
FINANCIAL AND FISCAL COMMISSION'S READING OF THE ZONDO COMMISSION OF INQUIRY INTO STATE CAPTURE REPORT - PART II

11 February 2022

Summary

Part 2 of the Judicial Commission of Inquiry into State Capture (also known as the Zondo Commission) Report is summarised below, following Part 1. The report, consisting of two volumes, focuses on investigations into state capture, corruption, and fraud within Transnet and Denel. Part 3 is expected to be released at the end of February 2022.

Volume 1: Transnet

Background

1. Transnet is the proprietor of all rail, ports and pipelines in South Africa and is made up of five operating divisions – Transnet Freight Rail (TFR), Transnet Rail Engineering (TE), Transnet National Ports Authority (TNPA), Transnet Port Terminals (TPT) and Transnet Pipelines (TPL). The primary objective of Transnet is the optimal development of the freight system.
2. Transnet is defined as a major public entity under the PFMA. Section 51(1)(a)(iii) of the PFMA obliges the accounting authority (i.e. the Board) of a public entity to ensure that its procurement system is fair, equitable, transparent, competitive and cost-effective. Section 50 and 51 of the PFMA also imposes a duty of utmost care that must be exercised by the Board to ensure reasonable protection of its assets and to act with fidelity, honesty, integrity and in the best interests of Transnet when managing its financial affairs. It is a criminal offence for the Board (or its members and officials with delegated power) to intentionally or with gross negligence to fail to comply with the above duties prescribed by law.

3. Part 2 of the Commission's inquiry into state capture investigates the many instances of wrongdoing that occurred at Transnet between 2011 and 2018, which possibly amount to fraud, corruption, money laundering and patterns of racketeering activity.

Chapter 1: State Capture at Transnet

4. Transnet's state capture involved a systematic scheme of securing illicit and corrupt influence or control over decision-making. Corrupt actors sought to gain control over staff appointments and governance bodies to:
 - 4.1. Influence large procurement decisions
 - 4.2. Give preferential treatment to corrupt suppliers by altering bid criteria
 - 4.3. Pay inflated costs and advanced payments to service providers, which ultimately benefited the Gupta enterprise and associated persons
5. The Commission's report identifies Mr Molefe (appointed GCEO in 2011), Mr Singh (appointed GCFO in 2011) and Mr Gama (dismissed as CEO of TEF in 2010 and reinstated in 2011) as the primary implementers of state capture at Transnet.¹
6. Following the appointment of these high-level officials, there was a restructuring of governance and a weakening of internal controls that allowed corrupt activities to take hold.
7. In 2011, the BADC was created as a sub-committee of the Board, which effectively changed the delegation of authority framework, enabling the Board to partake in certain procurement-related activities. The approval authority of the BDAC was increasingly expanded to grant the BDAC greater power over procurement decisions which ultimately benefited the Gupta enterprise.
8. Approval authority at the board level was thus highly centralized to the effect that procurement processes were not subject to scrutiny by a broad group of officials who could have detected and reported irregularities. The result was that high-value

¹ The former Minister of Public Enterprises, Mr Gigaba, was involved in the appointment of Mr Molefe and Mr Singh as directors of Transnet as well as in the reinstatement of Mr Gama. Former President Zuma insisted on the appointment of Mr Gama as GCEO even though he was facing investigations of misconduct relating to tenders, which reflects the first steps taken by the former president towards state capture of Transnet by the Guptas. The former president also appointed Gigama, who had a close relationship with the Guptas, as Minister of Public Enterprises.

procurement decisions by the Board were often uninformed or made based on advice from external advisers and consultants.

9. Examples of problems prevalent in the procurement practices at Transnet include: Inadequate needs assessment; poor or biased drafting of specifications; inappropriate deviations from the open bidding processes; changing of evaluation criteria during bid evaluation and adjudication; inconsistent application of disqualification criteria; improper overruling of the evaluation team; manipulation of scores; multiple repetitive awards to the same supplier; abuse of variation procedures, and inadequate validation of services rendered before payment.
10. The concentration of power within the hands of a few senior executives and Board members fostered an authoritarian culture of decision-making at the expense of inclusive and transparent deliberation.
11. The weakening of internal controls was accompanied by increased reliance on consulting and advisory services – such as those offered by McKinsey, Regiments and Trillian (linked to Mr Essa) – despite the extensive expertise and internal capacity available within Transnet at the time.
12. The fees paid to consulting firms was then shared with companies established and controlled by Mr Essa, a Gupta associate, after which money was laundered to the Gupta enterprise. Between 2012 and 2017, financial advisors with links to the Gupta enterprise were engaged to manage the finances of R70 billion procurement locomotives at enormous and unnecessary costs.
13. Transnet contracts to the value of approximately R41.2 billion were irregularly awarded to the benefit of entities linked to the Gupta family or Mr Essa. The appointment of financial advisors concerning the 1064 locomotive procurement formed a significant part of racketeering in Transnet between 2012 and 2016.
14. Other key procurement contracts were in relation to IT and data services (T-Systems, a company with Gupta links, was given preferential treatment despite not having scored the highest in the bidding process), and to the procurement of cranes (where there is evidence of money laundering and substantial kickbacks paid to the Gupta family companies in Dubai).

