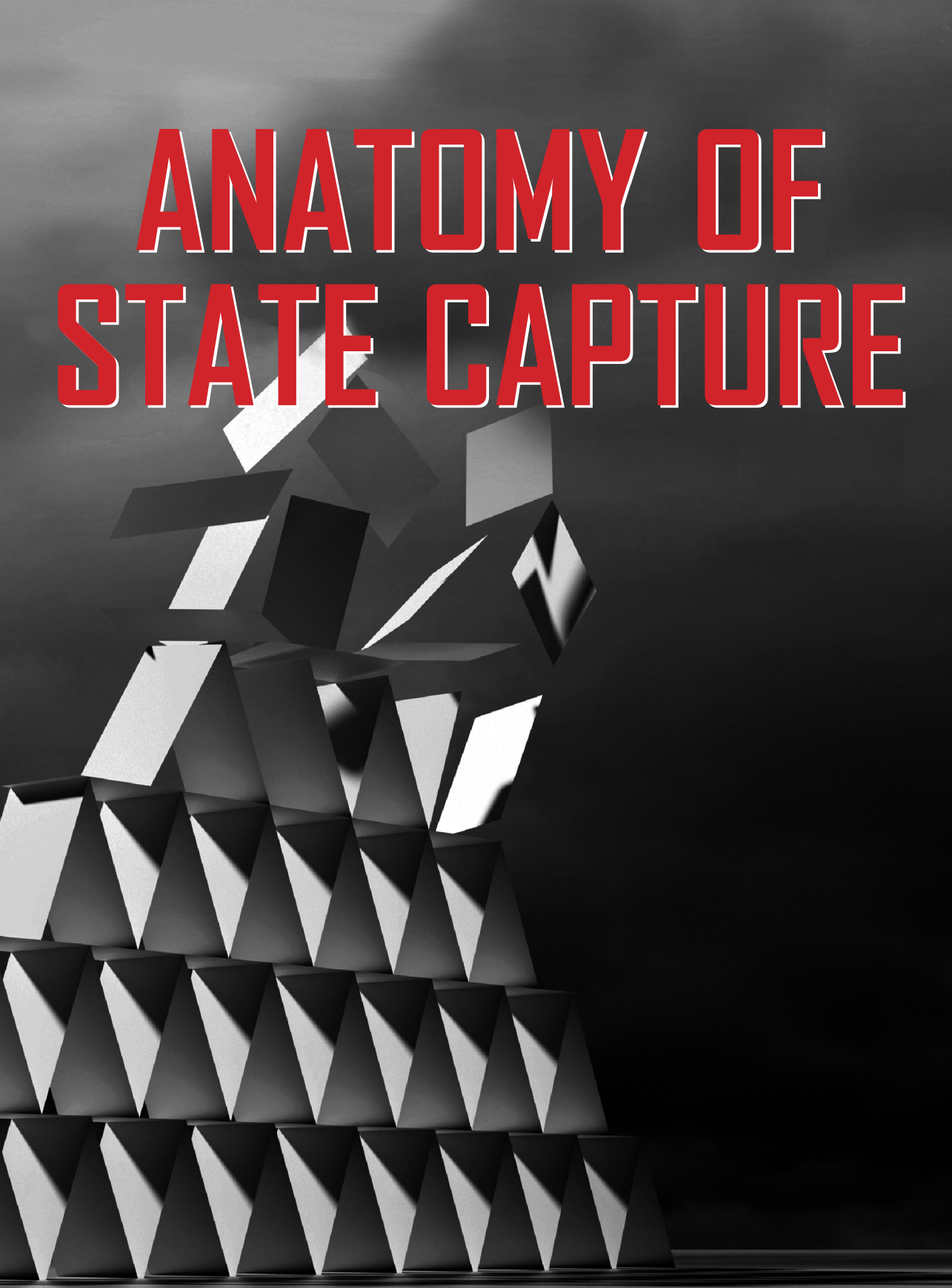
ANATOMY OF STATE CAPTURE



Nina Callaghan, Robyn Foley and Mark Swilling (Editors)

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Anatomy of State Capture

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CONTENTS

List of Figures x

List of Tables xi

1 Anatomy of State Capture: Introduction 1
Nina Callaghan, Robyn Foley and Mark Swilling

1.1 Introduction 1
1.2 How did we get to #ZumaMustFall? 2
1.3 Where are we Now? 6
1.4 State Power, Accumulation and the Rackets 21
1.5 Understanding that State Capture is not Systematic, but Systemic 25
References 32

PART 1

THE FOUNDATIONS FOR UNDERSTANDING STATE CAPTURE

2 Towards a Political Economy of South African Rackets 39
Sanet Madonsela and Mark Swilling

2.1 Introduction 39
2.2 Context 40
2.3 Economic Policy since 1994 43
2.4 From the Mbeki to Zuma Era Economic Policies 44
2.5 Zuma Era 47
2.6 Rackets from the Zuma Era 49
2.7 Beyond Zuma 55
2.8 Conclusion 56
References 58

3 State Capture: Why Nobody Did Anything to Stop it 63
Songezo Zibi

3.1 The ANC's Internal Culture and Organisational Character 64
3.2 The Destruction of the Scorpions and the Birth of Sophisticated Disinformation 67
3.3 Black Economic Empowerment as a Cover for Cronyism 72
3.4 Black Solidarity and "Radical Economic Transformation" 74
3.5 Conclusion: Nobody could have Said Anything 77
References 79

4 A Long Shadow: State Capture Under Apartheid and Afterwards **81**
Hennie van Vuuren

4.1 Introduction 81
4.2 Back to the Original Sin 82
4.3 Elements of the Crime 84
4.4 Busting the Myths 86
4.5 Conclusion 91
References 93

PART 2

CONTROLLING RENTS: HOW TO LOOT THE STATE

5 Between Liberalisation and State Capture: A Deeper Look at the Case of Eskom **97**
Erica Johnson

5.1 Between the De Villiers Commission and the Zondo Commission: Key Inflection Points in the Electricity Sector 97
5.2 What are the Key Issues at Play? 108
5.3 What do we Do Now? 114
References 115

6 The Case of State Capture at Eskom **117**
Catrina Godinho and Lauren Hermanus

6.1 Introduction and Context 117
6.2 South Africa's Lights go Out 119
6.3 2010-2014: From Corruption to State Capture 120
6.4 State Capture Networks seize Control of Procurement 123
6.5 Minister Brown takes the Helm and the Project Expands 124
6.6 2015-2019: Capture Intensifies with Two New Captains 125
6.7 Conclusion: What was Lost in the Looting 128
References 129

7 State Capture and the Economics of Corruption: The Case of Transnet **131**
Development Policy Research Unit, University of Cape Town

7.1 Transnet as a Key Player 132
7.2 Transnet's Spending Boom 133
7.3 How the Rents were Accessed 134
7.4 Transet–Gupta Interactions 135
7.5 The Cost of State Capture 137
7.6 Following Kickbacks from the Chinese Locomotive Deals 145
7.7 Concluding Remarks 147
References 149

8 State Capture at Denel 151
Nina Callaghan

8.1 Introduction 151
8.2 Armscor during Apartheid 152
8.3 Demilitarisation, Democracy and the Formation of Denel 153
8.4 Arranging Denel's Capture 157
8.5 The Costs of State Capture for Denel 166
8.6 Conclusion 168
References 169

9 State Capture at a Local Level 173
Crispian Olver

9.1 What is Different about Local Government? 173
9.2 How to Steal a City 175
9.3 Networks of Political Control 176
9.4 The Rise of Party Factionalism 179
9.5 The Persistence of Political Corruption 181
9.6 Patrimonial Regime in Cape Town 182
9.7 Conclusion 185
References 187

PART 3

MAINTAINING LEGITIMACY AND ITS HUMAN COST

10 Bosasa's Monopoly Money 191
Robyn Foley

10.1 The Caveat: Stories Yet Told and Some that will Never be Heard 192
10.2 Struggle Hero to Syndicate Kingpin: State Capture from the Bottom Up 194
10.3 Rackets of Race, Religion and Righteous Struggles 208
References 213

11 Capturing the Message 217
Nina Callaghan and Robyn Foley

11.1 Controlling the Message: Power of the Fourth Estate 217
11.2 Maintaining Legitimacy: Pursuit of Positive Publicity 220
11.3 The Malice behind the Message: Bell Pottinger and the Gupta Bots 225
11.4 The Double-Edged Sword of Leaks and Sources: Advocacy or Active Measures? 226
11.5 Conclusion 234
References 235

12 Stealing from the Poor: State Capture at SASSA **241**
Robyn Foley

12.1 Evolution of the Grants Payment System and the SASSA-Gate Crisis 242
12.2 SASSA as Case of State Capture 249
12.3 The Cost of SASSA State Capture 259
12.4 Conclusion: The Constitutional State at Work 261
References 263

PART 4

WEAKENING ACCOUNTABILITY AND ENDANGERING THE NATION

13 State Capture and Zuma's Criminal Justice Agenda **269**
David Bruce, David Lewis and Gareth Newham

13.1 Introduction: The Legal Travails of Jacob Zuma 269
13.2 Manipulation of Criminal Justice Agencies by the Executive under Zuma 270
13.3 Richard Mdluli and the Manipulation of the SAPS Crime Intelligence Division 271
13.4 Ensuring Influence Over the NPA 277
13.5 Criminal Justice Leadership Instability during Zuma's Term as President 278
13.6 Neutralisation of Opponents in Political Office and the Administration 281
13.7 Conclusion 284
References 285

14 A Captured Security Cluster **289**
Marianne Thamm

14.1 State Security Assault 289
14.2 Red Flags and Smoke Screens 291
14.3 By Hook or by Crook: Removing Obstructionists 293
14.4 A Web of Rogue Spies 295
14.5 The Secrets of Power 297
14.6 Cross Hairs and Slush Funds 298
14.7 Undoing the Damage 299
References 301

15 The Real Rogues that Ruined SARS **305**
Robyn Foley

15.1 Why the Real "Rogues" Captured SARS 305
15.2 Outsourcing Strategic Thought: Bain & Company Inc. 306
15.3 And the Consultants Keep on Coming 316
15.4 The Rogue Unit Racket 318
15.5 The Consequences: Isn't it Time to Stop Drinking the "Corporate Kool-Aid"? 322
References 325

16 How State Capture went Nuclear 329
Dzvinka Kachur

16.1 Introduction 329
16.2 Background and Context 330
16.3 What's Required to get Nuclear? 335
16.4 Democracy at Work: Civil Society and the High Court 347
16.5 Nuclear Discourse Post-Zuma 348
16.6 Conclusion 349
References 351

PART 5

STATE CAPTURE IS A MIRROR OF THE GLOBAL RACKET

17 From the Margins to the Centre: Private Sector's Role in State Capture 359
Michael Marchant and Mamello Mosiana

17.1 Introduction 359
17.2 Global Finance: Enabling Grand Corruption 360
17.3 The Role of Banks 361
17.4 Front Companies for Sale: Company Formation Agents that Sell Secrecy 363
17.5 Case Study: Enabling the Looting of Transnet 364
17.6 Conclusion 370
References 372

18 Risky Business: Corporate Ethics in the Era of Capture 375
Rob Rose

18.1 Enron, Africa style 376
18.2 A Slippery Slope 378
18.3 Coincidence, or a Reflection of the Social Fabric? 380
18.4 Watchdogs who Didn't Bark 382
18.5 Bridging the 'Expectation Gap' 385
18.6 Wanted: CEOs in Jumpsuits 386
References 388

