be imminent could be seen as a reason why the committee should have reported before the election took place.

1102. The appointment of the Sixth Parliament's JSCI was delayed and only took place[971] on 30 October 2019. In terms of section 6(1) of the Oversight Act, it should have filed its initial report within 5 months of its appointment, i.e. by 30 March 2020. It only did so on

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[968] Supplementary affidavit by Ms Mbete dated 30 May 2021**,** exhibit ZZ16 PO -05(a) 981 and ff, para's 6 to 13.

[969] The 2014-15 report was tabled in Parliament on 26 January 2016; the 2015-6 report was tabled on 13 December 2016; the 2016-17 report was tabled on 31 October 2017; and the 2017/18 report was tabled on 12 December 2018.

[970] Supplementary affidavit by Ms Mbete dated 30 May 2021 *(supra*) para 14.

[971] According to its reports to be referred to below.

27 October 2020.[972] Because of the Covid lockdown Parliament suspended its business from 19 March 2020 and this explains, at least in part, the delay in preparing and submitting the initial report.

1103. The initial report comprises an interim report on the new committee's first activities[973] and did not cover the year ending 31 March 2019, which preceded its appointment. There has thus been no report to Parliament (whether by the previous or present JSCI) on the year ending 31 March 2019, even though that period ended more than a month before the May 2019 elections.

1104. This is not a satisfactory situation. It is likely to arise in respect of many Parliaments. It is essential for Parliament to receive a report on the intelligence services in respect of every financial year and that this should not simply "fall through the cracks" in respect of the last year of a given Parliament. The Commission is therefore of the view that section 6(1) of the Oversight Act requires amendment so as to ensure that, before an election, the outgoing JSCI is required to report to Parliament on as much as possible of the period preceding the election.

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[972] ATC201111: Report of the Joint Standing Committee on Intelligence on Activities of the Committee after five Months of Establishment, as Stipulated in the Intelligence Services Oversight Act, No. 40 of 1994, Dated 27 October 2020

[973] The report reveals that the JSCI held quite a few meetings between November 2019 and March 2020, as well as special meetings, despite the Covid lockdown, in August and September 2020.

1105. The JSCI appointed for the Sixth Parliament should have filed its first annual report, i.e. its report dealing with the year ending 31 March 2020, by the end of May 2020. It failed to submit this report on time, once again breaching section 6(1) of the Oversight Act. It only tabled its first annual report on 13 September **2021** (i.e. about 15 months late), when it reported both on the year ending 31 March 2020 and on the period up to December 2020. Though reference was made in the report to the difficulties cause by COVID-19, no adequate explanation was given in the report as to why it was so late or why it had chosen (in breach of the Oversight Act) to combine its report on the year to 31 March 2020 with a report on the period up to December 2020.

1106. By the time this report was tabled, a report on the financial year ending 31 March 2021 was already overdue, having been due by the end of May 2021. The committee therefore committed a further breach of section 6(1) of the Oversight Act by not reporting timeously on the full year ending 31 March 2021. That is unacceptable. The Commission is not aware that this breach has, even now, been remedied.

1107. Whilst it is true that the COVID-19 lockdowns adversely affected the JSCI's ability to carry out its duties timeously, this does not in the Commission's view excuse the extent of the delays and failures to adhere to the requirements of section 6(1) of the Oversight Act out lined above.

<u>Ms September's affidavit</u>

1108. In her affidavit, Ms September correctly points out that Dr Dintwe's certificates relate to periods after she had ceased to chair the JSCI and she says that she can therefore not comment on them.

1109. As to the allegations regarding the Principal Agent Network (PAN) programme, she says that, without access to classified material which is not at her disposal, she is unable to respond to this issue. She says, however, that one of the recommendations in the JSCI's 2015 report was for the JSCI and SSA to address challenges related to companies owned by former intelligence officers.

1110. She also makes the point that Mr Arthur Fraser - who was the primary subject of core complaints raised by Dr Dintwe - was appointed as DG of the SSA in or about September 2016, after she had resigned from the JSCI.

Mr Nqakula's affidavit

1111. In his affidavit, Mr Nqakula emphasised the secrecy obligations on members of the JSCI, particularly those imposed by section 5 of the Oversight Act.

1112. As regards the IGI's certificates referred to above[974], Mr Nqakula's response was that the JSCI "had advised the IG of the correct procedure protocol of handling the certification", in terms of ss 7(7)(d), (e) and (f)[975], which enjoins him to submit the certificates to the relevant ministers and to the JSCI.[976] He said that the IGI had "left out the Ministers in his mailing list. That caused a lot of friction between him and the Ministers". He said that, to the best of his recollection, the IGI did not revert to the JSCI

[974] i.e. Annexures SSD 20, 21 and 22 to Mr Dintwe's affidavit.

[975] Presumably read with s 7(11), which provides that the certificate must be submitted to the minister concerned who shall cause it to be submitted to the JSCI

[976] Para 25 of Mr Nqakula's affidavit

regarding this issue until his departure from Parliament on 15 June 2018. [977] (It is noted in passing that there appears to have been a substantial period between Mr Nqakula's departure and the appointment of the next chairperson, Mr Masondo.)

1113. Mr Nqakula also said:

> "I confirm that the JSCI received the report from the Principal Agency Network ("PAN") and that the Committee engaged with the report at one or more of its meetings".[978]

1114. Like all the members of the JSCI to whom Reg 10(6) directives had been issued, Mr Nqakula was asked to state in his affidavit (*inter alia*) whether:

> "1.7 you confirm or deny that during the relevant period the JSCI received a report or reports, whether from the Inspector General of Intelligence (IGI) or from any other source, on an investigation or investigations into the Principal Agent Network (PAN) and, if you admit that the IGI did receive such report or reports, you state the following:
>
> 1.7.1 from whom such report or reports were received
>
> 1.7.2 when such report or reports were received
>
> 1.7.3 whether such reports disclosed criminal conduct, or conduct reasonably suspected of being criminal, on the part of any person
>
> 1.7.4 if so:

[977] Para's 25-29

[978] Para 30

(a) whether the JSCI revealed to Parliament (or to any other entity or person) that such information had come to its attention (and if not, why not)

(b) what steps, if any, the JSCI took (or recommended to Parliament that it should take) to ensure that such criminal conduct was referred to the appropriate authorities for the prosecution of any person reasonably suspected of being guilty of such conduct

(c) if no such steps were taken, or recommended why they were not taken or recommended

1.8 you state whether you admit or deny that during the relevant period the IGI, or any other person or entity, brought any or all of the following to the attention of the JSCI and/or of yourself in your capacity as chairperson of the JSCI:

1.8.1 that Mr Arthur Fraser (Mr Fraser) was believed to be implicated in material irregularities and/or unlawful conduct in relation to the PAN

1.8.2 that Mr Fraser had resigned after the above had come to light and that the investigation into irregularities and/or unlawful conduct in relation to the PAN had thereafter dissipated or been halted

1.8.3 that Mr Fraser had subsequently been appointed as director general of the SSA, without his name having been cleared in respect of the allegations above

1.8.4 that the SSA (including but not limited to Mr Fraser, as its director general) was refusing to co-operate with and/or to subject itself to oversight by the IGI and thereby (i) undermining the office of the IGI and consequently (ii) undermining the Constitution

1.8.5 that there was a prevalence within the State Security Agency (SSA) of fraud and theft cases involving large sums of cash

1.8.6 that financial controls within the SSA were avoided or ignored

1.8.7 that secrecy and classification were being used as a cloak to hide criminality

1.8.8 that the SSA had become politically motivated, contrary to the requirement under the Constitution (see s 199(7)) that the security services should not prejudice any political interest that is legitimate or further in a partisan manner any interest of a political party.

1.9 if the answer to any of the questions in para 1.8 above is in the affirmative, you state in relation to each issue:

1.9.1 what steps, if any, you and/or the JSCI took or recommended to Parliament that it should take to address such issue

> 1.9.2 if no such steps were taken, or recommended or if such steps as were taken or recommended were not adequate and effective, why such steps were not taken or recommended or why such steps as were taken or recommended were not adequate and effective."

1115. Mr Nqakula's answer to all of this was that "(t)he information and details requested in these paragraphs is classified as confidential and thus cannot be divulged."[979] The Commission will consider below whether this was an adequate and acceptable answer.

1116. In response to the question as to whether, in Mr Nqakula's view, the JSCI reports submitted to Parliament in respect of the years ending 31 March 2017 and 2018 adequately addressed the issues reported to the JSCI by the IGI, the essence of his reply was that the annual report submitted to Parliament "does not provide details of the work that relates to confidentiality".[980]

1117. Like others, Mr Nqakula was also requested to provide an affidavit in which:

> "1.13 you state whether you admit or deny (and, to the extent that you wish to do so, you comment further on) the following allegations made by Mr S Dintwe, the IGI, in his testimony to the Commission:
>
> 1.13.1 that the JSCI did not take any action in response to reports submitted by the IGI (day 378 pages 352-3)
>
> 1.13.2 that the IGI's recommendations to the JSCI were "just being ignored willy nilly" (day 393 page 42)

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[979] Para 31

[980] Para 33

> 1.13.3 that the observation by the Chairperson of the Commission, based on his testimony, that "if anything has been done, it seems not to have been effective" was his submission (day 393 page 56)
>
> 1.13.4 that no member of the JSCI could claim ignorance of problems raised in his testimony, summarised by the evidence leader as "the impropriety, the illegalities, the loss of monies, the looting that you have spoken about, the improper use of monies in factional battles" all of which were in his reports (day 393 page 151)
>
> 1.13.5 that recommendations made and reports produced by the Office of the IGI are largely ignored by the Ministry and Director Generals and equally by the JSCI (day 393 pages 102-3)"

1118. His response[981] was that the JSCI had made a case, in its December 2018 report[982], for the reconstruction of the state security agencies given the many weaknesses within the entity which the JSCI became aware of, but that the inner workings of the Committee could not be revealed.