15. From the fees paid to Regiments, more than R1 billion was laundered through various shell companies (who were nominated by Mr Essa and Mr Moodley).
16. Transnet's inappropriate use of confinements, emergency procurement, and contract variations aided corrupt activities.¹
17. Internal controls were also undermined by limiting access to information that would expose corruption at Transnet (such as withholding disclosure of audit information).
18. Mr Essa exerted influence within Transnet when Mr Gigaba appointed him as director of Broadband Infraco (BBI) – an SOE in the IT sector. He worked closely with two consulting firms, Regiments and Trillian. Both of them were awarded strategic consulting contracts with Transnet, which put them in a position to influence Transnet's financial, strategic, and procurement decisions. He also concluded the BDSAs with locomotives under substantial contracts awarded by Transnet (which provided for a 21% fee for services of little to no value). It is also likely that Mr Essa played an influential role in advancing Mr Molefe to GCEO of Transnet.
19. Evidence of cash bribes provides strong and reasonable grounds that Mr Molefe, Mr Gigaba, Mr Singh, Mr Gama and Mr Jiyane corruptly received property from, and participated in, the affairs of the Gupta enterprise.
20. The investigations found clear and convincing evidence of Mr Singh committing the offence of corruption by accepting a gratification to influence the price under various contracts and procurement tenders that favoured the Gupta enterprise and thereby acted in violation of his duties under the law.

Chapter 2: The GNA/ABALOZI contract

21. Chapter 2 of the Commission's report deals with the GNS/ABALOZI contract ("GNS contract"). The GNS contract was signed in June 2008 to provide specific types of security services at Transnet. However, shortly after the contract conclusion, the contract was extended to expand the scope of services offered by GNS significantly. Thereafter, a second extension to the scope of GNS's contract was made
22. These extensions to GNS's contract resulted in additional invoices issued by GNS to Transnet. Over two years and two months, the total amount paid by Transnet to GNS amounted to R95.5 million.

23. The contract award to GNS was based on significant misrepresentations and irregularities, including the fact that the security service provider did not employ any staff, which meant that it could not provide the necessary human resources for which it invoiced Transnet.
24. Under the management of Mr Molefe, Transnet agreed to pay the legal costs of persons who were not parties to the litigation proceedings with GNS.
25. Evidence from the report shows that there are reasonable grounds to believe that Mr Molefe breached his obligation to exercise the duty of utmost care in ensuring suitable protection of the assets of the public entity. Further, he breached his obligation to act with fidelity, honesty, integrity and in the best interest of Transnet in managing its financial affairs.

Chapter 3: The Procurement of the 95 Locomotives

26. Chapter 3 deals with the significant locomotive transaction: the procurement of 95 locomotives from CSR Zhuzhou Electric Locomotive Company Ltd (“CSR”). The irregularities surrounding the conclusion of this contract indicate that CSR was improperly favoured as a supplier in various procurements. This formed part of a broader scheme of corruption and racketeering activity involving the Gupta enterprise at Transit.
27. CSR was inappropriately favoured by an irregular change in the evaluation criteria – supported by Mr Gama and Mr Molefe – when, following the original RFP issued, CSR’s bid for the tender should have been disqualified at stage 1 of the tender process.
28. The non-disqualification of CSR’s bid ensured that the planned 20% kickback to the Gupta enterprise negotiated by Mr Essa remained possible.
29. The relationship of the events spanning from the acquisition of 95 locomotives to the purchase of other locomotives from CSR indicates the existence of an enterprise engaging in a pattern of racketeering activities.²
30. The evidence from the report establishes reasonable grounds to believe that the offences of corruption, money laundering and racketeering may have been committed by Mr Essa and his associates in the Gupta enterprise.

Chapter 4: The Procurement of the 100 Locomotives

31. Chapter 4 of the report deals with the procurement of 100 additional locomotives on a coal export line.
32. Transnet favoured a supply agreement with CSR over Mitsui and agreed in March 2014 under irregular and unjustifiable circumstances.
33. According to the agreement terms with CSR, Transnet was required to pay 60% of the purchase price upfront before any delivery. These terms resulted in R1.32 billion being paid to CSR before delivering any locomotives.
34. Furthermore, following the initial RFP published, the CSR tender did not comply with the 60% mandatory SP requirement in terms of which organs of state must make it a condition for bidders to comply with minimum local production and content requirements for designated sectors. Failure to meet localized production was an irregularity that confirms that CSR was inappropriately favoured and accommodated.
35. The price negotiations in the CSR contract also culminated in substantial price increases, which, at R R43.8 million per locomotive, could not reasonably be justified. Even so, this inflated price was recommended by Mr Molefe, Mr Singh and Mr Gama – all of whom benefited substantially from the conclusion of the agreement with CSR.
36. There is evidence of a substantial kickback of R925 million paid by CSR to companies and individuals linked to the Gupta enterprise. Regarding the payment schedule, 21% was paid to a company JJT, and approximately 85% went to companies controlled by the Gupta enterprise.
37. By favouring CSR as the preferred tender, the Board breached their fiduciary duties by not acting in a manner in the best interests of the SOE. This contravened sections 76(1) and (3) of the Companies Act and sections 50 and 51 of the PFMA.
38. The favouring of CSR indicates corrupt activity relating to procuring a tender, racketeering and offences related to the proceeds of unlawful activities.
39. Overall, the Commission's findings are to the effect that there are reasonable grounds to believe that the employees and Board members of Transnet implicated by the evidence present in the report violated the Constitution and other legislation (including POCA, PRECCA and law prescribing public procurement processes) by facilitating the

unlawful award of tenders by Transnet which benefited the Gupta enterprise and involved corruption.