19 Final Reflections by the Editors 391
Nina Callaghan, Robyn Foley and Mark Swilling

19.1 "Fixing" Governance 394
19.2 A Provocation: Imaging Alternatives 397
References 401

Appendix 403

Contributing Authors 411

List of Figures

Figure 1.1	Timeline of State Capture	10
Figure 1.2	Relational Dynamics of the Shadow State	19
Figure 1.3	The Racket of Predatory Power in South Africa's State Capture	28
Figure 5.1	Two decades of liberalisation of the industry lead to the first coal power system emergency in 2008	100
Figure 5.2	A tumultuous decade leading up to the second coal power system emergency in 2018 and the liquidity insolvency in 2019	106
Figure 7.1	Heat map of Transnet mentions in the #GuptaLeaks: 2013-2016	136
Figure 7.2	Visualising State Capture of Transnet	138
Figure 7.3	Timeline of State Capture of Transnet	140
Figure 7.4	Tainted Deals by Supplier: Rbn, 2013-2018	144
Figure 7.5	Kickbacks by Supplier: Rbn, 2013-2015	145
Figure 8.1	Denel Financial Indicators: 1996-2005	154
Figure 8.2	Breakdown of Gupta shareholding in VR Laser Deal	163
Figure 8.3	Extract of Denel Financial Statements	167
Figure 9.1	Schematic Summary of Local Government System	174
Figure 10.1	Gavin Watson counting out cash for paying bribes	191
Figure 10.2	Estimated Value of Bosasa Contracts with Government: 2003-2018	196
Figure 10.3	Network of Bosasa State Capture	200
Figure 10.4	Timeline of key developments in the Bosasa Scandal	204
Figure 11.1	Breakdown of different types of Active Measures	219
Figure 11.2	Timeline of the Rogue Unit Narrative	230
Figure 12.1	Timeline of State Capture of SASSA	250
Figure 12.2	SASSA Shadow State Network	254
Figure 13.1	Timeline of State Capture of Criminal Justice	282
Figure 15.1	Timeline of State Capture of SARS	314
Figure 16.1	Organisational structure of South African institutions managing nuclear energy	337
Figure 16.2	Timeline of the Nuclear Deal	340

List of Tables

Table 7.1	Capital Expenditure and Revenue, selected SOEs: Rm, 2016/17	132
Table 7.2	Expected and Actual Delivery, Chinese Locomotive Suppliers: 2018	147
Table 8.1	Denel Profit/Loss Summary over time	157
Table 10.1	Agrizzi's breakdown of estimated Contract Values and Bribes Paid	194
Table 13.1	Key criminal justice agencies leaders who were suspended or removed from office prematurely during Zuma Presidency	280
Table 15.1	Breakdown of the various meetings Bain had with former President Zuma	312

1 ANATOMY OF STATE CAPTURE: INTRODUCTION

Nina Callaghan, Robyn Foley and Mark Swilling

1.1 INTRODUCTION

7 April 2017 marks a distinctive turning point in South Africa's history. It was the day of the largest nationwide protests since becoming a democracy in 1994. For the first time, members from all sectors of South African society including civil society, the private sector, religious leaders, trade unions and political opposition parties united behind one clear and succinct message: #ZumaMustFall. Though not the first protest calling for the then President Jacob Zuma to resign (*Mail & Guardian*, 2015), the events leading up to (and subsequent to) that day of mass mobilisation cemented the concept of State Capture in the nation's consciousness.

This book seeks to unpack the details of what led to this profound public outcry, and it examines the revelations that have followed, as they relate to what is now commonly referred to as State Capture.

State capture is not yet conceptually clearly defined. It is not explicitly defined in law or as a formal application to the South African experience. Even though relatively new, the concept has evolved, been adapted and supplemented over the years, rendering it in Bach's words "rather fuzzy" (Bach, 2011). The concept was first coined by Hellman, Jones and Kaufmann (2000) in a World Bank report in 2000 that provided an analysis of governance and corruption in the 'transition economies' of the former Soviet Union. For Hellman et al. (2000, p. ii), 'State Capture' manifests when there is evidence of "firms shaping and affecting formulation of the rules of the game through private payments to public officials and politicians".

For the editors and contributors to this book, this definition is too narrow and insufficient to describe the full breadth and depth of what has taken place in South Africa. A distinction must be made between the specific form of grand corruption defined as 'state capture' by Hellman et al. (2000) and the more systemic processes of State Capture that South Africa has experienced before and since 1994, and in a more pronounced way since 2007.

We prefer a more institutional definition of State Capture derived from previous work (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017; Chipkin & Swilling, 2018), but applied beyond the so-called 'wasted nine years' following the election of Jacob Zuma as President in 2009. State Capture is best defined as a systemic process that results in the reconfiguration of political power using legal and illegal means to suit the rent-seeking purposes of a specific power elite. In South Africa, this process has been characterised, since 2009, by the formation of a shadow state directed by a power elite which operates within and parallel to the constitutional state in both formal and informal ways. The shadow state is a network of operators whose role is to facilitate the repurposing of state governance in order to derive financial and/or political benefits for a specific usually narrowly constituted power elite (Bhorat et al., 2017; Chipkin & Swilling, 2018).

1.2 HOW DID WE GET TO #ZUMAMUSTFALL?

At the end of 2017 the term "State Capture" was proclaimed as the South African word for the year, by the Pan South African Language Board (PanSALB) (Pijoos, 2017). The term found its way into the public lexicon following the release of the Public Protector's (2016) *State of Capture* report in November 2016. The report detailed the findings of an investigation into the alleged corrupt relationship between senior government officials at various state institutions and the Gupta family who were personally connected to then President Zuma by way of his son. The report itself does not make reference to the specific term 'state capture', but it undoubtedly reflected the alleged occurrences of grand scale corruption as defined by Hellman et al. (2000).

The 355-page report details several alleged events, actions and locations that are clear illustrations of a group of individuals leveraging political influence and institutional manipulation to irregularly, and in some cases illegally, extract rents from the state. Prime targets were State-Owned Companies (SOCs), particularly Transnet, Eskom, SAA and Denel, which have subsequently been subject to several forensic investigations by National Treasury, parliamentary inquiries and by the SOC Boards.

The Public Protector (2016) report went beyond just detailing the supposed dubious contracts and dirty dealing of the Guptas and their associates. It outlined how these deals were enabled, through the strategic placement or removal of individuals in key positions of power. Former President Zuma was clearly implicated in these deals.

Perhaps the most profound example detailed in the report was the alleged attempted bribe of then Deputy Minister of Finance, Mcebisi Jonas, by the Guptas. On 16 March 2016, in a public address to the nation, Jonas took South Africa into his confidence and confirmed the rumours that he had rejected the R600m bribe by the Guptas to

become an agent of the shadow state after being appointed finance minister (SABC Digital News, 2016b). As shocking as these revelations were, what was revealing was the response that followed by some members of the governing party. In an interview with the South African Broadcasting Corporation (SABC), speaking on the sidelines of the Commission on the Status of Women (CSW) at the United Nations (UN) in New York on 19 March 2016, Bathabile Dlamini, then Minister of the Department of Social Development (DSD) and President of the African National Congress Women's League (ANCWL), cautioned ANC members against airing the party's dirty laundry in the media, saying: "All of us in the NEC [National Executive Committee] have our *smallanyana* skeletons and we don't want to take out skeletons because all hell will break loose" (SABC Digital News, 2016a).

Jonas alleged that the attempted bribe took place in August 2015, facilitated by the President's son and Gupta business partner, Duduzane Zuma, at the now infamous Gupta compound in Saxonwald (Jonas, 2018). Only a few months later on 9 December 2015, Zuma announced the removal of Nhlanhla Nene (then finance minister), replacing him with unbeknown ANC back-bencher, Des van Rooyen. This was one of several late-night cabinet re-shuffles that became a hallmark of the Zuma Presidency – ministers were moved or replaced with unclear motivations and little, if any, explanation given to the people of South Africa. It would later emerge through the various investigations, reports and public hearings that there were potentially several reasons for Zuma wanting to remove Nene. One such motive included signing off the potential trillion-rand nuclear deal with Russia. Others included pending authorisations for a much inflated Transnet contract and the formal establishment of a shelf company for Denel, the country's national arms manufacturer (Nene, 2018; PARI, 2018).

Nene's dismissal sent a shockwave through the markets, which resulted in at least R378bn being wiped off the Johannesburg Stock Exchange (JSE) and the estimated loss of some 148 000 jobs (Merten, 2019). Within a few days Zuma was forced to appoint a previous Minister of Finance, Pravin Gordhan, to replace Van Rooyen (Areff, 2015). Alive to the machinations of the Guptas and their cohorts, Gordhan was an obstacle for those handling the shadow state. After unsuccessful attempts to pressure him, Zuma removed Gordhan together with Deputy Minister Jonas from office in yet another late-night cabinet reshuffle. The reshuffle presented no rational justification, especially Zuma's decision not to remove then Minister of Social Development Bathabile Dlamini. Just days earlier she had been issued a scathing rebuke from the highest court in the country for putting the payment of some 17 million beneficiaries at risk of not receiving their social grants (Chirume, Hendricks, Furlong & Damba-Hendrik, 2017).

These are just a few examples in a long list of seemingly 'irrational' and inexplicable public moments where decisions and actions by the former President and his administration were taken with seeming disregard for what was good for the country. Other seminal moments include, amongst others, the landing of the Gupta plane at Waterkloof Air Base in 2013, as well as the 2014 findings by the Public Protector in a report titled *Secure in Comfort* (2014) that Zuma had unduly benefited from an approximately R225m security upgrade to his Nkandla homestead.

The 7 April 2017 mass protests were a direct response to the firing of Gordhan, an action that triggered a down-grade by three rating agencies, with Standard & Poor and Fitch moving South Africa to junk status (Van Zyl, 2017). In the months that followed, protests continued and various actions were taken in different quarters of the public to mobilise support to pressure the governing party to remove Zuma from the Presidency. Opposition parties in parliament, together with a faction of the ANC that was mobilising against the President, pressed for parliament to undertake formal inquiries into the various allegations contained in or related to the findings of the Public Protector. Civil society and religious organisations hosted events to build public awareness of the extent of the Zuma-centred power elites' exploits and 'big business' joined in the unfolding civil discourse. In response to the calls to 'connect the dots', a collective of academics formed the State Capacity Research Project (SCRP). They collaborated to formulate a conceptual framework for understanding the South African manifestation of State Capture. In May 2017, the SCRP released a report titled *Betrayal of the Promise: How South Africa is being stolen* (Bhorat et al., 2017).

The *Betrayal of the Promise* was the first academic attempt at linking the transactional and tangible acts of visible corruption with the more blurred and informal nature of state and state-like power dynamics that enabled such corruption. As highlighted by Labuschagne, the "discussions around state capture are principally done from an economic context, not from a political perspective" (2017, p. 51). It is precisely this lack of political perspective that the *Betrayal of the Promise* report sought to address. It not only detailed the alleged corrupt dealings of the Guptas and their facilitators in government, but also reflected on the political and social dynamics that underpinned what had happened under the Zuma administration (Bhorat et al., 2017).

The report provided key concepts that better enabled the country to recognise State Capture as a political project, rather than just a few isolated instances of grand scale corruption. These included bringing to the fore the notion of a shadow state, highlighting the critical role played by the power elite, identifying the deliberate weakening of accountability and enforcement institutions. The report outlined the pattern of State Capture to reveal the modus operandi of how various institutions were captured (Bhorat et al., 2017).