1119. Asked to comment on the various criticisms of the effectiveness of the JSCI made in the passages from the HLRP quoted above, his response was that the recommendations made by the HLRP were informed by the findings of the JSCI. He said that it was "simply disingenuous and opportunistic to blame the ANC and the purported factionalism within the JSCI, as contributing to unsubstantiated grounds for its purported ineffectiveness" and said that he could only account for the 21 months period in which he was the chairperson of the JSCI.[983] He added that the suggestion that the Committee is divided and unable to articulate a coherent and collective response to the state of intelligence

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[981] Para's 35 to 37

[982] This is not clear but it may be a reference to the JSCI's report tabled in Parliament in December 2018 in respect of the 2017-2018 year.

[983] Para's 38 to 39

in the country "is unfortunate for its lack of appreciation of the law". He said that the JSCI had made meaningful contributions to the President and Parliament.

Mr Gamede's affidavit

1120. Mr Gamede said in his affidavit that in his experience the committee is unable to function without a chairperson and that, as a matter of fact, it did not function in periods when there was no chairperson. This included the period after Mr Nqakula stepped down until Mr Masondo was appointed to replace him.

1121. He said that the reason no report was furnished in respect of the financial year ending 31 March 2019 was the delay in appointing a chairperson to replace Mr Nqakula. [984]

1122. As regards the concerns raised in Dr Dintwe's reports, he said that these were raised by the Committee with the relevant ministers.

1123. He said that Dr Dintwe had raised with the committee the breakdown of his working relationship with the then DG, Mr Arthur Fraser. He said that the JSCI had discussed this matter with President Ramaphosa and that Mr Fraser had, as a consequence, been transferred to a position outside the intelligence agencies. He said that intervention from the JSCI had contributed to Dr Dintwe's security clearance being reinstated.

1124. Mr Gamede accepted that Dr Dintwe had raised concerns about long-outstanding allegations of criminal conduct linked to the PAN network, including but not limited to allegations concerning Mr Fraser. The JSCI had requested and received a briefing on this from Minister Cwele.[985] The Minister informed the committee that the HAWKS were still investigating these allegations. The committee took the view that this was the

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[984] Para 7.

[985] Mr. Siyabonga Cwele served as Minister of State Security from 2009 to 2014.

appropriate manner for this issue to be dealt with.[986] Generally speaking he defended the steps taken in response to the IGI's concerns though he added that: "Perhaps they might not have been enough". [987]

1125. Mr Gamede also said the following:

> "Most if not all problems raised by the IGI were also raised by other structures like the Auditor General. The JSCI could only recommend for action 1,2,3. The implementation was/is with the accounting officer or the political head."[988]

1126. As regards the criticisms levelled by the HLRP's report, Mr Gamede said that it was the JSCI which had recommended that panel's appointment. He disputed almost all of the criticisms of the JSCI in the report.

1127. However, in response to the report's assertion that the Committee was "divided and unable to articulate a coherent collective response on the state of intelligence in the country", his entire response - without explanation - was "I agree".[989]

Mr Schmidt's affidavit

1128. In his affidavit, Mr Schmidt's said that the certificates from Dr Dintwe in respect of 2018-19 would only have been submitted to the committee after termination of his membership of the committee in May 2019. He could not recall whether the certificates for the preceding two years (2016-17 and 2017-19) had been produced in the (redacted) format

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[986] Para 9; see also para 29.

[987] Para 12.1.

[988] Para 37.1.

[989] Para 43

later disclosed to the Commission but said that certificates submitted by the IGI were submitted to the committee without reference to the names of intelligence operatives, methods used and organisational weaknesses, as testified by Dr Dintwe.

1129. He said that:

> "Of significant concern is the strong presumption which existed with members of the JSCI during the relevant period (at least with certain members) that the Minister of the SSA and the Chairperson of the JSCI controlled the information served before the JSCI. This pre-supposes that the Chairperson and the Minister of the SSA had the necessary authority to prevent information being provided to the SSA, which is not in accordance with the legislation nor the Constitution. It is, therefore to be expected that as a consequence, oversight over the Services by the JSCI would be negatively affected by not having access to information it deemed relevant, but which was left to the discretion of other authorities to determine what was relevant or not concerning the Services in particular.""

1130. As to the adequacy of the Committee's reports to Parliament, he said:

> "The JSCI reports to Parliament by submitting its annual reports. All concerns raised during its deliberations out to have been provided to parliament via this reporting mechanism.
>
> When the content of the IGI certificates for 2016/2017 is compared to the annual reports of the JSCI for the same financial year, the lack of accountability to Parliament is indicated. It appears that limited information was provided to Parliament on the issues discussed by the JSCI … Although a measure of sensitive information will need to be withheld from Parliament, and therefore the public, the gist and gravity of the issues were not indicated to Parliament."

1131. He could not recall whether the JSCI had submitted an annual report for 2017-2018. He said that he would not know whether a report had been submitted for 2018-2019 as this would have been dealt with by the committee which replaced the committee of which he had been a member (whose term office expired in May 2019).

1132. As regards the JSCI'S task of considering and making recommendations on the reports and certificates submitted by the IGI, he said that the recommendations of the JSCI "…were indicated primarily in closed committee sessions to the IGI and various services after conclusion of the closed committee briefings to the Committee".

1133. He said that conduct alleged to be criminal that was brought to the attention of the committee "was always indicated by the Services and/or relevant organisation as being subject of an investigation(s)" and that the task of referring alleged criminal matters to the appropriate authorities was "left to the different Services".

1134. He said that the JSCI on which he served had received a report on a previous investigation during the term of the previous JSCI (2009-2014) into the Principal Agent Network (PAN), despite "certain members, in particular ANC members" not wanting the PAN report to be discussed by the JSCI. At approximately the same time the IGI had reported to the JSCI on the PAN investigation. Both these reports had directly implicated the then director-general of the SSA, Mr Arthur Fraser, in alleged activities which, if proven to be true, constituted serious criminal conduct. They also alleged a prevalence within the SSA of fraud and theft of large sums of cash.

1135. He said that the JSCI was also informed by Dr Dintwe of Mr Fraser's refusal to co-operate with him and of the refusal of the SSA to subject itself to oversight by his office. This was at or about the time Dr Dintwe informed the Committee of the withdrawal of his security clearance by Mr Fraser.

1136. The JSCI had responded to the report on the PAN investigation and Dr Dintwe's reports to it by arranging to meet with President Ramaphosa. Mr Schmidt thought that the meeting with the President may have taken place shortly before Mr Fraser was removed from his position as director general of the SSA. He said that members of the JSCI generally assumed that the meeting with the President led or contributed to this removal.

1137. Mr Schmidt alleged that the JSCI functioned in a politically partisan manner. He said:

> "Where important (and possibly damaging) concerns arise in the Services under the majority party's leadership, the most apparent fall-back position is to vote along party-political lines and/or to avoid or control the flow of information to members of the JSCI. Although attempts have been made to avoid this position by (at least certain) JSCI members, legislative amendments to some of the above issues are required. …"

1138. Asked to comment on whether the annual report by the JSCI for the year ending 31 March 2017 adequately addressed the issues which had been reported to the JSCI by

the IGI, Mr Schmidt said that it failed to do so. He said that there were two reasons for this:

> 1. "The level of reporting to Parliament was more generic due to the lack of security clearance of Members of Parliament who were not members of the JSCI".
>
> 2. "The level of accountability by the IGI to the JSCI was on a lower level than would be expected because the IGI redacted certificates to exclude the names of individuals, methods used, and organisational weaknesses as testified by the IGI. Unfortunately, this led to certificates/reports that were more generic and excluded detail, enabling better follow-up on issues raised before."

1139. He also made the following points:

> "Despite the JSCI having oversight responsibility for the SSA and a duty to make recommendations, it has no decision- making power in respect of the Services nor any other institution; hence the concern that many of the issues raised by the IGI continued to be raised from year to year without them being satisfactorily resolved by the Services."
>
> "Members of the JSCI from the majority party were often hesitant to criticize senior office bearers in the executive or the departments due to political considerations. This culminated in reports and Annual Reports issued by the JSCI that did not deal in a forthright and critical fashion required of the circumstances due to the majority of JSCI members emanating from the majority party in government."

Evaluation

1140. The issues on which the Commission primarily focussed were whether the oversight by the JSCI was ineffective as regards:

1140.1. Mr Fraser allegedly seeking to avoid oversight by the IGI; and/

1140.2. allegations of criminal conduct within the security services.

Mr Fraser and oversight by the IGI

1141. Mr Fraser was appointed as director general in or about September 2016.[990] Dr Dintwe assumed office as IGI in March 2017. His 2016/2017 certificate alluding to the growing conflict between himself and the SSA, led by Mr Fraser, appears to have been completed in or about February 2018[991]. In April 2018 Dr Dintwe's security clearance was revoked by Mr Fraser but was shortly thereafter reinstated by the minister. In the same month, Mr Fraser was removed by President Ramaphosa as director general of the SSA and transferred to the Department of Correctional Services.[992]

1142. The affidavits of Mr Nqakula, Mr Gamede and Mr Schmidt indicate that the JSCI met President Ramaphosa to discuss concerns regarding the relationship between Dr Dintwe and Mr Fraser; and that this may have contributed to the President's decision to remove Mr Fraser as director general of the SSA. In the Commission's view, the JSCI can therefore not fairly be criticised for failing to exercise appropriate oversight as regards the concerns expressed in Mr Dintwe's certificates about Mr Fraser's avoidance of IGI oversight.