Chapter 5: The Procurement of the 1064 Locomotives

40. During 2011-2012, the business case for the procurement of the 1064 locomotives with the acquisition cost of **R38.6 billion** was developed at Transnet Freight Rail (TFR) by a team coordinated by Mr Callard. Two-thirds of the costs would be financed using the cash generated by operations and R13 billion raised externally. The delivery of the locomotives was scheduled to take place over seven years.
41. Request for proposals (RFP) was sent on 23 July 2012. **McKinsey** was appointed in March 2013 to assist with the acquisition and evaluate the business case. The business case was approved on 25 April 2013. The minister of Public Enterprises approved the acquisition on 3 August 2013.
42. Between 2012 and 2013, the business case was dealt with by **Mr Singh, Mr Mohammed Mahomed, Mr Callard** and **Mr Pillay**. **Mr Jiyane** of TFR was the overseer of the procurement process.
43. The investigation revealed that Until March 2013, when McKinsey was appointed as the transaction manager, the business case was submitted to the board on 25 April 2013 (**signed by Mr Singh and Mr Molefe on 18 April 2013**). It stated that the R38.6 billion excluded the potential effects from forex hedging, forex escalation and other price escalations. The board approved the **ETC of R38.6 billion**, which assumed excluding these costs. **The ultimate cost of the procurement was R54.5 billion.**
44. Mr Callard and others testified that the ETC figure of R38.6 billion did include the provision for escalations, forex and hedging. Mr Callard maintained that the ETC initially calculated was only intended to exclude “borrowing costs” (interest on borrowed capital), which was possibly changed on the LSC on 18 April 2013 before the business case was served before the board and even afterwards.
45. The metadata for the file containing the final version revealed that it was modified on the computer of Mr Yusuf Mahomed on 30 April 2013. Mr Mahomed admitted that he deleted the word borrowing costs” and inserted the phrase “the potential effects from forex hedging, forex escalation and other price escalations”. He stated that Mr Singh

instructed the change to bring the document in line with the resolutions passed by the board and other committees during April 2013.

46. Mr Singh confirmed that he had instructed Mr Mahomed to make the change, but Mr Mahomed has incorrectly formulated the sentence.
47. Mr Chabi (investigative actuary) concluded that there is no doubt that the ETC of R38.6 billion included the potential effects from forex hedging, forex escalation and further price escalations (to a total of R5.892 billion). He concluded that the ETC of R38.6 billion in the business case was a reasonable and acceptable estimate.
48. On 31 March 2014, two weeks after the signature of the LSAs, Ms N Huma from the department of Public Enterprises addressed an email to Mr Singh noting that the department had approved an ETC of R38.6 billion querying because there was such a vast difference between the approved ETC and the actual transaction. Mr Singh responded the same day, stating that the R38.6 billion excluded the impact of forex hedging, forex escalation and other price escalations. He noted that the ETC typically doesn't include these figures.
49. This false accounting may have facilitated the ability of **CSR and CNR to pay the 21% kickbacks** to the Gupta enterprise on the 1064 locomotive contracts. The conduct, if shown to have been intentional, gives rise to reasonable grounds to believe that there was a fraud on Transnet in that it amounted to the misrepresentation that was prejudicial to Transnet that there may have been an infringement of the duty in section 50(1)(b) of the PFMA to act with fidelity and integrity and in the best interest of Transnet in managing its financial affairs.
50. Much evidence before the commission suggests that **CSR and CNR** were unduly favoured at various stages of the procurement process.
51. Evaluating the bidders based on not using TE as a sub-contractor was not on its own unfair. Evaluating on that basis meant that all bidders would be treated equally. Mr Callard emphasised that the inclusion or exclusion of TE was inconsequential to the ranking of the bidders based on price. CSR moved from 4th to 5th place after including TE. It would have been difficult to justify the CSR proceeding to the BAFO stage without the TE adjustment. As seen presently, in the BAFO stage, CSR increased its price to add back the TE deduction.

52. The BAFO price of the successful bidders for the electric locomotives was fundamentally misstated because, later, CSR added back the impact of the TE to the BAFO price.
53. The BAFO price used in evaluating CNR's bid in the diesel locomotive procurement was problematic. As mentioned on 4 January 2014. Transnet wrote to CNR seeking its BAFO using specific guidelines. CNR responded to the request for information on the 10th January 2014 and claimed, amongst other things, to reduce their base price in the Total cost of Ownership (TCO) model from R39.7 million per locomotive to R27.36 million. It noted that the price is related to the cost of manufacture and does not include other costs.
54. The exclusions from the base price in CNR's letter did not constitute a comparative BAFO price. It should have been excluded from the BAFO because it was open-ended. CNR's BAFO price was accordingly **misleading**.
55. Regarding the results of the BADO, responses indicated that the original base price used for evaluation of the CNR bid before BAFO was **R44.23 million per locomotive, and the BAFO price used for evaluation was R30.45 million**. This evidence confirms that the BAFO price carried forward to evaluate CNR's bid included the inappropriate qualifications and exclusions from the BAFO price presented by CNR in its letter on 10 January 2014.
56. Post tender negotiations took place during February and March 2014 and endured for about six weeks and were led by **Mr Singh and Mr Wood of Regiments**, which were both associates of the Gupta enterprise. Regiments assumed the role that generally was reserved to Transnet Treasury. The Group of Treasurer of Transnet, Ms Makgatho, was sidelined and excluded from the process.
57. During the post-tender negotiations (PTN) in the period from the shortlisting of the bidders to the conclusion of the LSA's on 17 March 2014. Throughout Regiments interactions with TFR during January 2014 to 17 March 2014, **the ETC increased by R15.9 billion**.
58. The provision made for batch pricing by the Transnet negotiation team during the PTN led to an increase of R2.7 billion in the ultimate price. Committing Transnet to batch

pricing was contrary to the provisions of the **RFP**, compromising the fairness of the procurement process and constituting an irregularity.