Many of the assertions and inferences made in the *Betrayal of the Promise* would, only a few days after being released, be substantiated and validated through a cache of leaked emails now known as #GuptaLeaks (2017b). The documents provided detailed evidence of shadow state operations. The leaked emails revealed tender fixing, contracts and invoices relating to various State-Owned Entities (SOEs) deals. Speeches prepared for politicians, and engagements with the PR company Bell Pottinger who pushed a disinformation campaign, were also part of the cache (#GuptaLeaks, 2017c). The list of potentially compromised government officials grew, and connections were made between seemingly separate events. Of particular note was a flurry of meetings of key shadow state actors in Dubai during December 2015 (Cowan, 2017). The meetings seemingly followed the fallout and response to the Nene-gate debacle. What took place in Dubai still remains somewhat of a mystery. However, the investigations which flowed from the release of the *State of Capture* (Public Protector, 2016) report give insight into the modus operandi of the shadow state.

Present were senior officials from SOCs – Matshelo Koko [then Group Executive for Generation], Anoj Singh [Eskom CFO], Siyabonga Gama [former GCEO of Transnet], Daniel Manthsha [Chairman of Denel Board]; Gupta business associates (Duduzane Zuma, Thato and Tshepiso Magashule [both sons of then Free State Premier and current Secretary-General of the ANC, Ace Magashule], Muhammad Saloojee [former KPMG Executive Director], Fana Hlongwane, Salim Essa; former Ministers and other high ranking government, as well as political figures Mosebenzi Zwane [then Mineral Resources minister] and David (Des) van Rooyen [4-day Finance Minister] (OUTA, 2017).

The Public Protector's (2016) *State of Capture* report did not contain any definitive findings of guilt against specific individuals or provide for remedial actions relating to any of the allegations. Rather, the report directed that a commission of inquiry be established by the President, with the presiding judge to be determined by the Constitutional Court Chief Justice. The commission was to be afforded the same investigative powers as the public protector.

In January 2018, more than a year after the release of the Public Protectors report, Zuma (under political duress) would promulgate the establishment of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, chaired by Deputy Chief Justice Raymond Zondo. The Commission is hereinafter referred to as 'the Zondo Commission' (President of Republic of South Africa, 2018).

It would be a further six months before the commission would start hearing oral testimony in August 2018. The resulting revelations detailed, in shocking terms, the

extent and depth of the various dimensions of the shadow state and interactions with the formal legal structures of the constitutional state. The section that follows unpacks and analyses some of these revelations in greater detail, as well as those that have come from other inquiries and investigations.

1.3 WHERE ARE WE NOW?

At this stage, the full extent of State Capture is yet to be determined. There are ongoing investigations and commissions while fresh details of fraud, corruption and abuses of power still find their way onto the front pages of daily news. The Zondo Commission has entered its third year of hearings with many of those implicated in State Capture yet to take the stand. Since the protests of April 2017, there have been at least 28 different investigations, commissions and inquiries in the public domain. Together with several significant court cases and the trove of evidence contained in the #Guptaleaks, they provide us with the details of well over 50 probable cases of State Capture. Each case presents its own contextual complexity and unique circumstantial nuances. However, there are certain re-occurring patterns that have emerged that inform the analysis in the chapters that follow from this introduction.

It is difficult to definitively state how many cases could be considered to be part of the State Capture project, particularly in applying the expanded definition provided above. There are several key criteria alluded to in the definition that serve as boundaries for classifying whether or not a case is valid, be it an indictment of an institution, an event or an individual.

The first criterium is the presence of those that could be considered to be part of the power elite and shadow state. These are individuals that often wield some form of influence. Political influence would include those with power to mobilise people and ideas inside and outside of government. Actors with economic influence would have access to political power brokers to attain and distribute resources. The relationships between these clusters of influence may appear to be merely transactional. However, given the clandestine nature of these transactions, high levels of trust are required for the network to operate. This is because there are often familial, tribal or historic ties that underpin the interactions of individuals within and between the various networks (Martini, 2014; Dassah, 2018; Von Holdt, 2019).

The second criterium is the use of these various forms of influence to repurpose an institution, process or system. In hindsight, it seems quite obvious when an institution has been repurposed. However, State Capture does not take place as singular events or as isolated decisions and actions. The repurposing of an institution only truly becomes visible when the damage is done and outcomes beneficial to shadow state actors become apparent. Actions and decisions taken by shadow state actors often

appear justified and legitimate at the time they were made. However, with hindsight we recognise them as irrational and illogical from the perspective of long-term developmental policy.

1.3.1 Motives for Capturing a State

The primary motives for repurposing state institutions are rent extraction and the accumulation of political power. Rent seeking is the technical term that is used to refer to financial gains that are not derived from profits earned from risk-based investments or from wages/salaries. These gains are not illegal or even immoral in and of themselves. They can include, for example, subsidies to incentivise certain kinds of investments, or housing subsidies for the poor, or even procurement preferences. However, when rent seeking results in gains made by those who have influenced decisions to allocate rents to benefit themselves, the end result is corrupt rent seeking that can lead ultimately into systemic State Capture, although this is not inevitable.

However, rent seeking and rent extraction may just be a means for accumulating political power to entrench and deepen the power position of a particular power elite, or vice versa, i.e., accumulation of political power becomes a means for rapid enrichment. It is not always easy to distinguish between rent extraction and political power, especially when it comes to identifying motivations for repurposing state institutions. However, in general, they enable each other: for some in the network, it is mainly about the accumulation of political power to maintain the conditions for rent-seeking over time, while for others with a shorter time horizon and more opportunistic strategic sensibility it is mainly about maximising the opportunities for rent-seeking while the conditions are appropriate.

There are many other reasons and ways to repurpose institutions, a prime example being the hollowing out of law enforcement bodies to ensure that those in the network are protected against prosecution. Another example is the use of the State Security Agency (SSA) to spy on political opponents (High-Level Review Panel on the SSA, 2018). This form of repurposing seeks to weaken accountability and minimise the overall personal risk to corrupted individuals operating within the network. The operators themselves in these kinds of processes might benefit from the crumbs that fall off the table but are rarely the big players.

A third motive for the repurposing of institutions is maintaining legitimacy. This is one of the key elements that differentiates State Capture as experienced in South Africa from being merely a form of grand corruption. It is one of the reasons why it is argued that State Capture was a political project and not just a collection of events with stand-alone ends. There are two key elements to maintaining legitimacy within a democratic state that suffers the consequences of State Capture. The first is

to hide (and ultimately deny) the actions of the shadow state and the second is about controlling the narrative through throttling information. This is in part achieved by weakening institutions that would hold those in power to account. For example, the Chief Operations Officer of the South African National Broadcaster (SABC) Hlaudi Motsoeneng instructed the news team not to show the destruction of property during service delivery protests in mid 2016 (Ad Hoc Committee on the SABC Board Inquiry, 2017; Zondo Commission, 2019b).

This decision affected the public's ability to fully comprehend the scale or extent of the protests, shaping the story to downplay the levels of anger and dissatisfaction of communities. Another example of controlling the narrative was when the Guptas established their own media company made up of *The New Age* newspaper and a 24-hour television news channel called ANN7. At his first appearance at the Zondo Commission, Zuma openly admitted that the media company was actually his idea for the specific purpose of celebrating what he called the positive developments and achievements of the state (Zondo Commission, 2019a). The shadow state also deployed mis- and disinformation campaigns, crafted by UK-owned public relations company Bell Pottinger to influence public perception and shape opinion (#GuptaLeaks, 2017c).

The shadow state derives its power and resources from the constitutional state, a relationship that is, ultimately, politically unsustainable – especially if the predatory capabilities of the shadow state are allowed to expand in an unmanageable way (Khan, 2000; Grzymala-Busse, 2008; Richards, 2008; Di John, 2010; Gray & Whitfield, 2014). In the case of State Capture in South Africa, the constitutional state has been hollowed out as the energy and objectives of governance were redirected to serve or defend the shadow state. The result was an abandoned social contract and a neglected development agenda for the working class and poor. The maintenance of legitimacy became a strenuous farce that further hollowed out the constitutional state, decimating any faith the voting public could have in participating in a meaningful political life. However, to artificially maintain legitimacy, the shadow state requires longevity, including all that is required to deny and therefore transcend consequences of weakening governance, growing social conflict and declining economic growth rates.

It needs to be stressed that each of these motives for repurposing institutions are not independent of each other. For example, part of the reason for extracting rents is to fund patronage networks and mobilise political support, which in turn maintains legitimacy. Weakening accountability reduces risk for extracting rents while simultaneously improving the prospects of maintaining legitimacy. However, in the end the internal contradictions of the State Capture project are unavoidable. As governance collapses and the economy disintegrates, the predatory nature of the

shadow state becomes increasingly obvious which, in turn, triggers the backlash that challenges those who are perceived to be responsible for State Capture.

1.3.2 The Extent of State Capture

As already indicated, we have tracked more than 28 major investigations, commissions and inquiries (see Appendix on page 403). A significant number of these investigations were triggered by the political fallout subsequent to April 2017 where calls for accountability could no longer fall on deaf ears. From the details contained in the various reports, public hearings, court cases and investigative reporting by journalists, it can be readily observed that State Capture is not as simple as the former President believes, having said, "it's a few people who did something somewhere". The State Capture project that has emerged in South Africa is multi-levelled, multi-layered, multi-nodal and multi-targeted.

From the information revealed to date, State Capture stretches across the country and beyond. Seven out of the nine provinces have been directly implicated and it has occurred at the lowest level of government. The prime example of this is the Vrede Dairy Farm scandal where money meant to be invested in the development of previously disadvantaged prospective farmers was looted to pay for the infamous Sun City Gupta wedding (#GuptaLeaks, 2017a; Shadow World Investigations, 2019).

At least 13 national level ministries and more than 15 of the most socially and economically crucial SOEs have been central to the State Capture project. The strategic institutions that were captured range from SOCs providing critical economic services (energy, transportation and infrastructure development), to the various law enforcement agencies and government entities that provide crucial social services. Each institution can be considered to have been repurposed in line with one or more of the motives, as described in the previous section.

Eskom, Transnet, SAA and Denel are capital intensive and have large operations budgets, making them prime sites for the extraction of rents and hence central targets for the Guptas. These institutions present the most visible and tangible aspect of the kind of State Capture that aligns with the traditional understanding, namely grand scale corruption. There are instances where policies have been formulated to enable the legal extraction of rents, for example: as minister of Public Enterprises, Malusi Gigaba was insistent that Eskom must award the majority of its coal supplier contacts to firms with 50%+1 black ownership (Eskom, 2016; Godinho & Hermanus, 2018). There is nothing wrong with this in and of itself. However, when this policy was coupled with the awarding of contracts to black-owned companies that paid off the Guptas to get the contract, then this is corrupt rent-seeking.

“THIS BIG NAME

Highlights of a subverted state 1999 to 2018

’99 Jacob Zuma is appointed Deputy President of South Africa.

’01 Guptas meet Zuma at a Sahara function.

’02 Bosasa gets into bed with Government

Known for their apartheid activism & strong ties to high-profile ANC comrades like Zuma, the Watsons expand their Bosasa operation from servicing mining operations to procuring further lucrative government contracts i.e. home affairs, correctional services, the post office, social development etc. The bribes expand accordingly. Over the next 18 years Bosasa will access over R12bn worth of irregular government contracts with 100s of millions going towards bribing corrupt government officials.

’03 Zuma Implicated in Arms Deal

He is fingered in the R30bn corrupt Arms Deal (that has actually cost +/-R65bn to date), however Director of National Prosecuting Authority Bulelani Ngcuka says, that even though they have a prima facie case against him, the prospects of a successful prosecution are slim & only Zuma’s advisor, Schabir Shaik is charged with corruption, fraud & tax evasion.