1143. The JSCI can also not be faulted for failing to alert Parliament to this issue in its 2016/7 report. That report was tabled in Parliament on 31 October 2017, which was before Dr

[990] SA Government News Agency statement issued on 26 September 2016.

[991] This was the month in which Mr Ramaphosa assumed office as President.

[992] Daily Maverick report of 17 April 2018.

Dintwe's 2016/2017 SSA certificate had been finalised. The issue was alluded to in the JSCI's 2017/2018 report, which was tabled in Parliament on 12 December 2018.[993]

1144. Parliament was informed in that report that a "major presentation" by the IGI "related to the submission of certificates issued by him regarding an assessment of the intelligence community"; that this had "generated substantial discussion and raised questions, in particular to matters of principle as well as governance relating to how the process had been managed"; and that it was suggested that time be found for a thorough engagement between the IGI and the Ministers in the cluster. The report continues as follows:

> "In the view of the Committee the following assessment was made,
>
> - that the IG did not consult the relevant Ministers before presenting the certificates to the JSCI
> - the IG exceeded the reporting on the mandate of the period under review
> - the report painted a compromised intelligence services an intelligent community matters related to corruption, unqualified people doing the job and questionable undercover fraud.
>
> The Committee is expecting a report with regards to the suggested interface.
>
> The IG's report relating to the State Security Agency raised a number of controversies which culminated into allegations and counter allegations between the Inspector General and the State Security Agency Director General, Mr Arthur Fraser. During that period, the Director General withdrew the Inspector General's security clearance. The matter was taken to court by the IG and is currently still before the courts. The former DG has since been redeployed by the President…
>
> There are a number of things that the JSCI still needs to give attention to, in particular, in terms of the relevant legislation, the relations between the offices of IG and the Intelligence community…"

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[993] At pp 7-8 of Annexure E to Ms Mbete's supplementary affidavit dated 30 May 2021**,** exhibit ZZ16 PO -05(a) 981

1145. The Commission is not in a position on the evidence available to it to accept or reject the criticism made that the IGI failed first to submit his certificates to the Minister. It is, however, of the view that, broadly speaking, the JSCI cannot be criticised for the manner in which it reported to Parliament on the conflict which arose between Dr Dintwe and Mr Fraser.

Allegations of criminal conduct within the intelligence services.

1146. Having regard to the limited evidence that the Commission received as to the effectiveness of the manner in which the JSCI addressed allegations of criminal misconduct within the intelligence services, the Commission is not in a position to make any conclusive finding on this issue. Nonetheless the Commission thinks it appropriate to express it *prima facie* concerns in this regard.

1147. The evidence does appear to show *prima facie* (i) that the JSCI was made aware of allegedly criminal conduct within the intelligence services and (ii) that the JSCI failed to ensure that adequate steps were taken to address this timeously.

1148. Of particular concern in this regard is the evidence of Dr Dintwe, not least his allegations of criminal conduct associated with the PAN 1 project and the JSCI's failure to deal effectively with this issue.

1149. Dr Dintwe asserted that the allegations of criminal conduct associated with the PAN 1 project were long-standing and that recommendations made by his predecessor remained unimplemented. The answering affidavits confirm that these issues were drawn to the committee's attention and discussed by it. But little concrete was done over the years to resolve the problem. The committee seems to have been fobbed off by

assurances that investigations remained ongoing[994] and appears to have left it to the affected services themselves refer matters for prosecution if appropriate.[995]

1150. The Commission is not impressed by the stance adopted by Mr Nqakula, (chairperson of the Committee at the time that Dr Dintwe raised his concerns) in relation to this issue. Asked whether the committee had received reports from the IGI in respect of the Principal Agency Network (PAN) which disclosed criminal conduct or conduct reasonably suspected of being criminal[996] and, if so, what steps if any the committee took or recommended[997], his response was that this is classified as confidential and cannot be divulged.

1151. He cannot be faulted for drawing attention to - and adhering to - section 5 and other provisions of the Oversight Act which bear on secrecy. The Commission does not accept however that, interpreted in line with the Constitution,[998] section 5 renders it unlawful to disclose to the Commission whether criminal conduct was reported to the Committee and, if it was, to disclose what steps, if any, the Committee took or recommended to ensure that such criminal conduct was addressed. This could be disclosed without having to "disclose any intelligence, information or document the publication of which is restricted by law…" as referred to in section 5(2).

1152. It should be borne in mind that section 6(3) of the Oversight Act - which has been quoted above – requires the Committee, when reporting to Parliament, not to include anything in its report "the inclusion of which will be more harmful to the national security **than its**

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[994] See Gamede's evidence above as to an assurance by Minister Cwele that the matter was being investigated by the Hawks – given that Mr Cwele served in this capacity between 2009 and 2014, this must have taken place during those years; and Schmidt's evidence above that conduct alleged to be criminal that was brought to the attention of the committee "*was always indicated by the Services and/or relevant organisation as being subject of an investigation(s)*".

[995] See Schmidt's evidence.

[996] Para 1.7.3 of the notice, quoted above

[997] Para 1.7.4(b) of the notice, quoted above

[998] Paying due regard, for example, to section 198 of the Constitution

exclusion would be to the national interest" (emphasis added). The national interest would lie in disclosing to Parliament whether criminal conduct was reported to the JSCI and, if so, what steps it took in this regard. Whatever is disclosed to Parliament is disclosed to the public at large. Information that can lawfully be provide to Parliament can lawfully be disclosed to this Commission.

1153. Reference has been made above to Mr Gumede's evidence that "(t)he JSCI could only recommend for action 1,2,3. The implementation was/is with the accounting officer or the political head. The impression created is one of impotent deference - or even abdication - to those that the JSCI was under a duty to oversee.

1154. Whilst it is true that the Oversight Act does not empower the JSCI to make executive decisions and only explicitly empowers it to make recommendations or to issue reports, the JSCI's fundamental role is, in terms of the Constitution, to "have oversight of" all security services. If the security agencies or their ministers fail to ensure that those services operate lawfully, the JSCI is, in the Commission's view, duty bound to "blow the whistle" on this, by drawing it to the attention of Parliament. The object sought to be achieved by section 198(8) of the Constitution is that there should be "accountability" in respect of the security services to Parliament. Impotent deference or abdication is the antithesis of holding accountable.

1155. A difficult balance must undoubtedly be drawn between the need to protect national security and the need to hold the intelligence services accountable. But the JSCI cannot properly adopt a supine attitude and defer to whatever may be decided as regards the security services by the accounting officer or Minister.

Inadequacy of the reports to Parliament

1156. If, in the JSCI's judgement, the accounting officer or Minister is acting unconstitutionally or unlawfully or is not taking effective steps to address such conduct, the JSCI is not only entitled to alert Parliament of this; it is under a duty to do so.

1157. This can and should be done in a manner that does not disclose any intelligence, information or document the publication of which is restricted by law.

1158. Reference has already been made above to the disclosure, in the JSCI's report to Parliament for 2017-18, of the conflict which developed between Dr Dintwe and Mr Fraser. Other than this, the annual reports to Parliament during the Fifth Parliament did very little, if anything, to alert Parliament to malfeasance within the intelligence services of the type and degree revealed to the Commission and revealed in the IGI's reports to the JSCI. This is concerning. The JSCI is meant to serve a Parliament's "watchdog" but it failed to "bark" when it should have done so.

1159. This was compounded by the JSCI's failure to submit any report to Parliament in respect of the year ending 31 March 2019.

1160. The reports by the JSCI of the Sixth Parliament were furnished well after they should have been. They are more revealing than those of the JSCI of the Fifth Parliament but there is still cause for some concern.

1161. The initial "5 month" report is formalistic, reporting on the committee's induction meetings. It did not reveal the substance of matters of concern which its report tabled

on 13 September 2021 shows it knew about during the period covered by its initial report and which could and should therefore have been disclosed in that report.[999]

1162. The report tabled by the JSCI on 13 September 2021 was only produced well after it was due and only after there had already been a great deal of publicity regarding evidence heard by the Commission in relation to matters about which – as the report shows - the JSCI had long been aware. It is not satisfactory that the material contained in the 2021 report was not reported by the JSCI to Parliament much earlier than it was in fact reported.

1163. The 2021 report reported to Parliament information that had come to its attention about multiple abuses. These including the following: that the acting DG had reported illegal instructions to members of the SSA by some members of the executive; that an acting DDG had reported that the counter intelligence programme had been paralysed by "the previous notorious leadership" and that illegal appointments had been made and irregular temporary advances given to people who were not producing any results; that the implementation team on the HLRP report reported that there had been corruption, illegal protective services and a parallel vetting structure which had issued fake top secret clearance certificates; that the IGI had reported the "there was looting of funds from the Secret Services Account by the officials" and that "the implementation of the IGI's recommendations was two percent and in some cases zero percent"; that the committee had been updated on Project Veza and its findings in relation to criminal action and asset recovery and that members of the Project Veza team had received threats and that their lives were in danger; that it had been informed that the SSA had

[999] For example, its report shows that it was briefed on Project Veza as early as during an orientation session in November 2019 (p 20); was presented with IGI certificates and was briefed on implementation of the recommendations of the HLRP report in March 2020 (p 96, annexure E).

received a qualified report from the AGSA, that there had been an abuses of the secret services account and that some senior officers were implicated but had been protected by management; that implementation of the High Level Panel Report had been slow; and more.