Chapter 6: The relocation of CNR and BT to Durban

59. While negotiations were being conducted for the supply of the 1064 locomotives, in February 2014, Transnet instructed Price Waterhouse Coopers (PWC) to conduct a review of the TE's operational readiness to deliver. PWC identified the TE sites that could be used for the assembly of the locomotives. PWC recommended that locomotives CNR and BT should be assembled in Durban.
60. CNRRSSA was to be awarded 233 diesel locomotives and was aware it could be assembled in Durban; however, they have based their costs on assembly of the locomotives at Koedoespoorts. To move the assembly to Durban would cost an additional R755 600. This meant an extra cost of R4 million on locomotives; R2.8 million for transport costs, R2.3 million for flights and accommodation and R600000 for new office set up. CNRRSSA stated that moving to Durban would cause considerable amount of immeasurable financial losses.
61. BEX was appointed negotiate a contract with Transnet for the cost of relocating to the Durban offices. Mr Singh, Mr Jiyane, Mr Pita, Mr Silinga and Ms Mdletshe would negotiate an agreement dealing with the costs of relocation. The total cost to relocate came to R716 090 548 less a 10% discount. On 20 June 2015, Mr Pita wrote a letter to the negotiation board, stating that the costs were significantly inflated and in some respects irrational and wholly unjustifiable, this was supported by Mr Laher. After CNRRSSA revised their proposed relocation costs, Mr Laher still had concerns. However, Mr Singh stated the Mr Laher's concerns was resolved, and Mr Singh said the proposed relocation costs was reasonable and the memorandum could be supported.
62. In October 2028, MNS attorney appointed Loilwer Rail solutions (Loliwe) to conduct an assessment of whether the approved relocation costs were rational and justifiable. According Loliwe, the costs did not have a detailed breakdown or specific information of the costs. It concluded that the variation costs were inflated intentionally and inadequately evaluated by Transnet. Transnet was only liable for additional costs of relocation because the LSA's provided for the assembly of the locomotives to take place either in Pretoria or elsewhere in South Africa.

63. Mr Shaw signed the contract between BEX and CNRRSSA. The bank records of BEX reflect that approximately R76.59 million was paid from CNRRSSA to BEX on 25 September 2015. This was after CNRRSSA received the initial payment of R368.89 million from Transnet on 19 August 2015. Mr Shaw was the signatory of the Standard Bank account into which CNRRSSA paid the fee. After receiving the payment, Mr Shaw laundered the money to other shell companies immediately to four instalments. As pointed out above R9 million of the R76.59 million was ultimately paid to Integrated Capital Management, of which Transnet director, Mr Shane, was a director in November 2015. Another R33.73 million was laundered to the Gupta family company, Confident Concepts.

Chapter 7: The financial advisors

64. On 17 February 2017, the BADC approved the use of Nkonki as consultants and delegated to Mr Gama the authority to sign a LOI for consultancy services. The suggested extension was an increase in values of 100% on the existing Nkonki contract a further 20-month extension to 2 March 2020. The procurement was open to question because the award of the contract did not go to tender and seemed a duplication of some of the services that were supposed to be rendered by **Mckinsey/Regiments**.
65. In March 2018, the Auditor-General requested state organs to consider termination of contracts with Nkonki because of its association with the Guptas. Transnet heeded the call of the Auditor-General and terminated the internal audit contract sometime before 31 July 2018. By 2019 Transnet had paid R26.1 million for these related services, with a further R16 million outstanding which has been disputed by Transnet.
66. It was found that 100% increase in value of Nkonki's contract was a contravention of the paragraph 9 of National Treasury Practice Note 3 of 2006/17 that limited the variation of Nkonki's contract to a maximum of 15%.

Chapter 8: The Procurement of the 1064 Locomotives

67. Transnet needed to identify appropriate and cost-effective funding sources to fund the procurement. Therefore, Transnet concluded funding facilities with USEXM and EDC, these facilities provided approximately R13billion of required funding. The Transnet board approved the use of a China Development Bank (CDB) loan facility.

68. The CDB financing was too expensive and other fees proposed by CDB was not in line with similar facilities. Transnet had diverse sources of funding that were more attractive. Ms Makgatho repeatedly expressed her concerns about the financing of the procurement to Mr Singh and Mr Molefe. She believed there was not needed to use Regiments. Mr Wood later came up with a pricing proposal from Nedbank that was more expensive.
69. Some reasons put forward by Regiments were factually incorrect and included significant misrepresentation, which according to, Ms Makgatho exposed Transnet to R3.7 billion in capital leakage. She stated that the proposition that the CDB loan was “fairly priced” was misleading and incorrect.

Chapter 9: The Manganese Expansion Project

70. In 2009, Transnet implemented the Manganese Expansion Project (MEP) due to the increasing demand and unprecedented growth of manganese exports. The project was aimed to increase export capacity, modernizing the country’s ports, rails and pipeline infrastructure to promote economic development in SA. After conducting feasibility studies, Transnet concluded that MEP implementation occurs in two phases.
71. McKinsey had changed the capital expenditure structure of Transnet from allowing operating divisions to have capital expenditure control over projects to having one central authority having responsibility and oversight of capital expenditure. Transnet’s Board Acquisition and Disposal Committee (BADC) approved the R 2.38 billion “no regrets” rail infrastructure investment.
72. Supplier development partner (SDP) is a clause within SOE tenders that ensures the inclusion of qualifying small enterprises (QSE), exempted medium enterprises (EME) and emerging black-owned enterprises in large public-funded projects. These enterprises receive leniency for not having extensive experience, while designated sub-contractors (or SDs) require extensive experience as a qualifying criterion. The norm SD requirement for public sector tenders is 30%. Mr Singh, GCFO, changed the threshold to 50% - this was ratified by GCEO, Mr Molefe.
73. During phase one, confinement of the project was authorized to Hatch (an international engineering firm with rail expertise) as they have completed feasibility studies and were well familiar with the design of the railways. Under the new criterion, 50% of the value

of work had to be subcontracted by Hatch to QSEs and EMEs. In an internal review, Mr Singh requested that DEC Engineering become a designated sub-contractor but was denied by members as DEC did not have adequate rail experience. After that, Mr Singh suggested that DEC become an *SDP*. Before the confinement approval occurred, Hatch was approached by Mr Padayachee of PM Africa, another engineering firm and Mr Reddy of DEC. Mr Padayachee requested that PM Africa be included as primary SDP on phase 1. The representatives of each firm and Mr Singh repeatedly harassed Hatch to have them in confinement but to no avail. After much negotiation, Mr Molefe signed off on the confinement to Hatch with a 30% requirement of sub-contracting to black owned-enterprises. There was no direct link between DEC, PMA and the Gupta family or affiliated enterprises during phase one.