’04 Alleged Bribes

Zuma becomes a key figure in Schabir Shaik’s corruption trial, with alleged bribes & payments Shaik & his companies made to Zuma.

’05 Mbeki Dismisses Zuma

Shaik is sentenced to 15 years for corruption. Charges are eventually brought against Zuma over the Arms Deal. He is also charged for raping a 31-year-old family friend, Fezekile Ntsukela Kuzwayo. Based on these charges, President Thabo Mbeki dismisses Zuma as Deputy President.

’05 Mdluli deployed

Zuma supporter, Richard Mdluli, is appointed Deputy Provincial Police Commissioner of Gauteng. He later oversees the detectives who investigate Zuma’s rape case in 2006 & also heads up investigations into the Scorpions who are investigating Zuma’s corruption charges.

’06 Zuma is let off the hook

Zuma is acquitted of rape charges & the Arms Deal charges against him are struck from the role due to botched prosecution efforts.

’07 Zuma elected ANC President

After an arduous ANC power struggle full of conspiracies, Spy allegations & prosecutorial to-ing & fro-ing between Mbeki & Zuma, Zuma is elected ANC President. Shortly after, Zuma’s Arms Deal corruption charges are reinstated.

’08 Mbeki out

Thabo Mbeki is forced to resign due to his controversial interference in the NPA around the prosecution of Zuma. Zuma supporting Kgalema Motlanthe takes over as president of SA & appoints a number of Zuma loyalists to key positions, including Mokotedi Mpshe as Acting National Director of Public Prosecutions (NDPP).

’09 Scorpions disbanded

Scorpions are replaced by the Hawks. At the same time “Spy Tapes” surface & the renewed corruption charges against Zuma are withdrawn by Mokotedi Mpshe shortly before national elections.

’09 Zuma becomes President of South Africa

He swiftly ensures the criminal justice system offers him & his friends impunity with a number of new questionable/irregular appointments. These include: Richard Mdluli as Head of SAPS Crime Intelligence Division, Menzi Simelane as Head of Public Prosecutions, & a previously suspended Nomgcobo Jiba is appointed Deputy National Director of Public Prosecutions.

’09 The Saxonwold Shebeen

Oakbay gives jobs to Zuma family. Meetings at the Gupta Saxonwald residence between the Guptas & Zuma, his family & fellow shadow state cronies become so prevalent that the compound becomes known as “The Saxonwold Shebeen” - these notorious meetings are later confirmed when the “Gupta Leaks” come out.

’10 1st motion of no confidence against Zuma

Amended to full confidence by majority of Parliament.

’10 Zuma’s first cabinet reshuffle

Most notable deployment of cadres are Bathabile Dlamini as Minister of Social Development (oversees repurposing of SASSA) & Malusi Gigaba as Minister of Public Enterprises (oversees repurposing of Transnet, Eskom & Denel).

’10 The R2 Trillion Nuclear deal that almost happened

Gupta-linked company Oakbay together with IDC & Duduzane Zuma’s company purchase the ‘Dominion’ uranium mine. Afterwards the 1st Integrated Resource Plan (IRP) reveals a 9,6 GW nuclear programme to be operational by 2030. The IRP undergoes 4 iterations over the next 8 years without critical public participation. Zuma takes a personal interest in controlling the Nuclear Deal by chairing various parliamentary nuclear coordination committees. He also visits Russia an unprecedented 7 times, where he personally (often privately) pushes Nuclear Deal arrangements forward with Putin.The estimated R2tn Nuclear Deal almost gets through till Head of Treasury Nhlanhla Nene refuses to sign the state guarantee with Russia. Nene is then fired by Zuma. Just the exercise of trying to push the unconstitutional Nuclear Deal through costs SA tax payers millions.

’11 Sunday Times’ “Death Squad” fake news report

An article states that Anwa Dramat & Hawks Gauteng Head Shadrack Sibiya are allegedly involved in the illegal handing over of six Zimbabweans to Zimbabwean police. Later in the year the paper alleges Hawks KwaZulu-Natal, Cato Manor Organised Crime Unit Head Johan Booysen is complicit in the extra-judicial execution of numerous crime suspects - Booysen was investigating Zuma ally, Thoshan Panday at the time.

’11 Mdluli’s 6 years free pay

Zuma appoints Lawrence Mrwebi as Special Director of Public Prosecutions & Head of Specialised Commercial Crime Unit. Mrwebi goes on to withdraw charges against Mdluli & Mdluli is reinstated Head of SAPS Crime Intelligence Division. Mdluli is soon suspended again & gets full pay plus benefits for the next 6 years without any disciplinary action ever taken. This becomes a fashion for many of Zuma’s comrades who are caught in the act.

’11 SASSA grants hijacked

Zuma’s newly appointed Minister of DSD Bathabile Dlamini, Tom Moyane & SASSA CEO Virginia Petersen oversee the specification for the grant payments tender bid biometric verification changes, from ‘PREFERRED’ to ‘MUST’ ensuring CPS is the only valid contender. With the help of scores of dodgy BEE partners & shadow state ‘work streams’ CPS/Net1 irregularly win the bid to service grant beneficiary payments for the next 8 years, extracting over R1.5bn in profit, of which R316m is for an irregular payment of re-registrations - this excludes the estimated R800m+ that is unethically taken from grant beneficiaries in irregular/unauthorised deductions on their grants. We can’t say who actually benefited from these profits but as Dlamini confesses, “Those that made profit through CPS through by their wives are known, but because they are well respected by the organization. Nothing has been said to them.”

’11 Bain helps hollow out SOEs

Telkom CEO Sipho Maseko introduces Bain & Co consultant Vittorio Massone to Zuma. Vittorio presents ‘Project Phoenix’ & consults Zuma on reshaping South Africa’s economy, communications, energy & implementing the shadow state agenda. Massone meets Tom Moyane in 2013 & coaches him on the ‘first 100 days’ of ‘SARS 2.0’ restructuring/take-over plan prior to his appointment. Once Moyane is CEO of SARS Bain is contracted to help implement the restructuring/capture of SARS. They are payed +/-R200m for this.

’12 Hlaudi repurposes SABC

Dec 2011 Zuma & Gupta’s close ally Hlaudi Motsoeneng is appointed acting COO of SABC. He illegally (without even a metric), becomes official COO in 2012 & starts causing havoc. Dodgy deals, outrageous bonuses & bungled actions cost the SABC over R560 million alone. More damaging is how he interfered with editorial decisions I.e. blocked ANC opposition party news, as well as mass protests that showed Zuma’s ANC in a bad light, forced reporters to cover political cadres & fired anyone who apposed him.

’12 The looting of Transnet

After a litany of dodgy dealings at Telkom Brian Molefe is appointed Transnet CEO. Propped up by Malusi Gigaba & fellow fixers Anoj Singh, Siyabonga Gama & Iqbal Sharma he initiates the lavish Market Demand Strategy (MDS), a 7 year investment plan with a R420bn budget & one of state capture’s biggest looting operations begins. It is later identified that between 2013-2018 Transnet spent a total of R37bn on contracts with direct links to the Guptas & state capture, amounting to 60% of the SEO’s CapEx, & 10% of its total revenue. Together Liebherr, CSR, CNR, SAP, ZPMC, Neotel, Software AG & other complicit companies payed kickbacks totalling R7.7bn for the lucrative contracts.

FIGURE 1.1 Timeline of State Capture

STATE CAPTURE”

’12 SAA quietly goes insolvent

PWC & Nkonki Inc. are irregularly contracted to audit SAA from 2011 to 2015. Zuma Foundation Chairperson, Dudu Myene Chairs the SAA board over the period & even though there is much speculation of corruption the embattled national airline consistently receives clean audits. Just before Nene is fired he gets the Auditer General to step in. In 2017 AGSA finds SAA’s self proclaimed irregular expenditure of R125m actually stands at R4.5bn with 103 of the 140 contracts probed being found to have irregular expenditure.

’13 The New Age & ANN7 misinformation machine

Zuma’s propaganda idea is realised in 2010 when Guptas launch TNA Media’s first edition of The New Age newspaper. The media house later expands to include the notoriously biased ANN7 TV channel in 2013. Both media platforms are used to syphon millions out of various SOEs (including the SABC) via dodgy multi-million Rand breakfast events & forced media-buys. Main function though is to push the shadow state propaganda & discredit opposition with fake news.

’13 Waterkloof Airforce Base scandal

A private plane with Gupta family wedding guests lands at Waterkloof Air Force Base. The unprecedented landing is cleared on instruction from “Number One”. The lavish R30m wedding itself is paid for from looting the R220m Free State Vrede Dairy Project.

’13 Zuma’s 5th cabinet reshuffle

Notably Ben Martins moves from Minister of Transport to Department of Energy where he issues the first determination 34 for the Nuclear Deal.

’14 Zuma round 2

Even with Waterkloof & Nkandla scandals playing out Zuma is re-elected President of SA. He introduces new Ministers Faith Muthambi as Minister of Communications (oversees repurposing of SABC with Hlaudi Motsoneng), David Mahlobo as Minister of State Security (oversees repurposing of SSA) & Nomvula Mokonyane as Minister of Water & Sanitation (Bosasa’s political conduit). Moves Tina Joemat Pettersson to Minister of Energy (signs nuclear agreement with Russia). Gigaba to Home Affairs (arranges naturalisation & visas for Guptas & friends), Lynne Brown takes over Public Enterprises (moves rent extractors Brian Molefe & Anoj Singh from Transnet to Eskom).

’14 SA in dark with load shedding

Malusi Gigaba becomes Minister of Public Enterprises in 2010 & Eskom sees Zola Tsotsi & a gang of shadow state operatives & enablers enter the picture. Billions are looted in irregular contracts linked to Gupta & Duduzane Zuma companies. When Lynn Brown takes over in 2014 she deploys Molefe & Singh & the capturing expands to extorting & highjacking external coal suppliers like Glecor’s Optimum Coal Mine. The corrupt deals, misgoverned expenditure and hollowing out of Eskom resulted in lost institutional knowledge, load shedding and exhorbitant annual tariff increase that citizens and the economy had to absorb caused by a decade of stagnant policy and infrastructure direction. This cost is estimated to be around R338bn over 10 years.

’14 Spies lies & the ‘Rogue Unit’ narrative

When SARS High Risk Investigation Unit (HRIU) starts looking into Zuma & his cronies, unconfirmed stories around the unit are leaked to the Sunday times. Based on these ‘stories’ Minister of State Security David Mahlobo gets the Inspector General of Intelligence to investigate. The investigations are taken even further when Tom Moyani takes the helm of SARS. He uses the evolving Sunday Times “Rogue Unit” story to dissolve the HRIU and abandon its high profile cases. After that KPMG is brought in (overseen by Johnas Makwakwa) to probe even deeper still, shifting the narrative to focus on Pravin Gordhan, Pillay & others in order to provide Head of NPA Shaun ‘the sheep’ Abrahams with material to prosecute. Even after Sunday Times has admitted to poor reporting & both the NPA & KPMG have withdrawn charges & findings respectively, Zuma’s new Public Protector Busisiwe Mkhwebane insists on resurrecting the narrative & tries numerous times to discredit Gordhan & co, squandering millions of tax payers money with ongoing court proceedings.

’15 2nd motion of no confidence against Zuma is withdrawn.

’15 3rd motion of no confidence against Zuma is voted down in Parliament.

’15 Zuma’s 6th cabinet reshuffle

Mosebenzi Zwane is appointed Minister of Mineral Resources (facilitates the Gupta’s mine take-over at Glencore Optimum).