1164. The report implies that, at least in the main, the JSCI was satisfied that the above alleged abuses had occurred. [1000]

1165. The report recommended *inter alia* that the HLRP report be implemented without delays and that the committee be briefed on a quarterly basis on progress made; that those implicated in financial irregularities be reported to law enforcement agencies and that consequence management be effected; that security be provided for those involved in Project Veza investigations and that those implicated in any wrong doing be reported to law enforcement agencies, with the Project Veza team to report to the JSCI quarterly.

1166. The committee cannot in the Commission's view be criticised for reporting the above concerns. What is concern, however, is how late in the day these concerns were reported by the committee to Parliament; and, in particular, how little progress seems to have been made in resolving deep rooted, serious and long-standing abuses.

Concluding comments regarding the JSCI

1167. The overall picture presented is that the JSCI has not shown itself to be effective in addressing issues of obvious concern.

[1000] See in particular (but not exclusively) para 8. Much of the balance of the report implies acceptance that the reported abuses did in fact occur.

1168. In short, the evidence available to the Commission gives it no reason to reject the conclusion reached by the HLRP that the JSCI was ineffective and dysfunctional.

1169. The criticisms expressed above reflect the Commission's *prima facie* views, based on the evidence before it, which is recognised as being insufficient evidence on which to base a final conclusion.

1170. The Commission is nonetheless of the view that it is better to express its *prima facie* views frankly rather than to remain silent, merely because it has been precluded from collating as much evidence as it would have preferred.

1171. The Commission's hope is that expressing its *prima facie* views and concerns may assist those tasked with addressing the problems of the intelligence services and those who bear responsibility for oversight over those services in determining the best way forward.

No parliamentary mechanism to "track and monitor"

1172. One of the primary practical problems to which various witnesses drew attention was the absence of any parliamentary system to "track and monitor" implementation or non-

implementation by the executive of undertakings given by the executive or of corrective action proposed in reports adopted by Parliament.[1001]

1173. Mr Godi referred to an occasion, during the fourth Parliament, when he approached Mr Frolick, about this problem and was given an assurance that the office of the Speaker would configure a "dashboard" which would keep track of deadlines and follow up and ensure compliance with House resolutions. However, no such dashboard was configured and no alternative mechanism was adopted to monitor and enforce House resolutions.

1174. As Mr Godi pointed out, this is not a new problem. Paragraph 4.1.4 of the OVAC model adopted by Parliament in 2009 commences as follows:

> "In developing the oversight model, the need was identified for support services relating to the monitoring and tracking of issues between Parliament and the Executive, and on all other related matters within Parliament's broader mandate. An Oversight and Advisory Section ought to be created in response to the need identified. Its main functions will be to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of members of Parliament and the committees to which they belong."

[1001] PO-01-107 para's 6.3(iv), 6.32 and 6.36 to 6.39; day 335 pp 39, 65-69 and 105-108

1175. Virtually all the witnesses - and there were many - who were asked about this agreed on the need to implement, as a matter of priority, a suitable “tracking and monitoring system”.

1176. For example, in an affidavit submitted on behalf of the ANC by its Secretary General, Mr Elias Sekgobelo (“Ace”) Magashule the following was stated:

> “44. To monitor and track issues between parliament and the executive, the ANC proposes the establishment of an Oversight Advisory Section in parliament that will include a financial scrutiny unit, tracking and monitoring unit, an advisory unit and a system to capture and manage information within Portfolio Committees.
>
> 45. This envisaged Oversight Advisory Section should encompass, inter alia, the following functionalities-
>
> 45.1 Provide information and advisory support to parliamentary oversight activities as an information management section;
>
> 45.2 Track and monitor Executive compliance in respect of issues that individual Members of Parliament raised flowing from their constituency work;
>
> 45.3 Assist with co-ordinating all oversight-related information gathered through parliament's public participation activities;
>
> 45.4 Assist with monitoring and tracking Executive compliance with House resolutions; and
>
> 45.5 Monitor and analyse debates, discussions and comments made by the public and participants in the sectoral parliaments with a view to advising the House on issues for consideration.
>
> 46. The ANC proposes that the Oversight Advisory Section be prioritised and implemented by Parliament within 12 months.” [1002]

[1002] PO-01-014. See also e.g. Mbete day 397 p 226; Smith PO-01-74

1177. Mr Gwede Mantashe, a former Secretary-General of the ANC who is now its Chairperson, associated himself with this.

1178. Ms T Modise, who served as the Speaker of the National Assembly at the time that she gave evidence, agreed that this was a priority and testified that "we have actually started with that".[1003] She also said that:

> "In both houses, whenever members of the Executive expresses and commit to doing certain things to or for the public, we take note; committees take note. When committees report, when ministers make statements on the floor of the House we write to them to remind them you have said this. Please give us the progress report.
>
> What we had not finalised, which we are working on, is to then have a kind of a report at the end of each session that says we wrote to you Minister X on your commitment but you have not come back to us to say how far you have gone on that commitment, whether you have done it or not done it and what the reasons are for not doing that. That we agree is what we are in the process of finalising and getting the personnel to do that."

1179. The Commission welcomes this and recommends that this be given the urgent priority that it requires.

Absence of consequences if ministers and other representatives of the executive fail to implement corrective action proposed by Parliament

1180. Much more difficult is what Parliament can and should do to address the complaint about frequent and persistent failures by ministers and other representatives of the executive

[1003] Day 377 p 224.

to ensure that corrective action, required by committee reports adopted by the Assembly, is implemented.

1181. Some Members of Parliament displayed a resigned acceptance of Parliament's impotence to fix problems. For example, Mr Vincent Smith said as follows in an affidavit[1004]:

> "In my understanding, 'accountability" refers to the institutionalized practice of giving an account of how assigned responsibilities are carried out. As such, accountability has become critical to good governance in both the public and private sectors.
>
> In the event that the account is not satisfactory, all that Parliament can do is to raise the concern in its report to the National Assembly. Under the current practice, Parliament and/ or the legislature can only persuade and not instruct nor micro-manage the department or the Executive Authority."

1182. Underlying this view is, one supposes, a recognition that the separation of powers between the legislative and executive branches of government requires the legislative branch to refrain from exercising executive authority[1005]. The question that arises is: is Parliament so impotent? What does the Constitution mean when it provides that the National Assembly is elected to ensure government by the people "by scrutinising and overseeing executive action"[1006]; that it must ensure that executive organs of state "are

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[1004] PO-01-068 para's 9 and 10

[1005] Mr Frolick said in his testimony that "there is this view in terms of the separation of powers between the judiciary, the executive and the legislature, that the legislature has a more junior role to those other two arms of the state." (ay 338 p186). That is not a view shared by the Commission.

[1006] Section 42(3)

accountable to it"[1007]; and that members of the Cabinet are "accountable", "collectively and individually" to Parliament for the exercise of their powers and the performance of their functions[1008]? How should these provisions be interpreted, given not only the doctrine of the separation of powers, but also the foundational constitutional values of "accountability, **responsiveness** and openness" (emphasis added) which underlie our democracy?

1183. The following view was expressed in the Corder report:

> "Accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions and actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent it in future." (emphasis added)

1184. Amongst the recommendations made in the Corder report was the enactment of legislation, including an Accountability Standards Act.

1185. In Professor Corder's evidence to the Commission he expressed the view that legislative reform remains desirable to "flesh out the skeleton", so to speak, of the provisions in the Constitution which provided for Parliamentary oversight and accountability to Parliament.[1009] An Accountability Standards Act would, he said, serve the purposes of (i) partially fulfilling the NA's constitutional obligations for establishing accountability mechanisms; (ii) setting the broad framework and minimum requirements for

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[1007] Section 55(2)

[1008] Section 92(2)

[1009] PO-03-280 para 9.5 and ff

accountability; and (iii) providing an authoritative and mandatory framework within which committee members can perform their oversight task.[1010]

1186. In his view the Act should provide for "amendatory accountability" which:

> "refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered. This Act should give strong effect to the constitutional requirements of accountability. Presently there is no effective machinery by which Parliament can compel the executive or an organ of state to answer to it. But as has been highlighted the South African.
>
> Constitution makes accountability to Parliament mandatory. Accountability is therefore removed from the realm of vague political convention to that of concrete constitutional law. Interaction between branches of government should be governed by the principles of co-operation set out in chapter 3 of the Constitution, but [the] Act should oblige executive and organs of state to answer and submit to scrutiny, as well as imposing on them an obligation to redress grievances. This means that remedial action should be authorised for exposed errors, defects of policy or maladministration. This form of amendatory accountability is essential to an effective system of reporting."[1011]

1187. Prof Corder also said this:

> "While much work would be needed to give appropriate and effective shape to the concept of "amendatory accountability", I would argue that this is essential. At present there seem to be few if any mechanisms in place, short of the tabling of a motion of no confidence in either the President or his Cabinet (see section 102 of the Constitution), an admittedly radical step, which should not be lightly countenanced. What is necessary are steps short of a motion of no confidence, through which individual or groups of ministers may be required to take amendatory action, sufficient to satisfy Parliament." [1012]

[1010] PO-03-281 para 9.7.1.1

[1011] Corder affidavit, PO-03-282

[1012] Para 9.7.1.2

1188. The official submission of the ANC to the Commission on parliamentary oversight[1013] said the following:

> The ANC proposes that the recommendations of the Hugh Corder Report be considered to further strengthen parliament's accountability and oversight model, in particular a key recommendation that accountability also requires that a person, in addition to explaining and justifying decisions and actions, goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future."