74. In phase 2, bidders had to comply with an SD threshold of 45% and a 30% SDP threshold. Further, as per McKinsey's SD and performance bond recommendations, no individual company will have the financial backing to meet tender requirements alone. Therefore, larger EPCM firms had to form joint ventures and include smaller ECPM companies within their structure for bidding. Two joint ventures, one comprising Hatch, Aurecon Mott McDonald and Siyathuta (H2N) and the other Fluor, Aecom and Gibb (FLAG), were identified as preferred bidders for both the Rail Phase 2 and Port Phase 2 contracts. Hatch met Mr Singh over late payments regarding phase 1 when representatives met Mr Salim Essa. Mr Essa took over the meeting with Mr Singh and attempted to persuade Hatch to sub-contract DEC and PMA for phase 2. H2N refused to sub-contract any of the companies prescribed by Mr Essa.
75. H2N was awarded the Rail tender, while FLAG was awarded the Port tender. Although, H2N provided the cheaper Port contract. H2N reduced costs by R 287 mil post-tender negotiations, while FLAG increased costs by R 68 mil. FLAG should not have been awarded the contract as the price is the overriding factor among contracts. In 2017, Transnet terminated all contracts due to prevailing market conditions and affordability constraints.
76. In 2014, Ms Strydom raised her concerns regarding suspicion of fraud and irregular procurement of MEP to the head of forensic investigations of Transnet, Mr Bramley

May. Mr May chose not to pursue the matter as he felt it was irrelevant and destroyed the subsequent interview tapes.

Chapter 10: Neotel and Homix

77. During 2007 and 2014, Transnet concluded three contracts with Neotel: the 2007 Master Network Services Agreement (MSA), the procurement of Cisco equipment and the 2014 MSA. Before 2009, Arivia owned Transnet's data centre, including all servers, information and data assets. Transtel, a subsidiary of Transnet, was the network service provider. In 2007, Transnet decided to dispose of both businesses. A competitive procurement process resulted in T-Systems and Neotel being the successful bidders for the data centre and network. Transtel was sold to Neotel, which led to significant repercussions – Transnet's network assets were controlled by an outside service provider, making it difficult to contract another firm to provide service in future. Therefore, Transnet had to remain a client of Neotel or repurchase their network infrastructure or replace the equipment at a high cost.
78. The 2014 MSA resulted in many controversies as Neotel was initially awarded the contract as they scored the highest on functionality and preference during the bidding process. Neotel also provided the cheapest bid. Contrastingly, T-Systems scored below the functionality threshold by a fraction (69.993 vs 70). T-System's functionality score was rounded up to the nearest whole number instead of the second decimal resulting in their eligibility. At the authority of Mr Molefe, the tender award was reversed and awarded to T-Systems. T-Systems had collaborated with BBI, and Mr Essa was the company director at this time. Mr Molefe cited the change necessary as Neotel posed an unnecessary risk to Transnet.
79. During the 2007 MSA, Transnet's Cisco equipment was sold to Neotel. By 2014, the equipment needed to be repurchased for T-Systems under the 2014 MSA. Some of the equipment had become obsolete as well. On the approval of Mr Singh, Transnet requested the procurement of new Cisco Equipment from Neotel (which had an exclusivity agreement with Cisco) for a maximum cost of R305 mil. T-Systems was required to remove this cost from their tender. Transnet was then approached by Mr Khan, the CFO of Homix – a company linked to Mr Essa. Mr Khan stated that Homix provided advisory services to Neotel and would deliver the Cisco equipment to

Transnet at the cost of R315 mil, excluding VAT. Upon considering various legal opinions, conflict of interest, and rounding-off issues concerning the 2014 MSA tender Mr Molefe revoked T-System's status as the preferred bidder. The award of the tender was then made to Neotel.

80. Homix approached Neotel as a business consultant for the MSA and Cisco Equipment contracts with Transnet. Initially, Homix proposed two amounts totalling R61 mil for consultancy fees to Neotel – Neotel paid Homix R 41.04 mil supposedly for the sale of Cisco equipment and the MSA tender conclusion. Transnet had no business dealings with Homix at the time, and Mr van der Westhuizen, the “business owner” for ICT procurement in Transnet, was unaware of the existence of Homix until the MSA contract was closed. In paying the R41.04 million to Homix, Neotel breached clause 65.6 of the 2014 MSA, which included a warranty against corrupt payments and permitted Transnet to terminate the contract. Investigations by Deloitte conclude that Homix is a shell company with little to no resources.

Chapter 11: T-Systems – The IT Data Tender

81. In 2010, Transnet agreed with T-Systems to provide IT data services. Five extensions of the contract between 2010 and 2019 totalling R4.8 billion.
82. Issues arose with T-Systems in 2015 when Transnet Group Capital was paying for approximately 2200 computers, and only 1100 were employed within the division. Further, 450 computers were leased from T-Systems but disappeared. In November 2015, Transnet issued a request for a proposal to outsource data services for the entire organization. Gijima outscored T-Systems 99% to 85.07% and were the preferred bidder according to the PPPFA. Regardless, T-Systems was awarded the contract.
83. The BADC discussed the irregularities regarding the tender. They chose not to support the tender award to Gijima and recommended to the Board that it approve the tender award to T-Systems. Gijima complained with the Transnet Procurement Ombudsman regarding the tender. National Treasury concluded that the BADC and the Board were unfair in disqualifying Gijima and that Transnet awarded the tender to Gijima.