’15 Nene-Gate

After Nene refuses to sign off the SAA deal & the nuclear state guarantee with Russia, Mcebisi Jonas is approached by the Guptas & offered a R600m bribe to become ‘their’ new Minister of Finance. Jonas informs Nene. Zuma fires Nene & appoints Des van Rooyen. Result: financial markets react, causing inflation to rise from R14.59 to R15.90 in just 3 days, costing the SA economy over R500bn in equities alone.

’16 Public Protector Thuli Modonsela’s State of Capture Report is released.

’16 4th motion of no confidence against Zuma

Voted down in Parliament. Then after Nene-Gate a Section 89 motion (impeachment) to remove Zuma is voted down in parliament. Later a 5th motion of no confidence against Zuma is also voted down in parliament.

’16 Bell Pottinger spins out of control

When Oakbay is drawing too much attention in 2016 around state capture suspicions, Bell Pottinger is pulled in to divert attention & are paid a £100,000 a month to change the narrative to help push the Zuma-Gupta agenda. The UK-based PR company spins the white monopoly capital campaign, inciting and heightening existing cultural and racial tensions. The white monopoly capital narrative is used to smear Gordhan & legitimise Zuma firing him.

’16 Zuma’s Nkandla upgrades

The Constitutional Court delivers its judgment on the over R246m Nkandla upgrades that had been ongoing on since 2010. The court rules that the powers of the Public Protector are binding & that Zuma has to pay back some of the money for his R3.9m ‘fire pool’ & other upgrades.

’17 6th motion of no confidence against Zuma

Delayed due to secret ballot request but later voted down in Parliament (even with secret vote).

’17 Zuma’s 8th cabinet reshuffle - Gordhan fired

Based on a ‘badly written’ conspiratorial ‘intelligence report’ & the ‘white monopoly capital’ narrative Zuma fires Gordhan & his deputy, Mcebisi Jonas. Gigaba becomes new Finance Minister & the SA Rand drops 7.7% in less than a week, effecting Standard & Poor’s downgrade to junk status. It is estimated that Gordhan and Jonas’s axing cost the country over R250bn to date & we are still feeling the effects to this day.

’17 Zuma’s 9th cabinet reshuffle

David Mahlobo is moved to Minister of Energy (revives push for Nuclear Deal). He is replaced by Bongani Bongo as Minister of State Security (attempts to bribe parliamentary officer overseeing enquiry into state capture at Eskom).

’17 SASSA-Gate

Due to Dlamini & her ‘work streams’ interference, SASSA lacks capacity to take over grant payments by the time they are supposed to on 1 April 2017. Being aware of the shortcomings for more than a year, she discloses it at the final hour, putting 17 million vulnerable South Africans at risk of not getting their grants. This forces the ConCourt to extend the invalid CPS contract for another year. By the end of the contract, 2.4m of South Africa’s poorest are transferred onto EasyPay Everywhere accounts & are being charged R10pm account fees by Grindrod (to cover R9.50 NET1 service fee).

’18 Zuma’s Public Protector

Zuma appoints Busisiwe Mkhwebane as his new Public Protector in 2016. Even after Zuma’s ousting, she continues to protect the shadow state agenda by exonerateing key figures, Magashule, Mosebenzi Zwane & the Guptas in her Vrede Dairy Project report in 2018. She also goes out of her way to persecute Gordhan by resurrecting nullified allegations including the “Rogue Unit” narrative. Most of the state capture related enquiries/reports in her office have still not seen the light of day (Nov 2020).

’18 Zuma out

Zuma resigns the day before a 7th motion of no confidence is brought against him (ANC MPs say they will vote him out if he doesn’t quit).

Key turning points

Maintaining legitimacy

Weakening accountability

Extracting rents

UNIVERSAL GRAPHICS KEY

The majority of the time, however, rent extraction still entailed the manipulation and subversion of procurement processes. This included having prior knowledge of (or a hand in developing) bid specifications, influence in the bid evaluation or adjudication committees or influencing the authorising party (be it the CEO or Board) to favour a particular party. There are multiple ways in which the procurement processes, as guided by the Public Finance Management Act (PFMA), have been subverted to enable large-scale looting of public institutions.

Perhaps one of the major stumbling blocks to the project of rent extraction and complete control of the public purse, was the oversight role played by National Treasury. The cabinet reshuffles of Nene and Gordhan, both occurred at pivotal moments when Treasury refused to sign off on large deals or challenged the Zuma-centred power elites.

Government institutions only represent one side of the corrupt and clandestine transactions. The role played by various companies within the private sector need to be highlighted and equally scrutinised. Many cases of State Capture entailed large scale international firms buying into the kick-back schemes, inflating costs to South Africa and in some instances facilitating the looting of the state. The likes of SAP, T-Systems, China South Rail, Net1, etc. – all internationally based – have derived significant financial benefit and have faced little to no consequence for their involvement in State Capture.

Certain private sector firms were also a critical part of weakening accountability and facilitating the extraction of rents. These are the auditors, consultants, lawyers and bankers that have assisted by providing a veil of legitimacy to mask the true nature of deals struck, facilitating movement of money and turning a blind eye to the dirty deals and 'irregularities' that they should in fact have called out. Most of the 'Big Four' international auditing firms have to some extent been implicated, namely KPMG, Deloitte and PwC (Abedian & Mantell, 2017; Cameron, 2019; Davis, 2020a). Various international consultancies have received excessively lucrative contracts for services that could/should have been undertaken by the institutions themselves or that in some instances were not necessarily required. These include the likes of Bain & Company, McKinsey and Gartner, as well as a group of local 'management' consultancies such as Regiments, Trillian and Rangewave.

A pivotal task of weakening accountability entailed the capture of the criminal justice system. This included repurposing of law enforcement and entities responsible for state security to shield the shadow state from facing criminal prosecution. The SAPS, Hawks, NPA and state security were central to the State Capture project. The ramifications of the hollowing out of these institutions is that government's overall

ability to enforce the rule of law has been greatly compromised. It is little wonder then that other white-collar criminal elements not connected to the shadow state and those responsible for major corporate scandals (such as Steinhoff, Tongaat Hulett and EOH) have not been called to book (*BusinessTech*, 2019; *Business Insider SA*, 2020).

Accountability extends beyond legal requirements of what can be considered criminal and there are several other state institutions that play a role in holding those in power to account. This is one of the main responsibilities of the legislature and the various Chapter 9 institutions, such as the Public Protector. Discussed in more detail below, the extent to which the National Assembly was captured is at this stage debatable. However, it is worth remembering that over the nine years of Zuma's reign there were several attempts by the opposition to table a vote of no confidence in his leadership. He emerged vindicated and emboldened after each failed motion (Wilkinson & Africa Check, 2017). The Constitutional Court scathingly rebuked parliament for supporting the white-wash fire-pool report produced to justify the R245m security upgrades to Zuma's Nkandla homestead. As argued in the judgment (Constitutional Court of South Africa, 2016, pp. 48 & 51):

> In principle, there may have been nothing wrong with those "parallel" processes. But, there was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and "remedial action". This, the rule of law is dead against. It is another way of taking the law into one's hands and thus constitutes self-help …
>
> … the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President.

Though it cannot be stated outright that there are no elements in the judiciary that are aligned with the shadow state, the number of significant court rulings thwarting and correcting the intended abuses of power needs to be applauded. Significant examples over and above the already mentioned Nkandla saga include the Constitutional Court intervention in the SASSA-Gate crisis and the High Court putting a stop to the Russian nuclear deal. There are many other examples, but these best illustrate the importance of ensuring that the different arms of government operate with independence.

There are two other sectors in society that play a crucial role in ensuring we have a functional democracy, namely a free and independent media and a robust civil society. Ultimately, at least in theory, within a constitutional democracy all those in positions of power should be accountable to the citizenry. The task of news media is to inform

citizens of how government is performing (or not as the case might be) and one of the functions for civil society is to give voice to citizen responses to government's performance.

Over the years, various civil society organisations have been instrumental in curtailing the extent of the damage that could have materialised from the machinations of the shadow state. Examples can be readily found in the two court cases already mentioned. The Black Sash Trust initiated the Constitutional Court case that saw Minister Dlamini reprimanded for putting 17 million social grant beneficiaries at risk of not receiving what for many was their only source of income and means of survival (Pijoos, 2018). Earthlife Africa and the Southern African Faith Communities' Environment Institute jointly took on the government's plan to ram through the Russian nuclear deal, saving the country from committing future generations to paying off the massive bill estimated at R1tn (Gosling, 2018).

There are many other cases that should be included in this analysis. One, however, is particularly noteworthy. This involved the case brought to the Constitutional Court by Corruption Watch, Freedom Under Law (FUL) and Council for the Advancement of the South African Constitution (CASAC). The case challenged the then President Zuma's appointment of Shaun Abrahams as National Director of Public Prosecutions (NDPP) following the coerced departure of the previous incumbent Mxolisi Nxasana. The Court ruled that Nxasana's removal was an abuse of power and that the appointment of Abrahams was therefore unlawful, as clearly stated (Constitutional Court of South Africa, 2018):

> Former President Zuma appointed Advocate Abrahams following his unlawful removal of Mr Nxasana. That removal was an abuse of power. Advocate Abrahams benefitted from this abuse of power. It matters not that he may have been unaware of the abuse of power; the rule of law dictates that the office of NDPP be cleansed of all the ills that have plagued it for the past few years.

The investigations by relentless groups of investigative journalists have been instrumental in unravelling State Capture. By asking the tough questions and probing beyond the surface level platitudes provided by the power elite, these journalists were able to shine a light on the shadow state. The role the media plays is, however, a double-edged sword. The use and manipulation of the media to spread dis- and misinformation against shadow state opponents, was rightfully assessed as being a central tool for maintaining the legitimacy of the shadow state.

South Africans, like the rest of the world, are faced with the challenge of being bombarded by 'fake news', the rise of gutter populism and the nameless, faceless onslaught of deliberate untruths used to drive hate and stir up division. This use of the media

(and particularly social media) can most readily be seen in the antics of Bell Pottinger (think White Monopoly Capital [WMC] and Radical Economic Transformation [RET]) and the 'good news' stories peddled by the Gupta-owned *The New Age* and ANN7 (both of which were established as a result of a 'suggestion' from Zuma [Zondo Commission, 2019a]). The shadow state also astutely used various forms of 'active measures', such as creating and leaking of salacious stories to journalists that were later used to remove obstacles and drive narratives (the SARS 'rogue unit' case is an example).

These propaganda tactics are not new. However, the overarching goal is no longer just about driving a specific agenda. Rather, as seen in the 'fightback campaign' and growing worldwide authoritarian populist movement, elites tend to focus on creating an environment that obscures and supports illegitimacy (post-truth politics) where facts no longer matter and all that counts is who can tap into the frustrations of the masses (real or constructed) and/or entertain the most (Abrams, 2016; Lewandowsky, Ecker & Cook, 2017). Fake news and disinformation campaigns have the effect of paralysing ordinary people's sense of agency and trust, contributing to what Timothy Snyder calls the politics of inevitability, "the idea that there are no ideas … that there are no alternatives" (Snyder, 2018, p. 15). Intentionally created doubt becomes the virus that infects the entire body-politic, ultimately draining out the vitality of democratic ideals.

The last critical element to maintaining legitimacy lies in the democratic system itself – the logics of patronage and clientelism that are embedded in our current political system (Van de Walle, 2007; Anciano, 2018). Those that enjoy the windfalls derived from the extraction of rents – the Oakbay's, BOSASA's and Trillian's – funnel a proportion of their wealth into bolstering the political legitimacy of the power elite and justifying the actions of the shadow state. In return they are protected from scrutiny and prosecution, in effect a political protection racket for the corrupt. It is an underlying logic of predatory power and is perhaps most eloquently presented in a quote, which is attributed to former Brazilian President Getulio Vargas (1930-45, 1950-54), "For my friends, everything; for my enemies, the law" (O'Donnell, 2004, p. 40).