1189. The Commission recommends that Parliament should consider whether it supports the principle of "amendatory accountability" and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament, along the lines suggested in the Corder report. In doing so, it will be necessary for Parliament to consider the implications of the separation of powers between the legislative and executive branches of government under the Constitution. However, the Commission believes that it should not be beyond the ingenuity of Parliament to devise mechanisms which promote responsiveness and effective accountability (in themselves principles which are entrenched by the Constitution) in a manner which does not infringe the separation of powers.

1190. If Parliament should not be minded to enact legislation of the above type, the Commission is of the view that serious consideration should be given by Parliament to amendments to its own rules, with a view to addressing the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial

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[1013] Affidavit by Mr Magashule, (in his capacity as secretary general of the ANC) (PO-01-019) supported by the testimony of Mr Mantashe (former secretary general, now chairperson of the ANC)

measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.

1191. In particular, the Commission supports the recommendation[1014] made in para 4.1.9 of the OVAC model (which, it will be recalled, Parliament adopted in 2009) but has not yet been implemented that:

> "… Parliament develop rules to assist it further in sanctioning Cabinet members for non-compliance after all established avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly of the Chairperson of the Council based on a full explanation."

1192. Also worthy of consideration by Parliament is the suggestion made by Prof Corder in his affidavit[1015] that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.[1016]

The critical role of political will

1193. Several witnesses expressed the view that an absence of political will lay at the heart of Parliament's inability to effectively hold the executive to account.

[1014] Supported by a number of witnesses including Mr Godi. PO-01-118 para 6.39. See also Mr Magashule's affidavit on behalf of the ANC at PO-01-023 ("Ministerial accountability to be considered for inclusion in the appendices to the rules. Compliance by the executive should be considered for inclusion in the rules.")

[1015] PO-03-290

[1016] See the evidence of Ms Modise at day 337 p 26 to the effect that when members complain that they are not getting "joy "from answers to questions put to ministers, "We whip the Leader of Government Business so that the Leader of Government Business whips the people he leads in the Executive to take us seriously".

1194. For example, in his affidavit Mr Godi contended that the lack of progress in implementation of remedial measures required by SCOPA reports can be attributed to "political dynamics, more specifically a lack of political will, within the structures of the governing party at the time, to resolve the serious problems of financial mismanagement".[1017]

1195. There does seem to be substance in the view that the all too frequent failure of the executive to implement recommendations in parliamentary reports is attributable to a lack of political will to address the problems identified. That Parliament failed to compel the executive to address the problems identified in its reports suggests a similar lack of political will on its part.

1196. Prof Calland argued in his submission that "…the political attitude and disposition of the ruling party" will determine the extent to which Parliament makes use of its oversight and accountability powers, and continues:

> "Instead of encouraging obsequious political fidelity and blind loyalty from MPs deployed to positions of parliamentary responsibility, the political leadership needs to encourage a culture of independent-mindedness not in an 'oppositional paradigm' but in the spirit of ensuring that the executive remains loyal to the mandate given to it by the electorate. This requires real leadership and a profound commitment to the Constitution and its system of accountability."[1018]

1197. To similar effect he said:

[1017] PO-01-117 para 6.35

[1018] PO-03-018

> "Over many years of watching parliamentary committees, it is clear to me that a number of political and institutional factors will determine whether or not a committee is willing to intervene and act. First of all, there is the over-arching disposition of the ruling party - does the party leadership create an 'atmosphere' in which oversight is encouraged or at least not actively discouraged or obstructed?…"[1019]

1198. To facilitate proper oversight over the executive, the Commission is of the view that leaders of political parties should provide the political space for individual MPs to ask difficult questions without prejudice to themselves, with the assurance that their concerns will be taken seriously and properly answered.

1199. In his affidavit, Mr Magashule said the following:

> "100. On behalf of the African National Congress I give an unconditional undertaking that the ANC has the political will to make parliament work and to ensure effective oversight and accountability."

1200. This undertaking, which Mr Mantashe reiterated in his testimony[1020], is to be welcomed.

1201. However, the force of this undertaking is diminished by Mr Mantashe's testimony that the ANC has *always* had the political will to make Parliament work and to ensure effective oversight and accountability.[1021] The evidence simply does not sustain this view. Whilst this may have been the official and professed position of the ANC, the evidence shows that it has not always been applied in practice. On the contrary: a substantial number of influential ANC representatives have, from time to time, taken the view that

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[1019] PO-03-027

[1020] Day 377 pp 210-211

[1021] Day 377 p211 lines 6-23

its MPs should not embarrass or ask difficult questions of ANC deployees or comrades. Much of the evidence referred to above shows a marked unwillingness to exercise vigorous and effective oversight. Furthermore, the deterioration of financial controls and lack of implementation over the years of corrective measures proposed by SCOPA and others shows that the requisite political will to address this serious problem has proved to be lacking.

1202. All human beings are fallible. It is idle to suppose that with the wave of a magic wand the requisite political will can be created. However, party leadership clearly plays an important role.

The vital importance of sound leadership

1203. Prof Calland said the following in his submission:

> "To my mind, this is the primary, pivotal challenge to confront and address: how best to insulate a backbench MP of a ruling party from partisan political pressure, applied in general by the leadership of his or her own party (which is where the overlap with the executive branch of government will exist)?
>
> One, short answer is: leadership. Where the leaders of the political party concerned are willing to set the tone and define a set of principles of accountability that parliamentarians, including backbench members of his or her own party, can freely enjoy. Such leadership will provide the political space for individual MPs to ask difficult questions of the executive without prejudice, and in the realistic expectation that they will be taken seriously and answered by the executive branch of government."

1204. The Commission agrees with this view. Sound leadership facilitates proper oversight and accountability. Conversely, where the leadership of a governing party is threatening or unsupportive, this cannot but discourage Members of Parliament who are subordinate to party structures dominated by the leadership from carrying out their constitutionally mandated task of holding the executive to account.[1022]

Resources

1205. A constant refrain in the evidence of MP's was that Parliament's budget for conducting its oversight is inadequate. The Commission was told that, out of its total budget of in excess of R 2 billion (which is used for a multiplicity of expenses), Parliament allocates R50 million to R60 million to cover all the financial requirements of portfolio committees.[1023] These include costs of their regular meetings, advertisements, inviting public comment on legislation (30-40 bills per year with each advertisement costing at least a quarter of a million rand), oversight visits (including travel and accommodation costs, hall hire and refreshments during oversight visits), etc.[1024]

1206. This does not seem to be a newly discovered problem. The OVAC model adopted by Parliament in or about 2009 referred to the need to ensure sufficient and appropriate resourcing of committees to enable effective oversight.

[1022] See e.g. the comment by Mr Frolick that "…our constitutional design is of such a nature that political parties and the leadership have a lot of power and influence in terms of what is happening to their elected representatives in the different legislatures, whether it is local, provincial or national government. (Day 347 p 254)

[1023] Frolick Day 338 pp 160-1

[1024] Ibid pp161-2

1207. Mr Frolick testified that, when a need was identified in 2017 for four committees to do specific oversight work, the Secretary of Parliament had to be approached for money to fund those activities, which had to be taken from other programs which had not been implemented or not implemented in full. As he correctly observed: "…this is not sustainable to exercise oversight".[1025]

1208. The Speaker during the fifth Parliament, Ms Mbete, addressing the question of inadequacy of parliamentary oversight in respect of allegations of state capture and corruption, said:

> "What did happen here might be inadequate and yes, I dare say actually it was inadequate, because the resources are not adequate. The capabilities, even as the other testimonies have been put before the Chairperson, and we hope the Chairperson will highlight that matter, the capability, the resources need attention."[1026]

1209. Inadequacy of financial resources is, in the Commission's view, not an adequate explanation for all the failures of parliamentary oversight noted, but it is nonetheless a concern. It goes without saying that, where a portfolio or other committee of Parliament needs to incur reasonable expenses to enable it to discharge its oversight obligations, sufficient money needs to be made available for this.

1210. By way of example, if – as appears to be the case [1027] - the Portfolio Committee on Minerals was foiled in its eventual attempt to hold the enquiry it decided to hold because of the inability to pay for some relatively small expenses, that is regrettable. Whether

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[1025] Ibid p 162

[1026] Day 397 p 212

[1027] PO-02-287

parliamentary oversight is to occur cannot be left to the exigencies of a somewhat arbitrary budgeting processes.

1211. It is therefore recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.

Skills

1212. The present Speaker, Ms Modise, also referred to the resource constraints but highlighted in this regard the need to capacitate MP's. Asked to draw on her experience and to summarise what factors accounted for inadequate parliamentary oversight, she commenced her response as follows:

1213. "Chair, if I could, I would really get resources to enable a member of parliament to really understand the portfolios they are overseeing. In other words, if it means because of our history, in other countries they do not have the disadvantage of education that we have. So with us we have a responsibility to enable this elected person to do the job. So if I could, I would increase capacity around the member, enable this member to have at their fingertips the things that would enable them to understand and to apply their mind. I would actually in that process try to make sure that the legislative arm actually gets its fair deal. We are unable to do this …"

1214. The evidence as a whole[1028] seems to support the view that quite many Members of Parliament lack the training and skills which are essential for Parliament to discharge its oversight responsibilities effectively. This aspect should perhaps be borne in mind when

[1028] See e.g. J Rault-Smith day 345 p 193]; Rantho at PO-02-551 para 10.6

candidates are being selected for party lists and when new members are inducted and prepared for the responsibilities associated with the committees to which they are allocated.