Chapter 12: Remedial Action and Recommendations by the Board of Transnet

84. Criminal investigations are underway regarding the individuals and companies involved in purchasing 1064 locomotives. Transnet is also launching legal proceedings against the four OEMs contracted to provide the locomotives. Disciplinary action has been taken and claims for damages instituted against several former Transnet executives, including Mr Gama, Mr Jiyane, Ms Mdletshe, Mr Thomas, Mr Ramosebudi, Mr Singh, Mr Pita and Mr Brian Molefe.
85. Transnet has instituted two actions against Regiments and four actions against Trillian. Transnet has recovered R618 million from CDR unjustifiably paid under the maintenance agreement. Through the office of the Chief Legal Officer, Transnet has strengthened its relationship with the SIU. The Forensic Department at Transnet has undergone restructuring.
86. On 31 January 2020, Cabinet approved the appointment of Ms Portia Derby as GCEO. Ms Derby came to clean up and rebuild where Mr Brian Molefe and Mr Gama inflicted considerable damage. The Parliamentary Portfolio Committee must play a more significant oversight role on Public Enterprises in ensuring that SOEs are not vessels of corruption, fraud and state capture. There also needs to be greater transparency on how procurement awards are made in SOEs.

Chapter 13: Summation and Recommendations

87. The Zondo Commission highlights that all the offences perpetrated by the Gupta family and associates are a part of a racketeering enterprise. Some of the instances of wrongdoing at Transnet during the period under consideration constitute Schedule 1 offences and thus possible predicate offences on a charge of racketeering. The central elements of the pattern of the racketeering activity at Transnet comprised: i) the kickback agreements between CNR/CSR/CRRC and Mr Essa's companies; ii) the inclusion of Gupta linked companies as SDPs on Transnet contracts; iii) the money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley and iv) the payment of cash bribes to officials and employees associated with Transnet.
88. It is recommended that the law enforcement agencies conduct further investigations to possibly prosecute Mr Essa, his various companies and the relevant functionaries of

CSR, CNR and CRRC on charges of corruption as contemplated in any law, including Chapter 2 PRECCA. These include racketeering offences and offences related to kickbacks.

89. It is recommended that law enforcement agencies conduct further investigations regarding the possible prosecution of Mr Brian Molefe, Mr Singh, Mr Gigaba, Mr Gama, Mr Pita, and Mr Jiyane on charges of corruption, racketeering and the receiving of cash payments.
90. It is recommended that Mr Brian Molefe and Mr Gama be investigated for contravening section 50(1)(a) of the PFMA and racketeering regarding the procurement of 95 locomotives. Simultaneously, it is recommended that Mr Molefe, Mr Gama and Mr Singh be investigated for contravening the PFMA while acquiring the 100 locomotives and procuring 1064 locomotives worth R38.6 billion.
91. It is recommended that law enforcement agencies conduct further investigations regarding the possible prosecution of Mr Reddy and Mr Padayachee with corruption regarding the MEP tender and Mr Khan, Homix, Neotel and Mr van der Merwe Transnet's IT contracts.

Volume 2: Denel

1. Denel, South Africa's military equipment manufacturer, is another SOE suffering the effects of state capture.

The Hoefyster Contract

2. In 2007, Denel Land Services (DLS), one of Denel's five divisions, was awarded the "Hoefyster" contract, which involved manufacturing 217 new generation infantry combat vehicle product systems, known as the "Badger" combat vehicle. Hoefyster was to be completed in two phases, development and production. The development phase was to be completed in 2012 but remained incomplete in 2021 due to Denel's lack of funds, engineering complexities, and loss of skills. It remains the single biggest program on Denel's balance sheet. Despite receiving billions of rands in guarantees and recapitalization from Treasury, Denel was due to run out of cash in 2021, having recorded a R1.2 billion loss at the end of 2020. This is a result of funding and governance challenges.

The 2011 Board

3. After being reconstituted in 2011, Denel's new Board achieved significant success, with business growing significantly during 2011 and 2015, reversing a history of losses in previous years. In 2015, Denel was solvent and liquid; however, Hoefyster remained a concern.

How the Gupta's Used VR Laser to Capture Denel

4. In 2012, Mr Essa, an associate of the Guptas, contacted Mr Saloojee, then Group CEO (GCEO) of Denel, to arrange a business meeting with individuals interested in working with Denel. He was taken to the Gupta compound where Mr Tony Gupta, Mr Atul Gupta and Mr Gigaba, the then Minister of Public Enterprises, were present. Mr Saloojee was invited to several meetings where the Guptas expressed interest in doing business with Denel and tried to pressure him to cooperate with their requests. Mr Saloojee would inform them that they would have to follow the proper channels. At one meeting, Mr Essa discussed buying companies, including VR Laser, a significant supplier of armoured steel to Denel, that would allow Gupta's entry into the defence environment.
5. By 2012, VR laser was not operating successfully, and, as a result, Mr and Ms Jiyane, who part-owned VR Laser, resolved that they would have to sell to foreign investors. Mr Jiyane sought to find a new partner in VR Laser and was introduced to Mr Essa through Mr Ntshepe, a Denel business executive. Mr Essa and his colleague, Mr Sharma, negotiated with Mr Jiyane to buy the shares from its current shareholders and retain the Jiyanes as shareholders. Mr Jiyane was CEO of VR Laser. This promise was not kept, and Mr Sharma transferred all executive control to two representatives of the Guptas, leading to the Jiyanes to sell their shares in VR Laser. Mr van der Merwe, the Guptas attorney, then took over as CEO. The evidence shows that the Guptas and Mr Essa took control of VR Laser, using it to gain the position as Denel's most privileged supplier of complex engineering systems and capture the SOE.