Literally hundreds of individuals and organisations have been implicated in the State Capture project. By the end of 2019, the Zondo Commission had issued more than 700 notifications to implicated parties; the commission was set to continue until March 2021 (Davis, 2020b; Wicks, 2020). Although the Gupta network was the central focus of the *State of Capture* report (Public Protector, 2016), the various investigations reveal that there are several other networks entangled in the State Capture project. These networks operate semi-independently of one another but remain interconnected by the power elites. At the beginning of 2019, South Africans were aghast at the testimony

that was presented by Angelo Agrizzi at the Zondo Commission. Video evidence of Gavin Watson counting out bundles of hundred rand notes for bribes and kickbacks relating to billion-rand tenders awarded to BOSASA helped illustrate the networks and characters involved. This is but one network and there are many more, as will be presented in this book.

1.3.2.1 The Cost of State Capture

As the full extent is yet to be determined, trying to definitively calculate the full cost of State Capture is at best speculative. However, as the stories have unfolded over time the estimates have successively increased over the years. For Former Finance Minister Pravin Gordhan it cost between R250bn in 2017 (*The Citizen*, 2017), increasing to R500bn as stated by President Ramaphosa in 2019 (Omarjee, 2019). These amounts may be the direct cost of moneys lost from the state, but journalist Marianne Merten pegs the indirect loss could be far greater, estimating it at "around R1.5tn over the second term of the Jacob Zuma administration" (Merten, 2019).

We argue that these types of cost calculations are far too narrow when we reflect on the true extent of the impacts State Capture has had on the nation. One needs only to consider the 'opportunity costs'. Cyril Ramaphosa referred to "nine wasted years" (Haffajee, 2019), but the cost of that lost time is yet to be adequately determined. David Fowkes, a lead economist for regional policy at SARB has noted that "in a normally functioning economy, growth should be over 4% [given SA's level of investment] and there certainly hasn't been growth … This is the evidence of what state capture looks like … Where you have major investment and no growth" (Magubane, 2019). The country faces a fiscal quagmire where we now have government debt and government revenue collection falling short year on year. Overall there has been a negative impact on the country's economic growth potential, due to policy uncertainty and instability, the rating downgrades and increased rates in financial outflows, as well as the negative ramification thereof such as rising unemployment and growing inequality (Hosken, 2017; Hofstatter, 2018; Makhafola, 2018).

Then there are the incalculable personal costs that the State Capture project has incurred on the many individuals whose careers and livelihoods have been decimated. This includes the trauma associated with intimidation and coercive acts they were forced to endure in order to keep their jobs. Many of those who attempted to push back and reveal the truth lost their jobs and reputation. The erosion of government's ability to meet the basic service delivery objectives or fulfil its constitutional obligations cannot be decoupled from the State Capture project. The struggle to access and control state resources at local levels has led to an increase in political violence in the country. The tragedy of Life Esidimeni (Moseneke, 2018; Mitchley, 2019) and

the rise in political killings in KwaZulu-Natal (KZN), as detailed in the Moerance Commission (Moerane, Gounden & Potgieter, 2018), did not occur in isolation from the political and economic context (Von Holdt, 2019). Corruption and State Capture is not a victimless crime and future generations will have to pay for it.

1.3.2.2 The Modus Operandi

In terms of the modus operandi for "capturing" a government institution, the shadow state undertakes the following tasks or actions from within the government itself:

- Securing control over the public service, in particular through the appointment of Cabinet Ministers, Board Directors, Heads of strategic agencies, etc.
- Intentionally weakening key technical institutions and formal executive processes. This often entails:
  - removing key top officials and replacing them with people who would not obstruct the objectives of the shadow state;
  - having officials serve only in acting positions (limiting their ability to take long-term strategic decisions);
  - appointing external advisors; and
  - deploying persons ("fixers") to intervene in the procurement process.
- Securing access to opportunities for repurposing the state by manipulating or changing the directives or objectives of the government:
  - In cases where the shadow state objectives are for the purposes of accruing wealth, this often centres around large-scale projects/contracts.
  - There is often an element of "scope creep" in the contract, where the value is increased or the contract is extended, potentially indefinitely.
- Creating parallel political, governmental and decision-making structures that undermine the functional operation of government institutions.

In the private sector, there are many different strategies and tactics that can be deployed. However, the pattern is clear:

- The companies which are awarded the contracts are either:
  - recently established (start-ups, with little experience or capacity to undertake the contractual obligations);
  - complex joint ventures, with very little background/clarity of ownership or capability (BBEEE deals often fall within this category); or
  - newly acquired reputable and established companies (business owners either sell or are pushed out of their companies – experiences of hostile takeovers).

- Behind formal (often legal) contract agreements, are the 'brokers/middlemen' who broker the deals, where often wealth is accumulated through lucrative BEEE partnerships entered into with a private sector company and then distributed across the informal network of the power elites.
- There is often a concerted effort, by those in the shadow state, to stifle or remove the competition or critics of the shadow state operations.

1.3.2.3 The Functions and Structure of the Shadow State

The formation of the shadow state is made possible by a host of actors who collaborate in various ways to realise their goas. These include:

- **Political Elites**: government Ministers, Presidential and Executive appointees and Members of Parliament (MPs). The function of these actors is usually to help change the rules of the constitutional state, and/or to bypass them where required.
- **Internal-Fixers**: technocrats that oversee the subverting or breaking of the rules. Most likely these actors have access to a cache of classified or sensitive information and have inside knowledge of how systems work. Their function is to facilitate "insider trading" and tender fixing.
- **External-Fixers**: dealers and handlers who launder money, pay bribes, conduct "hits" on opponents (literal or metaphoric) in ways that are coercive and threatening. Legal and auditing professionals are also classified in this group who authoritatively sign off illegitimate and illegal behaviour (e.g., KPMG, Deloitte).
- **Brokers**: act as coordinators and visionaries of the project. These actors are generally never directly involved in the transactions and activities of corruption. In South Africa, this group would include the Guptas, the Watsons and other politically connected individuals.
- **Corrupt Corporates, Middlemen and Influencers**: they are involved in the transactions and generally have more formal exchanges (facilitation fees/BEE fronting). Often only take a percentage and then pass on to brokers for distribution (but can also act as brokers). Included in this category are the banks and other financial institutions that facilitate illicit financial flows (money laundering), as well as the private sector companies that derive profits through payments of kickbacks.

1.3.3 The State of Political Capture

Though profound significance has been placed on the April 2017 protests, it is important to recognise that in spite of the protests and the substantial pressure from the body politic, it would be a further 10 months before Zuma would be removed

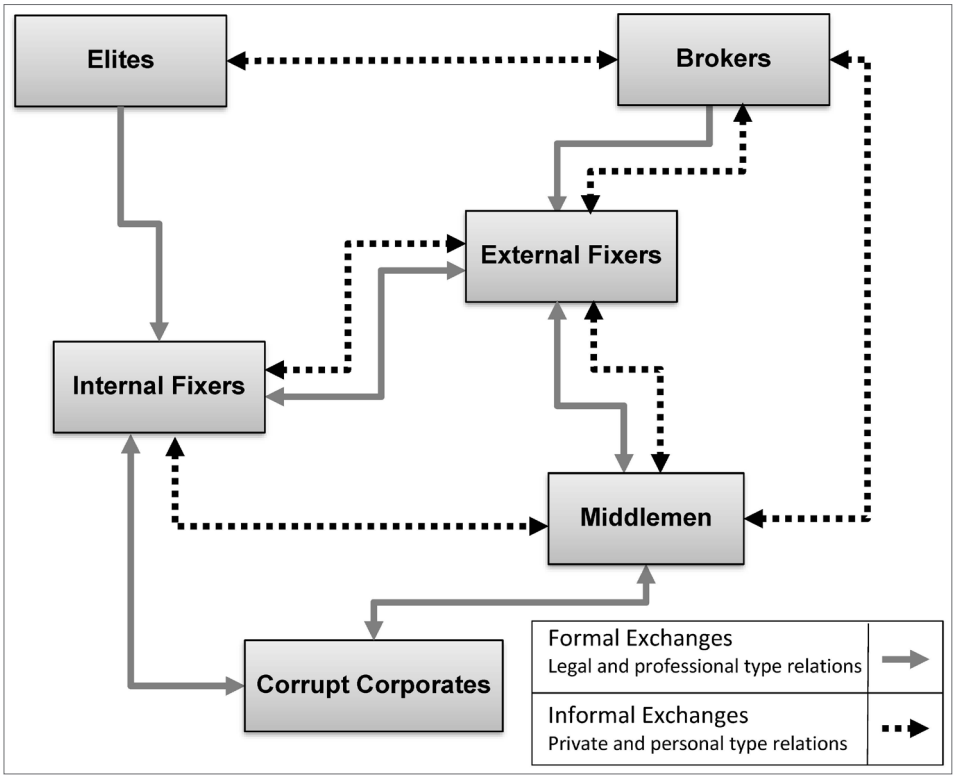


FIGURE 1.2 Relational Dynamics of the Shadow State

from office. It only happened after Cyril Ramaphosa, running on an anti-state capture platform, managed to narrowly beat the 'RET' ('radical economic transformation') faction nominee Nkosazana Dlamini-Zuma at the ANC's national conference in December 2017. The outcomes of the conference are largely viewed as a compromise, where the likes of Ace Magashula (extensively implicated as part of the Gupta network) (Myburgh, 2019) was elected Secretary-General of the ANC and David D. Mabuza was elected Deputy President. Mabuza made a last minute swing of support to Ramaphosa despite having previously anchored the provincial support base for Zuma's faction (Friedman, 2019).

On 14 February 2018, Zuma announced his resignation as President of South Africa in what was arguably one of the most bizarre media briefings. It was unclear at the time if he would step down and from the speech he gave, it was quite apparent he was reluctant to release the reins of power (*BizNews*, 2018; CNBCAfrica, 2018). For his part, Zuma denies the existence of "state capture" and has been on a campaign to discredit the entire notion. Since the release of the Public Protector's *State of Capture* (2016) report, he's called it a fake political tool, a "politically decorated expression"

and has countless times presented himself as a hapless victim under threat. He acknowledges that something has occurred, but refuses to engage the concept of State Capture: "There are people who did things to others in one form or the other, and you can call it in any other name, not this big name 'state capture'" (Deklerk, 2018; eNCA, 2018).

In quick succession after becoming President of the country, Ramaphosa moved certain compromised ministers out of their various roles in government. Without a clear mandate from the electorate and with such a narrow margin of victory, his Presidency's legitimacy is precarious. The extent to which he could enact bold changes within the party and within the state was limited. For instance, even though he could move Bathabile Dlamini as minister of DSD, he would not remove her from Cabinet entirely (Davis, 2018).

The necessity to make strategic political trade-offs has ensured that certain elements of the shadow state still have access to the political decision-makers and key business brokers. When we take stock of the glaring contradictions and hypocrisy of events and decisions taken, the ANC emerges as a startling reflection of the underlying dynamics of power, money and personality that shape the current political landscape. For instance, on 25 June 2018, the ANC established its manifesto working groups in preparation for the May 2019 national elections. In the document it states emphatically that "We will use Parliament, commissions, investigators and the courts to get to the bottom of the problem and deal with the offenders. As the ANC, we will take strong action against any of our leaders guilty of corruption"(ANC, 2018, p. 51). The irony was that none other than Tony Yengeni, the only individual to have been tried and pled guilty to corruption in the Arms Deal saga (spending a mere 4 months in jail for fraud and corruption), would chair the ANC's anti-corruption committee (Carter, 2006; Mahlati, 2018).