Research and technical assistance

1215. Though this aspect was not investigated by the Commission – being only indirectly relevant to its terms of reference – it would appear from the evidence heard on point[1029] that, to the extent that available resources permit, it would be desirable to enhance the scale and skills of the research and technical assistance made available to portfolio committees. It is recommended that this issue be considered by Parliament.

Inadequate reports and presentations from departments and entities

1216. Regular, timeous and proper reporting to Parliament by representatives of the executive (including SOE's and other organs of state) is essential if Parliament is to be in a position to exercise proper oversight. This was recognised some years ago by the Corder report.

1217. Though considerable reporting by representatives of the executive to portfolio committees does clearly take place, it appears to the Commission that such reporting is all too often not timeous and inadequate.

1218. The primary – and sometimes the only - source of information to a portfolio committee on an issue are written presentations from the minister, department or entity sought to be held to account. These could be everything from a lengthy and complex report with

[1029] See e.g. J Rault-Smith, day 345 p 187; Rantho

considerable technical or financial detail, to a more-easy-to-follow simple “PowerPoint” presentation.[1030]

1219. Overdependence on material produced by the overseen entity is one of the reasons why better training of MPs and better resourced and trained research and technical assistance is necessary.

1220. It also makes it important that, if written presentations are to be submitted, they should properly address the requirements of the committee and be submitted sufficiently long in advance of the relevant committee meetings. A repeated refrain heard from frustrated MP’s is that presentations are often submitted late, not infrequently at the very meeting at which they are then presented. That obviously makes it impossible for the MPs to read and consider the reports and is clearly unsatisfactory. The apparent frequency with which this occurs makes one wonder whether it is sometimes done deliberately, precisely in order to obstruct proper oversight.

1221. Parliament needs to make it clear that this type of practice will not be tolerated. It needs to ensure that consequences follow to those who, without adequate cause, make proper and timely oversight impossible. If a culture has developed of documents being only being made available to portfolio committees late or on the day of the presentation, it is up to the Portfolio Committees to reject that kind of treatment from the executive and send the persons concerned back, until they submit documents and their presentations on time. If portfolio committees allow the executive to treat them with disrespect, the executives will treat them with disrespect as if they count for nothing. It is up to the portfolio committees to choose how they want to be treated.

[1030] See e.g. M Johnston, day 338 p 46; J Rault-Smith, day 345 pp 173-4.

1222. The Commission also recommends that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament. It may be that, absent such legislation, the present sometimes unsatisfactory situation will persist.

1223. An alternative might be to amend the Rules of Parliament to deal with this.[1031] However, since the objects to be achieved include placing duties on persons outside of Parliament and possibly visiting appropriate sanctions on those who are recalcitrant or unacceptably inefficient, the Commission's *prima facie* view is that legislation would probably be preferable to amending Parliament's rules.

Ministers and others who fail to arrive at scheduled meetings

1224. Another refrain repeatedly heard is that far too frequently minsters and others scheduled to appear at meetings of portfolio committees fail to arrive, with or without belatedly tendered excuses.

1225. For example, Ms Letsatsi-Duba testified that, when she chaired the PCPE, Minister L Browne repeatedly failed to attend scheduled PCPE meetings. She estimated that she attended "far less than half" of the meetings she had been requested to attend, sending her deputy minister in her stead, which was not regarded as satisfactory.[1032] Reference has also already been made to the way in which Minister Zwane repeatedly failed to honour arrangements to testify before the PCM.

1226. President Ramaphosa admitted that, when he served as Leader of Government Business, he became aware of quite a few instances when ministers were due to attend

[1031] This is supported in the affidavit for the ANC by Mr Magashule – PO-01-019

[1032] Day 349 pp 266-7; see also pp 210-2

meetings of portfolio committees and simply did not turn up.[1033] He saw it as part of his role at the time to exert pressure on ministers to fulfil their obligations:

> "…as the Leader of Government Business, you are able to exert pressure on, for instance, towards ministers, if I can call them that, to answer questions. There are occasions when the Leader of Government Business will be quite precipitous in Cabinet in insisting that members of the Executive must answer questions and you know pull them on the carpet and even meet them and say you have got fulfil your obligations. So the role is a little behind the scenes to some extent."[1034]

1227. It is not only ministers who fail, without adequate cause, to arrive at meetings which they are scheduled to attend.

1228. Once again, it is for Parliament to make clear that this type of practice will not be tolerated and to ensure that consequences are visited on those who offend without adequate cause. Parliament must decide how it wants to be treated. If it wants to be taken seriously by the executive and to be treated with respect, it must make it clear to the executive who calls the shots in Parliament. The executive must also not be allowed to call the shots in Parliament.

1229. It has been suggested above that Parliament should consider legislating on the issue of reporting by the executive to portfolio committees. The same legislation could, if this is deemed appropriate, regulate non-appearance without adequate cause of persons scheduled to attend committee meetings,

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[1033] Day 385 pp29-30

[1034] Day 385 p 29. See also Mbete, Day 397 p 233.

Ministers who fail to answer questions

1230. Under the Rules, ministers are obliged to answer questions put to them and to do so within 10 working days.[1035]

1231. The Commission heard evidence that questions are quite frequently not answered within the required period.[1036] The Leader of Government Business plays a role in addressing this problem. It was asserted by Ms Mazzone that he "routinely fails to take steps to enforce accountability by ministers in this regard".

1232. By contrast Ms Mbete testified as follows[1037]:

> "Well with the delaying issue we would have to rely on our management to assist us in follow up. We would also use the mechanism of the structure of three which involve the Deputy President who is the Leader of Government Business, the Chief Whip and the Speaker. We often put our heads together to deal with issues of that nature so that the Deputy President would take those issues to cabinet meetings and in fact apparently a lot of naming and shaming would obtain in that space through the Leader of Government Business."

1233. Another complaint heard is that ministers who purport to answer questions do so evasively and in a manner which does not actually answer the substance of the question put.[1038] This appears to be a significant problem, for a minister who fails to answer the

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[1035] Rule 145(5) of the Rules of the National Assembly (9th ed). The Speaker is empowered on good cause shown to grant an extension for a further 10 working days.

[1036] Ms Mazzone asserted in her affidavit of 30 December 2020 (at PO-02-040 para 17.15) that, of close to 1500 written questions submitted by the DA for the 2020 calendar year, 345 were still unanswered, by the end of the year, 263 having passed the 10-day period stipulated by the rule

[1037] Day 397 p234

[1038] See repeated allegations to this effect in the affidavits of Mazzone (exhibit ZZ5), De Freitas (exhibit ZZ12), and Selfe. (exhibit ZZ7).

substance of a clearly put question breaches his or her constitutional obligation of accountability.[1039]

1234. Ms Mbete, the former Speaker, acknowledged the existence of this problem[1040] but adopted the stance that there was nothing the Speaker could or should do about this and that the only remedy is for the member to "ask a follow up question".[1041]

1235. If a minister is permitted to evade answering a direct question, one wonders how asking a follow up question resolves the problem? Why is there not a similar duty to the duty acknowledged above, that the Speaker and Leader of Government should ensure that the minister is "named and shamed" if he or she is unwilling to fulfil his or her obligation?

The importance of the role of committee chairs and the question as to whether more chairs should be selected from opposition parties

1236. Many witnesses agreed that the role played by the chair of a portfolio committee is influential in determining the extent to which a committee succeeds or fails in its

[1039] See e.g. s 92(2) of the Constitution: "Members of the Cabinet are accountable collectively and individually to Parliament for the powers and functions of the executive assigned to them by the President."

[1040] "And yes I probably agree with this MP who is complaining…" (Day 397 p 234 lines 19-20)

[1041] Day 397 p 234-8

oversight mandate. It is a matter of considerable concern that not all persons appointed as committee chairs have the requisite inclinations or demonstrated capacities.

1237. Traditionally only SCOPA is chaired by an opposition MP. Several witnesses suggested that chairpersons of portfolio committees should be appointed from parties represented in the NA according to a proportional formula.[1042]

1238. One witness who regularly observes portfolio committees observed that, once presentations have been made to portfolio committees, *"opposition party members tend to ask questions very directly, but what happened here, why is this not here?*" By contrast when ruling party MPs get their chance

> "it is inevitably, you have done so well and only the good side and I really have to praise you for this. And if there is something that they are picking on then it is going to be something that is pre-decided and they will have decided well, this is a problem. But on the whole they do not demand answers to difficult questions from the departments. Their role is more to say you guys have done a great job."[1043]

1239. There is clearly nothing wrong with congratulating those who have done a good job. But if the objective is to exercise effective oversight and to hold to account, it may well be advisable to enhance this by permitting more opposition MPs to serve as chairs of portfolio committees. The Commission was told that this is a common feature in many

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[1042] E.g. CASAC submission para 119; Corder PO-03-280 para 9.3; De Freitas PO-03-329; Mazzone – day 335 p225

[1043] Ms J Smith, Day 345 pp 181-2

parliamentary systems.[1044] The majority party would still exercise a lot of influence in the Committee because it would still have the majority of the members of the Committee.