The Hulls Contract

6. In 2014, Denel needed to outsource the construction of hulls for the Badger under the Hulls Contract. Arguments ensued over who should be awarded the contract. Denel had recently exercised an option to purchase 51% of Land Mobility Technologies (LMT) as it would

secure a subsidiary capable of constructing hulls, generate additional business and save costs. However, Mr Burger, CEO of DLS, persistently argued that LMT could not be relied upon and that VR Laser was equipped to meet the required expectations. The contract was eventually put out to a closed tender sent to LMT, DCD-Dorbyl and VR Laser. VR laser won the contract by a small margin. This was due to LMT and DCD's BBBEE certificates being expired, and they were not given a chance to update them. The result is extraordinary as it was known that LMT, the new subsidiary of Denel, met the BBBEE requirements. Additionally, the award of the contract was improper that given VR Laser was given a chance to revise its tender while the others were not; that Mr Mlambo, the Denel Group Executive: Supply Chain (GSCE), who was against the award to VR Laser, was ignored; and that the tender process was not restarted when flaws in the process were pointed out. The award of the contract to VR Laser was, therefore, irregular.

Reconstitution of the Denel Board: the 2015 Board

7. In 2014, Minister Gigaba was replaced by Ms Brown as Minister of Public Enterprises, who praised Denel and Mr Saloojee for its turnaround. Despite commending the highly effective Board, in July 2015, Minister Brown announced that new Board members had been chosen to replace all but one of the 2011 board members. Mr Motseki, who appeared to have an existing relationship with the Guptas, was the only 2011 board member whose term was extended. Evidence indicates that Minister Brown selected new board members who lacked the appropriate skills needed in an SOE board and appointed Mr Mantsha, who had previously been struck from the roll of attorneys due to acts of misconduct, as Chairperson of Denel.

The Land Systems South Africa (LSSA), renamed Denel Vehicle Systems (DVS), Acquisition

8. The 2011 board had concluded an acquisition for LSSA, later renamed DVS, in 2014 to enhance Denel's capability to produce landward equipment. The transaction required that Denel gain a strategic equity partner to bring in R450 million as investment and provide access to markets. The acquisition followed sound, complete processes and had gained approval by, among others, the Department of Public Enterprises and Treasury. However, the 2015 board simply cancelled the strategic equity partnership, which put a considerable

financial strain on Denel. Ms Janse van Rensburg, Chair of the 2011 Board, links the decline of Denel to this decision, exacerbated by governance failures.

The Suspension of the Denel Executives

9. Following the Constitution of the 2015 Board, its members proceeded to suspend three Denel executives. In September 2015, Minister Brown expressed her contentment with Mr Saloojee's performance and her intentions to extend his term as GCEO. A few days later, Mr Saloojee was summoned to an Audit and Risk Committee (ARC) meeting with its newly appointed ARC members, asking him to explain why he should not be suspended because of his participation in the DVS transaction. Mr Mhlontlo, Group CFO, and Ms Afrika, Group Company Secretary, were summoned to similar meetings. The three executives protested their innocence and proposed an expedited process to test the allegations. Still, the Board refused and found excuses over the suspension period to delay their disciplinary hearing. The executives complained to Minister Brown and asked her to intervene, but she did not.
10. The 2015 Board instructed Denton's Attorney's to investigate. A written letter by Mr Mantsha to the Acting Group Company Secretary appeared to castigate Denton's for producing a report which did not justify the suspensions and requested them to fabricate a report which did. Despite the serious allegations made against them and the critical financial state of Denel, the three executives were then paid large cash settlements². The Commission concludes that the entire scheme appears to be manufactured to remove three senior employees and replace them with officials more likely to comply with the Guptas and other officials involved in Denel's capture. Mr Ntshepe was appointed Acting GCEO, having links to Mr Essa and having worked with the Guptas before. Shortly after the suspension of three executives, Mr Mantsha was found to have used Gupta money to fund overseas travel to Dubai and India, which the Commission presumes to be a form of reimbursement for assisting in Denel's capture. The Commission also notes that the

²Mr Saloojee received approximately R2.6 million (R2.3 million ex-gratia), Mr Mhlontlo received R8.4 million (R6.6 million ex-gratia), and Ms Afrika received an ex-gratia amount of R1.6 million.

suspension of the executives at Denel shared similarities with the suspension of executives at Eskom³.

The DLS/VR Laser Single Source Contract

11. The next major contract was the DLS single-source contract, awarded by Denel to VR Laser for the supply of hulls and related armour steel components to DLS. The DLS Exco proposed a submission to the corporate office for an arrangement intended to achieve “price competitiveness” whereby a single source supplier is given exclusive rights to supply its products at prices similar to the market. The DLS Exco intended the contract to go to VR Laser. Ms Malahlela, then DLS Supply Chain Executive Manager, instead recommended that DLS go out on tender or RFQ. Her advice was consistently ignored, and she was eventually excluded from the submission's progress. Mr Burger continued to pursue the contract award to VR Laser, expressing that VR Laser was more suited in his opinion and that he was frustrated with the slow procurement process. Mr Burger, lacking the necessary authority, signed an MOA with Mr van der Merwe appointing VR Laser as the single-source supplier for these components for ten years – instead of the intended 3-year period initially.
12. Apart from the lack of a competitive procurement process, the MOA further conflicted with Denel’s supply chain policy, which states that no external suppliers can be used to procure goods that can be procured in-house unless approved by Mr Mlambo, GSCE, who had not been consulted. Additionally, the contract involved placing orders of over R20 million. The DLS Exco merely communicated to Mr Mlambo that the decision had already been taken after signing the contract. He refused to grant his consent and stated that DVS and LMT, the in-house suppliers, must submit proof that they cannot meet the requirements before awarding the contract to VR laser. The Commission finds that Mr Ntshepe, as Acting CEO at the time, acted in breach of policy by overruling Mr Mlambo and authorizing the transaction.