Ramaphosa himself would be caught in controversy when the details of the funding for his political campaign for ANC Presidency were leaked, following an investigation by the current Public Protector. Busisiwe Mkhwebane probed whether or not Ramaphosa lied to parliament about having received a donation from Gavin Watson, the then director of BOSASA (Rabkin, 2019). The findings of the report are being taken on review in the courts and several allegations have been made that Mkhwebane is actively part of what is considered the "fight back" campaign that calls itself the 'Radical Economic Transformation' faction of the ANC that openly campaigns in favour of Jacob Zuma. However, the monetary value attached to the political campaigns and the associated list of funders lays bare the stark reality of the

embedded power relations that form a bridge between South Africa's corporate and political elites – perhaps the most pervasive racket of them all.

As already argued, the State Capture project is inherently political. This perspective permeates the various chapters as they pertain to the respective case studies. However, it needs to be acknowledged that this book does not present a comprehensive analysis of the political system in its entirety. There is a political dimension to each case of State Capture and as the full extent of State Capture is yet to emerge, so too the extent of political capture – in short, it is a story that is yet to play itself out. As recognised by Deputy Chief Justice Zondo, an understanding of the role of party politics in government, and in parliament particularly and various legislative bodies within the state, still needs to be ascertained.

1.4 STATE POWER, ACCUMULATION AND THE RACKETS

An expanding body of literature by a diverse group wanting to explain the absence of fundamental transformation since 1994 has brought into focus the complex dynamics of elite formation (Terreblanche, 2002; Mbeki, 2005; Hart, 2008; Von Holdt, 2019). In essence, the argument is that the black elite that gained access to political power in 1994 lacked any form of significant capital and, therefore, were dependent on state power to create the conditions for accumulation. By contrast, the Afrikaner elite that came to power in the 1940s had significant land and agricultural capital that they leveraged to establish investments in mining, manufacturing and finance. The English-speaking elite that preceded the Afrikaner elite was rooted in mining and (globalised) finance capital. Under these conditions, the black elite was completely dependent on state institutions, with the ANC playing out its new role as key coordinator of what Von Holdt describes as the "informal political-economic system" that evolved during the Mbeki era (Von Holdt, 2019).

The problem with the business class in post-1994 South Africa was not simply that it was largely white, but also its reluctance to be embedded in the South African political economy. Moving capital out of South Africa (using legal and illegal means) has been a top priority for white business elites since 1994, accelerating whenever there is a crisis. "Hence the question", Von Holdt argues, "of a patriotic black bourgeoisie with national commitment, which so exercised Mbeki's mind. These are very political dynamics with a real material content, and place the political economy of a rising class at the centre of ANC politics" (Von Holdt, 2019, p. 6). Despite the emphasis (from 2002 onwards) on the need for a 'developmental state' to manage this (Swilling, 2008), the reliance on BEE, financialisation and shareholder value did not do the trick. The emerging black elite remained relatively small and financially weak. To compensate,

reliance on state institutions intensified, culminating in the ousting of Mbeki and rise of Zuma to the Presidency with a promise to accelerate the capital accumulation of a new 'black industrial class'. It is worth citing Von Holdt at length:

> Numerous black entrepreneurs, and aspirant entrepreneurs, were unable to access these opportunities because of political gatekeeping or because they lacked the capital or the skills. Already, during the Mbeki period as well as the presidency of Mandela, an alternative political-economic system was emerging at national, provincial and local levels, through which networks of state officials, ambitious entrepreneurs as well as smalltime operators, were rigging tenders or engaging in other kinds of fraud so as to use revenue flows from the state to sustain or establish businesses, or simply to finance self-enrichment. Given the property clause in the Constitution, as well as the conservative strategies adopted by the ANC government, and in the context of economic domination by large corporations and white owned businesses, there was little alternative for channelling the aspirations and burning sense of injustice of black elites and would be elites in post-apartheid South Africa. *The state – newly re-nationalised by the liberation struggle – had become the only channel for the emergence of these aspirant classes, given the scope of its resources and activities.* (Von Holdt, 2019, p. 8, emphasis added)

As demonstrated elsewhere (Chipkin & Swilling, 2018), the Zuma government focused on the R200bn per annum procurement spend via SOEs. The argument was that instead of depending on the largesse of white capital, the procurement spend of 'our industries' must be used to foster the development of a 'Black Industrial Class' – the term used in a policy paper published in 2014 by the Department of Trade and Industry. The new Zuma-centred power elite knew that the repurposing of state institutions could not be done by remaining within the parameters of the law and the Constitution. A range of brokers, fixers and middlemen were needed to manage a new generation of transactions. This, in turn, created the material conditions for the emergence of the shadow state. In essence, the 'informal political-economic system' created during the Mbeki era was consolidated, streamlined and centralised via key brokers like the Guptas and Watsons. The end result was the formation of what Olivier de Sardan (2016) calls a "predatory authority" – a mode of governance that is common across many post-colonial African governments with deep roots in racist colonial systems. Political leaders and senior Managers are accorded what Olivier de Sardan calls "royal prerogatives, *which their victims describe as rackets*". These rackets, he argues,

> … appear in the eyes of the beneficiaries, not simply as a matter of personal choice, but *rather as a rightful aspect of their office*. The latter therefore 'naturally' entails a predatory dimension. A policeman has the right to deduct his dues from transporters, in the same way that a 'directeur de

> cabinet' has the right to dip into special funds, or the customary judge the right to exact fees from offenders. (Olivier de Sardan, 2016, pp. 41-42, emphasis added)

What is missing in the South African literature on State Capture is a narrative that can help to understand the granular micro-dynamics of how these 'rackets' actually get assembled in practice and how they work in everyday life. Yet, in the chapters that follow – and almost every day at the Zondo Commission – there is mounting evidence that there are indeed a definite set of rackets in place that are deployed to enrol thousands of people in a set of relationships that result in the internal moral compromise of individuals and the repurposing of institutions and rent extraction. This is how the 'informal political-economic system' and the shadow state works. It is easy to imagine how all those who 'confessed' to the 'unburdening panel' established by the South African Council of Churches in 2016/2017 expressed what they must have gone through as they got enrolled in these rackets.

The notion of 'rackets' and the 'racket society' evolved out the Frankfurt School of Critical Theory in the 1930s and 1940s to understand the collusion between political and business elites, and is being revived today to comprehend the way corporate and political elites collaborate to achieve shared goals (Jay, 2020). According to Adorno and Horkheimer, "[r]ackets are comprised of and operationalized by cliques, gangs and other established groups that act protectively towards their own members, while externally they attempt to circumvent the market process by misappropriating economic income and by deceiving the public" (Granter, 2017). Most of this kind of literature on rackets is useful because the collaboration between business and political elites is not assumed but described. However, little is revealed about *how* they work in practice in organisational terms.

For this, we need to turn to the social psychology literature on rackets that refers to "coercive feelings" that are triggered to actively enrol people into a particular set of rackets (Ernst Jr, 1973). These feelings are fear, rage, shame, guilt, desperation, anxiety, helplessness, greed and confusion. These feelings get manipulated in the relationship of power between the racketeer and the person that the racketeer wants to enrol. Each coercive feeling is aimed at engendering a particular response that favours the racketeer. A racket always involves the following mix: an active agent (the 'racketeer'), those who get enrolled in the racket (the 'rackatee', so to speak), a story premised on a fundamental untruth (underlying manipulation) and a 'coercive feeling' or mix of 'coercive feelings' to engineer the relationship and reproduce compliance (Ernst Jr, 1973; Erskine & Zalcman, 1979; Christoph-Lemke, 1999). A racket, therefore, can be defined as a pattern of behaviour that enables the racketeer to enrol others into acting out a fundamental untruth that is often masked by a seemingly credible story.

What is recognised in both the 'society of rackets' and psychological racket theory is that rackets are self-perpetuating and re-enforcing (Ernst Jr, 1973; Erskine & Zalcman, 1979; Christoph-Lemke, 1999; Granter, 2017; Klein & Regatieri, 2018; Scheit & Fischer, 2018). These characteristics of rackets helps to bridge the two theories. If an individual racket proves effective, it will most likely continue to be repeated and replicated elsewhere, and thus the racket spreads. Unchallenged, rackets become practised norms within groups. There are numerous examples of these rackets, such as the way that ministers meeting with business people at informal luxury locations gets normalised. Former President Zuma threw a spotlight on this normalised and sanctioned practice when questioned at the Zondo Commission if it was 'okay' for a President to ask a Director General (DG) of a department to "please help" the Gupta's *The New Age* access advertising budget of the state. He replied, "… if such a call is made, would that call have moved away from the normal procedures, would it be trying to compel the DG to do a wrong thing or whatever, even if the call was made or not made?" (Zondo Commission, 2019a). Ultimately these practised norms become accepted, going on to corrupt social norms. Understanding rackets as an underlying practice (expressed via repeatable patterns of behaviour) helps to perpetuate State Capture by blurring boundaries and normalising the loyalties that exist in informal spaces that subvert the desired norms of accountability (even though these may not have ever existed in practice).

In new democracies, relationship building between elites may be necessary for stability, but it can also oil the wheels of the rackets that reproduce anti-democratic behaviours. The large literature on the developmental state has always wrestled with this tension, but essentially concludes that if this tension resolves in favour of the business elite, then the developmental state is compromised and State Capture follows. The alternative is what Evans famously called "embedded autonomy" – this is when a political elite (that is not totally corrupted) keeps the business elite in check to ensure that national rather than particular interests are promoted (Evans, 1995).

Influenced by the literature on rackets, we have noticed fives kinds of rackets:

- **Conspiracy**: here two or more relatively autonomous parties mutually agree to cooperate in secret to achieve a shared goal. In this case, the parties enrol reach other in a mutually beneficial racket that operationalises the shared goal. The coercive feeling is often greed. The Transnet South China Rail deal might be a case in point.
- **Collusion**: this refers to the way a relatively more powerful racketeer uses various 'coercive feelings' to ensure that one or more 'junior' parties agree to actively collude in ways that are often denied by the story that the racketeer tells, and the

enrolled person chooses to believe. The coercive feeling is fear. A good example is the countless cases where someone is pressurised to grant a contract to a BEE contractor on the grounds that this supports 'black empowerment'.

- **Coercion**: this refers to the way a racketeer uses various direct and indirect threats to coerce a reluctant party to actively participate in a particular racket. Threats range from getting sacked, to physical violence directed against the individual and/or his/her family, blackmail or exclusion from being considered as a contractor. The coercive feeling is anxiety and desperation. There are countless examples of this, many of whom have given testimony at the Zondo Commission.
- **Complicity**: this racket is similar to coercion, but the aim is not active enrolment in the racket, but rather passive compliance of someone who knows what is going on but is enrolled to say and do nothing. The coercive feelings are confusion, fear and shame. Perhaps one of the most alarming examples was when in 2011, Rieaz ('Mo') Shaik and other senior officials of the State Security Agency (SSA) decided to halt all investigations into President Zuma's friends the Guptas after it became clear that the President was not pleased to hear they were being investigated (Shaik, 2019). As already noted, complicity is how politicians in parliament and in the governing party were enrolled into the racket.
- **Con**: this refers to complex rackets where the racketeer sells a story to enrol others on false pretences that the enrolled person fully believes. A good example is Benny Jiyani who agreed to be the BEE partner in VR Laser. Jiyani then facilitated the sale of the remainder of VR Laser shares to Saliem Essa without knowing that the latter was in cahoots with the Guptas. Jiyani believed Essa's story, but after the deal was done the Guptas moved in, forcefully ejected Jiyani from the business and took over (Jiyane, 2019). He was conned. The coercive feelings were confusion, fear and helplessness.