1240. It is recommended that Parliament should consider whether representatives of opposition parties should be appointed as chairs of portfolio committees.

1241. Implementation of other proposals made in the Corder report and OVAC Model

1242. There was wide-spread agreement from witnesses that the recommendations in the Corder report should be given serious reconsideration.[1045] The Commission has already alluded above to some of these. The Commission agrees that Parliament should reconsider, not only those recommendations specifically referred to above, but also the other recommendations made. Whilst some have been implemented, e.g. by means of rule amendments made subsequent to the Corder report, others which may well still have merit, others have not.

1243. The same applies to those parts of the OVAC model that have not yet been adopted. That would include:

1243.1. The establishment of an Oversight and Advisory Section to "provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong";

[1044] PO-03-329, citing Doring, H. (Editor), *Parliaments and majority rule in Western Europe,* Mannhein Centre for European Social Research, University of Mannhein (p 279) and Bowler, S. & Farrell, OM., *Parties and party discipline within the European Parliament: A norms-based approach, Party Discipline and Parliamentary Government*, Ohio State University Press, Columbus, p 210

[1045] See e.g. Magashule PO-01-019; CASAC's report at para's 121-3 read with para's 94-109; Calland PO-03-032; Godi PO-01-116 footnote 5.

1243.2. Development of rules to assist Parliament "further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly or the Chairperson of the Council based on a full explanation.

1243.3. Ensuring sufficient and appropriate resourcing and capacity to develop specialised committees to deal with issues that cut across departments and ministries.

Parliament's role in appointment processes

1244. Corruption Watch made a submission to the Commission dealing with the appointment processes of leaders of key institutions, with recommendations in relation to parliamentary appointment processes. [1046]

1245. It referred to evidence which had been submitted to this Commission and other recently established commissions of inquiry[1047] highlighting how the appointments of certain compromised persons to prominent leadership positions within the criminal justice system led to the manipulation of these agencies and to the harmful effects of these politically motivated appointments. It noted Judge Nugent's proposal for an open, transparent and apolitical selection process for the SARS commissioner to ensure that the best possible candidate is selected for that position; and noted that this is not dissimilar to the process taken by the Judicial Services Commission.

[1046] PO-05-969 and ff

[1047] Commission of Inquiry into Tax Administration and Governance by SARS, chaired by Judge Robert Nugent; and Enquiry in terms of Section 12(6) of the National Prosecuting Authority Act, chaired by Judge Yvonne Mokgoro.

1246. It pointed out that the National Assembly is tasked with appointing the heads of the following institutions:

1246.1. The Office of the Public Protector

1246.2. The Auditor-General

1246.3. The South African Human Rights Commission

1246.4. The Commission on Gender Equality

1246.5. The Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities

1246.6. The Independent Electoral Commission

1246.7. The Inspector-General of Intelligence

1246.8. The Independent Policing Investigative Directorate (through approving the Minister of Police's appointment).

1247. After describing the processes followed in the appointment of a Public Protector and regarding renewal of an IPID executive director’s term, it asserted that there is a need for selection processes to be amended. In summary, it suggested the following:

1247.1. Review the necessary legislation to ensure that it provides guidance on fair and objective appointment processes.

1247.2. Develop multi-stakeholder structures to oversee the appointment proceedings.

1247.3. Ensure that all parliamentary selection processes are transparent and open.

1247.4. Candidates must be tested for integrity and ethics as well as their skills and expertise, using clear, merit-based, and objective criteria.

1247.5. Ensure that the principle of public participation is a central tenet in parliamentary appointment processes.

1248. The commission endorses these recommendations[1048], which are spelt out in more detail both in the Corruption Watch submission and in the testimony of its executive director, Mr D Lewis.[1049] It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by Parliament.

Conclusions as to effectiveness of parliamentary oversight

1249. In what follows the Commission summarises many of the primary findings made by it above.

1250. In the main the Commission has concerned itself with determining whether state capture, corruption or fraud occurred in the public sector, the nature and scale thereof and who participated in this. However, to make recommendations concerning the avoidance of similar problems in the future, it is necessary to consider what explains why state capture and corruption were able to become so entrenched and to persist over an extended period and to consider, in particular, why institutions which ought to have contributed to detecting or addressing these maladies may not have been as effective in doing so as one would have hoped. Amongst these institutions is Parliament.

[1048] As does CASAC at p 43 para 115 of its submission.

[1049] Day 345 pp 112 to 149

1251. Parliament has a constitutional duty to exercise oversight over the executive branch of government ("the executive"), including organs of state such as state-owned entities (SOE's). The executive is accountable to Parliament.

1252. Key to the performance of parliamentary oversight over the executive in South Africa is the institution of the portfolio committee.

1253. When the rules of the National Assembly are read together with the Constitution, there can be no doubt that a portfolio committee:

1253.1. is obliged to maintain oversight over the exercise of national executive authority within its portfolio and over any executive organ of state falling within its portfolio;

1253.2. is entitled to monitor, investigate, inquire into and make recommendations concerning any such executive organ of state;

1253.3. is entitled to conduct public hearings; and

1253.4. is entitled to summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.

1254. Though there is room for improvement, parliamentary committees have, throughout the period of concern to the Commission, enjoyed the essential powers required in order to exercise oversight over the executive and SOEs and to hold them accountable.

1255. Since the dawn of the democratic order in 1994, the African National Congress (ANC) has enjoyed majority representation in Parliament. This is a fact of fundamental importance when analysing the practical implementation of parliamentary oversight, since the ANC has, throughout the democratic era, had the power to determine the

stance adopted by every structure of Parliament, including the National Assembly, portfolio committees, joint committees, and *ad hoc* committees.

1256. The official *stance* of the ANC, as articulated by its conference resolutions and statements by its leaders, has been to encourage vigorous parliamentary oversight.

1257. However, as appears below, this official stance has all too often not been reflected by the ANC's representatives' *conduct in practice*.

1258. Parliament is not obliged to investigate or enquire into every allegation of public-sector corruption or every allegation of malfeasance within the executive branch of government, particularly where the evidence available is scant.

1259. Parliament's duty to exercise oversight over the executive and to hold it to account does, however, include a duty to investigate or enquire (or to take other reasonable and appropriate measures) where there is reasonable cause to suspect unconstitutional, unlawful or improper conduct on the part of a senior representative of the executive.

1260. The same applies where there is reasonable cause to suspect a failure by a senior representative of the executive to ensure that other persons reasonably suspected of such conduct are not themselves being appropriately dealt with. The oath of office by every Member of Parliament to "respect and uphold the Constitution and all other law of the Republic" (when read together with the obligation to oversee the executive and hold it to account) requires nothing less.

1261. Allegations of state capture and/or of improper influence by the Gupta brothers have long been in the public domain.

1262. It is difficult to accept that Members of Parliament did not yet have sufficient cause to probe the veracity of the allegations of improper Gupta influence by 2013, at the latest.

1263. Widely publicised allegations of state capture came to a head in early 2016; but the ANC was unwilling to support requests by opposition parties for a portfolio committee or an *ad hoc* committee to inquire into these allegations.

1264. The fact that the allegations had been referred to the SAPS or chapter 9 institutions does not excuse Parliament's inaction. In issue were serious and plausible allegations which, if found to be substantiated, revealed a threat to our constitutional democracy. Leaving it exclusively to other agencies to investigate and, if necessary, to take action regarding these allegations at this time, was not, consistent with Parliament's constitutional responsibilities.

1265. The Portfolio Committee on Public enterprise's ("PCPE's") decision on 17 May 2017 to commence an inquiry into allegations related to Eskom was a welcome and significant development.

1266. A further turning point was reached soon thereafter with the publication in the press, from the last weekend of May 2017 onwards, of what were claimed to be a voluminous set of Gupta-linked emails (the so-called "Gupta leaks"). It was asserted, at least by some, that these emails substantiated allegations of state capture which had long been in the public domain.

1267. On or about 15 June 2017 Mr Cedric Frolick, the House Chairperson of Committees, addressed letters to the chairpersons of four portfolio committees, namely the Portfolio Committees on Public Enterprises ("PCPE"), Transport ("PCT", in relation to PRASA), Home Affairs ("PCHA") and Mineral Resources ("PCMR"), calling on their committees to investigate allegations of state capture that had appeared in the media recently and report their findings to the National Assembly as a matter of urgency.

1268. Up to this time, the ANC as an organisation (and therefore - because of the ANC's internal rules and practices – the ANC's members of Parliament) had been unwilling to initiate or to support a parliamentary inquiry or inquiries into the allegations concerned. The allegations implicated senior ANC leaders, right up to the President, as well as others regarded by the ANC as its cadres and deployees. The leadership of the ANC remained committed to support President Zuma and these cadres or deployees and was unwilling to expose the allegations of malfeasance to transparent public scrutiny.

1269. The ANC had for some time been divided between those allegedly implicated together with their supporters, on the one hand, and those who would be more inclined to support proper parliamentary oversight but who lacked sufficient support within party structures, on the other hand. Those who supported proper parliamentary investigation of the allegations may, not unreasonably, have feared the personal and political consequences to them if they should deviate from the "party line".

1270. Political considerations also led to opposition within the ANC to effective parliamentary scrutiny.

1271. The decision to direct a series of portfolio committees to inquire into allegations of state capture must on the probabilities have been preceded by, or at least endorsed by, a decision of the ANC's Political Committee.