³ Some similarities between the two SOEs include: the executives were suspended shortly after a new Board was appointed; the suspensions were sudden and hasty; the new Board members at both SOEs had connections with the Guptas; Denton’s was the law firm appointed to conduct investigations during the suspension period.

The DVS/VR Laser Single Source Contract

13. A few months later, a similar single-source contract was awarded by DVS to VR Laser to fabricate complex engineering systems. Mr Ntshepe had instructed Mr Wessels, Group COO, and Mr Steyn, CEO of DVS, to negotiate contract terms with Mr van der Merwe. Mr Ntshepe rejected advice that the contract was inappropriate as the work to be outsourced was part of the core in-house business of DVS, which had the necessary capacity to carry out this work. Mr Wessels also cautioned that the award would have significant implications from the point of view of finances, personnel, technology and proprietary information. Mr Ntshepe and Mr Mantsha then excluded Mr Wessels from Denel Board meetings and the process regarding this contract. After complaining, he served as interim CEO at LMT until he resigned after frustration.
14. Mr Wessels and other executives who expressed concern for these contracts were most likely side-lined for being an obstruction to Mr Ntshepe and Mr Mantsha's plan to serve the interests of Mr Essa and the Guptas through VR Laser. The Commission concludes that the purpose of these sole supplier contracts was to bind Denel closer to VR Laser, ensuring it participated in any lucrative undertaking in which Denel became involved. The Guptas, through Mr Mantsha and Ntshepe, sought to stifle competition between the Guptas and other potential suppliers to Denel.

Denel Asia

15. A joint venture between Denel and VR Laser was proposed under the Denel Asia project to generally market Denel to India and Asia. As authorization had to be provided by the Department of Public Enterprises and Treasury, the 2015 Board hastily sent letters for approval to the departments and the then Minister of Finance, Mr van Rooyen, the day after being appointed. Evidence indicates Mr van Rooyen was prepared to advance the Gupta's agenda. The process was delayed as officials from the departments raised queries, and Treasury ultimately did not give its approval. The Denel Asia venture, thus, never came to fruition despite the company being incorporated in Hong Kong. Public opinion turned against the Guptas, and their dealings concerning Denel were made public in a Mail and

Guardian report in 2016⁴. The commercial banks in South Africa also closed all accounts of the Gupta linked entities. VR Laser had no established expertise in the field it proposed to operate, and the venture made no commercial sense for Denel. Denel Asia is described as a shameless attempt to benefit the Guptas.

The Conduct of Minister Brown

16. Other evidence confirms that Minister Brown was a conscious participant in the Gupta's schemes to capture Denel and Eskom. The Commission obtained cell phone records relating to her, Mr Essa and Mr Gupta. One such phone call was recorded the day after the suspension of four Eskom executives. She also had eight calls with Mr Essa, despite claiming she did not interact with him, four of which took place when the appointments to the new Eskom board were made.

Key Findings and Recommendations

17. The report concludes that the appointment of Boards and senior executives (CEOs and CFOs) for SOEs is a matter of concern. In Denel, Minister Brown appointed an attorney who held a list of acts of misconduct as Chairperson. At SAA, Transnet, Eskom, and SARS, the executive failed to select the right people into these high-powered positions. As a result, the Commission says that the appointment of such individuals can no longer be left in the hands of politicians. It is recommended that a body is established for the identification, requirement, and selection of individuals for these positions. The full recommendation will be dealt with in Part 3. It is also recommended that the Government consider the creation of a criminal offence for any person with public power found to be abusing said power. It is proposed that such violations extend from the President to junior officials with either a fine of up to R200 million or imprisonment for up to 20 years or both.

⁴ This report was mentioned in the 2016 State of Capture Report by the then Public Protector, forming the terms of reference for the Commission's investigation into Denel.

Analysis and Recommendations

Volume 1:

- i. The FFC supports the recommendation by the Zondo Commission to investigate further and possibly prosecute all individuals and firms involved with fraudulent, corrupt, racketeering and the looting of public funds at Transnet. The FFC encourages authorities to deal with the matter swiftly to ensure perpetrators are brought to justice as soon as possible.
- ii. Improvements in governance and oversight within Transnet and the support of the Parliamentary Portfolio Committee regarding SOEs are welcomed by the FFC to ensure that Transnet's leadership, accountability, and oversight structure is rehabilitated into a well-functioning parastatal.

Volume 2:

- iii. The suggestion that an independent body is established to appoint boards and executives of SOEs and create a criminal offence to curb abuse of public power is supported. Furthermore, the Commission agrees with the additional recommendations to investigate the single source contracts to VR Laser, Mr Mantsha's role in Denel's capture, and the 2015 Board members who supported the decisions regarding the suspension of the executives.
- iv. Denel has experienced sustained damage because of state capture. Denel went from being highly regarded internationally to being associated with liquidation and business rescue. It is thus important that all those with the relevant authority act to assist in possible prosecutions, rectifying the effects of corruption that have plagued the SOEs, and ensuring preventative measures for state capture in the future.

Compiled by: Hannah MacGinty, Lauren Stevens, Gianni Delle Donne, Inger Ruiters



Mr C Tseng

Acting Chief Executive Officer

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