1272. If regard is had to President Ramaphosa's evidence that the delay in Parliament taking the decision to institute inquiries into allegations of state capture was attributable to the balance of power within the ANC, then it must mean that the balance of power initially favoured those in the ANC who did not want such inquiries to be held and that there was a change in the balance of power in the ANC in 2017 which favoured those who wanted such inquiries to be held. The two views were held, respectively, by those within the ANC who supported Mr Jacob Zuma and those who supported Mr Ramaphosa. While

the Gupta leaks may have been an important factor in the shift in the balance of power, another important factor was probably that it was known that at the end of 2017 the ANC was going to hold its elective conference in which a new president of the organization would be elected and Mr Ramaphosa, being the deputy president of the ANC, then would be a candidate. That was enough for many within the ANC to seek to position themselves favourably on Mr Ramaphosa's side.

1273. The struggle as to whether to support or suppress parliamentary inquiries and effective oversight over the executive in respect of allegations of state capture or corruption continued even after mid-2017. This is demonstrated by the way in which the four committees to whose chairs Mr Frolick addressed his letters dealt with his requests.

1274. In short:

1274.1. The Portfolio Committee on Public Enterprises showed courage and determination and did manage to conduct an effective enquiry into the allegations relating to Eskom. However, essentially because of the time taken by its Eskom enquiry and because of the establishment of the present Commission, its inquiry did not, as it had intended, reach the issues relating to Transnet and Denel.

1274.2. The Portfolio Committee on Transport failed to conduct any inquiry. It may not even have been informed by its chairperson of Mr Frolick's letter.

1274.3. The Portfolio Committee on Mineral Resources failed to hold an adequate inquiry, initially due to evasive conduct on the part of Minister Zwane and thereafter because of (i) a failure to provide required resources when the committee finally decided that it wanted to hold a formal inquiry and (ii) the establishment of the present Commission.

1274.4. The Portfolio Committee on Home Affairs did not demonstrate much willingness to proceed with due expedition. Although it did ultimately conduct an effective enquiry, it acted far too slowly.

1275. The evidence of Dr M Khoza in relation to her experience on various parliamentary committees confirms that there was factional division within the ANC regarding the approach to be adopted in relation to parliamentary oversight and that this persisted well after the distribution of the Frolick letters.

1276. Similar failures to exercise adequate oversight took place in earlier years (from 2006 onwards) in respect of allegations of corruption on the part of companies in the Bosasa group of companies ("Bosasa") and the Department of Correctional Services. There is evidence that a minister and the chief whip placed the chair of the Portfolio Committee on Correctional Services (PCCS) under pressure not to scrutinise these allegations.[1050] There is also evidence that Bosasa paid bribes to members of the PCCS (Mr Vincent Smith, Ms Winnie Ngwenya and Mr V.V. Magagula) and Mr C Frolick (the House Chair of Chairs), all with a view to avoiding proper parliamentary scrutiny of Bosasa.

1277. Ministers frequently attend ANC study group meetings which precede portfolio committee meetings. There is evidence that a minister colluded in such a meeting to frustrate proper oversight by a portfolio committee. Care should be taken to avoid causing an impression that a portfolio committee's oversight responsibilities have been fettered by decisions taken at a study group.

[1050] Para 202.

1278. Party discipline is a legitimate and indispensable feature of our party-based democratic system. But there can be a tension between party discipline and the oversight obligations under the Constitution of Members of Parliament.

1279. Having regard to the applicable provisions of the Constitution and relevant judgments of the Constitutional Court, the Commission is of the view that:

1279.1. Corruption is the antithesis of the Constitutional values that every Member of Parliament takes an oath or solemn affirmation to uphold. So too is conduct which may be described as “state capture”.

1279.2. Promoting, facilitating, or conniving with corruption or state capture cannot be a lawfully adopted policy a political party.

1279.3. It follows that party discipline may not legitimately be directed at obstructing Members of Parliament from doing what they believe, in good faith and on reasonable grounds, to be appropriate in order to address concerns as to allegations of corruption or state capture.

1279.4. It is also unacceptable for a minister or fellow party members to castigate a member of Parliament for attempting to hold a minister to account, or for asking difficult questions of persons regarded as comrades or deployees of the same party.

1279.5. It is inappropriate for a party caucus to resolve not to permit, or to discourage, conduct amounting to legitimate parliamentary oversight over the executive.

1279.6. It is also inappropriate for members of Parliament not to enquire into allegations of misconduct for which there appears to be plausible evidence, on the basis that to do so could cause embarrassment to, or divisions within, a political party.

1280. Even where the will to oversee the executive existed, parliamentary oversight has too often proved to be ineffective.

1281. This is illustrated by the Parliament's ineffectiveness in in addressing the staggering annual increases in irregular expenditure on the part of PRASA in 2014 to 2018, which were disclosed to the Standing Committee of Public Accounts (SCOPA) and to the PCT.

1282. Thought SCOPA made repeated recommendations directed at addressing the problem of increasing irregular expenditure (both within PRASA and elsewhere), the executive all too frequently failed to implement such recommendations.

1283. The PCT failed to exercise effective oversight in respect of PRASA. Its failure to do its job is completely unacceptable.

1284. The failure of the executive to implement recommendations in parliamentary reports seems to be attributable to a lack of political will by the executive to address the problems identified. That Parliament failed to compel the executive to address the problems identified in its reports suggests a similar lack of political will on its part.

1285. Whilst the evidence available to, and considered by, the Commission as to the activities of the Joint Standing Committee on Intelligence (JSCI) is limited and incomplete, there is in the Commission's view nonetheless reason to be concerned that the JSCI has not been effective.

1286. The annual reports by the JSCI to Parliament during the Fifth Parliament did very little, if anything, to alert Parliament to malfeasance within the intelligence services of the type and degree revealed in reports to the JSCI from the Inspector General on Intelligence.

1287. The JSCI appears *prima facie* to have failed to ensure that adequate and timeous steps were taken to address apparently criminal conduct within the intelligence services which had been drawn to its attention.

1288. The JSCI has, on more than one occasion, failed to furnish reports to Parliament within the time stipulated by section 6 of the Intelligence Services Oversight Act, No. 40 of 1994.

1289. The JSCI cannot properly adopt a supine attitude and defer to whatever may be decided as regards the security services by the accounting officer or minister. If, in its opinion, an accounting officer or minister is acting unconstitutionally or unlawfully or is not taking effective steps to address such conduct, it is not only entitled to alert Parliament of this, it is under a duty to do so. This can and must be done in a manner that does not disclose any intelligence, information or document the publication of which is restricted by law.

1290. One of the primary practical problems to which various witnesses drew attention was the absence of any parliamentary system to "track and monitor" implementation or non-implementation by the executive of corrective action proposed in reports adopted by Parliament. They agreed on the need, with which the Commission also agrees, to implement such a system as a matter of priority.

1291. To facilitate proper oversight over the executive, the Commission is of the view that leaders of political parties should provide the political space for individual MPs to ask difficult questions without prejudice to themselves, with the assurance that their concerns will be taken seriously and properly answered.

1292. Inadequacy of financial resources is, in the Commission's view, not an adequate explanation for all the failures of parliamentary oversight noted, but it is nonetheless a concern.

1293. Presentations to portfolio committees are often submitted late, not infrequently at the very meeting at which they are then presented. That obviously makes it impossible for the MPs to read and consider the reports and is clearly unsatisfactory. The apparent frequency with which this occurs makes one wonder whether it is done deliberately, precisely in order to obstruct proper oversight.

Summary of recommendations

1294. In what follows the Commission summarises the recommendations it has made above.

1294.1. It is recommended that Parliament should consider whether it would be desirable for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency, which are not overseen by existing portfolio committees.

1294.2. It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of Members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system have this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages of, this advantage justifies amending the existing electoral system.

1294.3. It is recommended that Parliament should consider whether it would be desirable to enact legislation which protects Members of Parliament from losing their party membership (and therefore their seats in Parliament) merely for exercising their oversight duties reasonably and in good faith.

1294.4. It is recommended that Parliament should consider amending section 6(1) of the Intelligence Services Oversight Act 40 of 1994, so as to ensure that, before an election, the outgoing JSCI is required to report to Parliament on as much as possible of the period preceding the election.

1294.5. It is recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.

1294.6. It is recommended that, subject to budgetary restraints, the scale and skills of the research and technical assistance made available to the portfolio committees be enhanced.

1294.7. It is recommended that Parliament needs to make it clear that the practice of late submissions to portfolio committees will not be tolerated.

1294.8. It is recommended that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament.

1294.9. It is recommended that Parliament needs to make clear that non-attendance by ministers and others scheduled to attend portfolio committee meetings will not be tolerated and to ensure that consequences are visited on those who offend without adequate cause. (Parliament should consider whether there is a need to legislate on this issue.

1294.10. It is recommended that Parliament implement a system to “track and monitor” implementation (or non-implementation) by the executive of corrective action proposed in reports adopted by Parliament.

1294.11. It is recommended that Parliament establish an Oversight and Advisory Section to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong.

1294.12. It is recommended that Parliament should consider whether it supports the principle of “amendatory accountability” and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament, along the lines suggested in the Corder report.

1294.13. If Parliament should not be minded to enact legislation of the above type, the Commission is of the view that consideration should be given by Parliament to amendments to its own rules, with a view to addressing the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.

1295. The Commission supports the recommendation that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.

1296. It is recommended that Parliament should consider whether more representatives of opposition parties should be appointed as chairs of portfolio committees.

1297. It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by Parliament.