1.5 UNDERSTANDING THAT STATE CAPTURE IS NOT SYSTEMATIC, BUT SYSTEMIC

South Africa, like most democratic states, is established on the foundation of a formal legal-rational structure of governance where power is distributed, limited and defined in terms of practical interactive institutions that make, adjudicate and enforce the rule of law. Like all human-centric systems, the successful functioning of this system does not depend on the written word but by the manner in which these laws manifest in the daily lives of people. The enactment of the values and principles from which these laws are conceived require continuous monitoring, reflection and reinforcement (or reform if needed) (Rosenfeld, 2000; Le Roux & Davis, 2019).

State Capture is when the formal legal structures are subverted and influenced by the informal structures that have become corrupted and predatory. It is a radical departure from the norms and values upon which a democratic developmental state depends. Like most liberal democracies, the Constitution provides for prerequisite checks and balances that are supposed to limit such abuses of power. However, when those checks become checkboxes and the balancing forces are biased, the system becomes a perpetual reinforcing loop spiralling towards a predatory authoritarian state – a silent coup.

This reinforcing loop of the State Capture project centres around three principal objectives, namely controlling of rents, weakening of accountability and maintaining legitimacy. As discussed above, these three objectives are aligned with the ultimate goal of building and maintaining control of the state to the benefit of a select few. The reinforcing nature of this political project is the reason we define this as the 'Racket of Predatory Power', with the strategy outlined in Figure 1.3 (pp. 28 and 29).

A wide diversity of reputable writers, journalists and academic researchers have contributed chapters to this book. They have a diversity of disciplinary backgrounds and therefore use different methods. Their positionalities also differ, resulting in a rich variety of perspectives. The prevailing methodology is qualitative in nature, with the use of quantitative information where required. Nevertheless, there was a shared research objective, and a core research question. All the contributors came together for a two-day workshop in August 2019. The research objective and research question were discussed here, and refined. Chapter contributors were then required to write up their respective chapters with this research objective and core question in mind. The editors scrutinised and discussed each chapter, providing in most cases extensive feedback until the editors were satisfied that the chapter met the required academic standards and addressed the research question.

The overall research objective was to provide an in-depth understanding of what we called the 'anatomy' of state capture. By 'anatomy' we meant a more extensive multi-faceted understanding of state capture that was not limited to one network (e.g., Guptas), nor limited to one period (the 'Zuma era'), nor one sector (the public sector). An 'anatomy' implies an understanding of all the parts, and how they fit together. This was achieved using case studies, historical analysis and conceptual analysis. The research question was as follows: how did particular (usually corrupt) agents manage to repurpose particular institutions to achieve their narrowly defined financial and/or political goals? For this purpose, we introduced the notion of rackets, i.e., practices aimed at enrolling people into activities legitimised by a believable lie. Although few

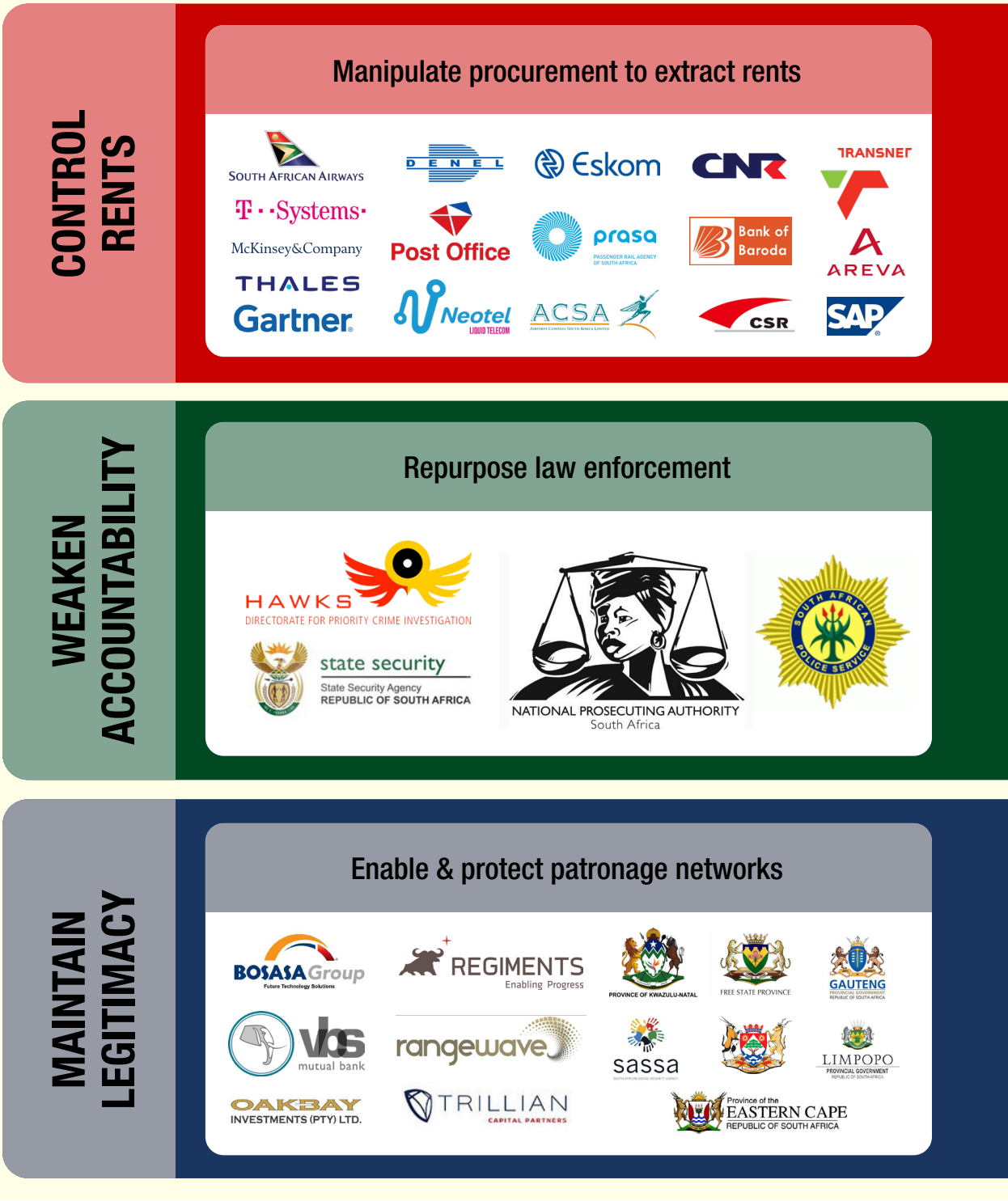
of the contributors used this term because we only developed this term after most of the chapters were written, it does get referred to in a number of different ways. The notion of 'rackets' is a particularly novel contribution to the global literature on state capture.

The mounds of evidence produced at the Zondo Commission and the reams collated by the various investigations, court cases and investigative journalism, push us to expand our understanding of State Capture to be way beyond merely a few individuals that did the wrong thing. We may well be seduced by the prospect of implicated figures taking the stand at the Zondo Commission, but what we refer to as State Capture did not start and will not end with Zuma. It existed in a different form under the apartheid regime, evident by the known Sanction Busters and illegal arms sales; the power elites of the Afrikaner Broederbond and the highly corrupted nature of the Bantustans. The chapters presented in Part 1 of this book thus look to unpack the historical roots of State Capture and place our understanding in the broader social, political and economic context.

State Capture aligns state institutions, SOEs and sections of business to reproduce corrupt rent-seeking practices within shadow state systems and flows. A veneer of constitutionalism is maintained to mask the complexities of these neo-patrimonial dynamics. Understanding State Capture as systemic rather than a chain of events helps to reveal how the Presidency became the centre of the spider's web that straddled the constitutional and shadow state, thus enabling the rent-seeking, the hollowing out of accountability and the modes of legitimation.

The next three sections of the book present various cases that reflect the three State Capture motives and dynamics as described above, namely rent-seeking, hollowing out of accountability and modes of legitimation. Part 2 discusses the rent-seeking systems that were established and the various ways in which the modus operandi of State Capture was deployed at some of the biggest SOEs. These cases come closest to the traditional application of the 'State Capture' concept as a form of grand corruption. Part 3 discusses how legitimacy was maintained, albeit in often contradictory ways. The case studies presented under this section outline the ways in which crucial social and democratic institutions did not escape the State Capture project and outline the human cost of the rackets deployed. Part 4 focuses on the systematic capture of the various law enforcement and security institutions that were hollowed out and repurposed, thus reinforcing the weakening of accountability.

VISUALISING THE RACKET OF PREDATORY POWER



28 FIGURE 1.3 The Racket of Predatory Power in South Africa's State Capture

What it takes to CAPTURE A STATE



Change/implement 'Shadow State' friendly policy and regulations

home affairs
Department: Home Affairs
REPUBLIC OF SOUTH AFRICA

social development
Department: Social Development
REPUBLIC OF SOUTH AFRICA

defence
Department: Defence
REPUBLIC OF SOUTH AFRICA

the doj&cd
Department: Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

water & sanitation
Department: Water and Sanitation
REPUBLIC OF SOUTH AFRICA

transport
Department: Transport
REPUBLIC OF SOUTH AFRICA

mineral resources
Department: Mineral Resources
REPUBLIC OF SOUTH AFRICA

energy
Department: Energy
REPUBLIC OF SOUTH AFRICA

public works
Department: Public Works
REPUBLIC OF SOUTH AFRICA

correctional services
Department: Correctional Services
REPUBLIC OF SOUTH AFRICA

government communications
Department: Government Communication and Information System
REPUBLIC OF SOUTH AFRICA

public enterprises
Department: Public Enterprises
REPUBLIC OF SOUTH AFRICA

Secure control of the public purse

PUBLIC INVESTMENT CORPORATION

SARS
South African Revenue Service

national treasury
Department: National Treasury
REPUBLIC OF SOUTH AFRICA

Capture Parliament and undermine institutional oversight

KPMG

THE PRESIDENT
REPUBLIC OF SOUTH AFRICA

BAIN & COMPANY

PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Deloitte.

Capture the Judiciary and Chapter 9 institutions

NOT CAPTURED

CONSTITUTION
OF THE REPUBLIC OF SOUTH AFRICA

PUBLIC PROTECTOR SOUTH AFRICA
Accountability • Integrity • Responsiveness

THE JUDICIARY
REPUBLIC OF SOUTH AFRICA

AUDITOR-GENERAL SOUTH AFRICA

Control the message through the media and drive misinformation

Bell Pottinger

ANN7
AFRICA NEWS NETWORK

SABC NEWS

TNA
THE NEW AGE
www.thenewage.co.za

Sunday Times

Curtail transparency and discredit opposition to the 'Shadow State'

NOT CAPTURED

Civil society
Whistle-blowers
Independent press

The project of State Capture would also not be possible without the collaboration with those located outside of the state. The familiar modus operandi is clearly evident within and outside the state: the masking of the real interests at play, manipulation of formal processes and normalisation of rackets. Multinational accounting firms like KPMG, Deloitte and McKinsey have all played a role in manipulating the systems of accountability and facilitating the extraction of ill-gotten gains. Investigative outfit, Open Secrets, released a report called *The Enablers*, which highlights how these private sector elites with global networks like banks, accounting firms, lawyers and consultants facilitated criminal conduct as part of the State Capture project (Open Secrets and Shadow World Investigations, 2020).

When the informal influence of power overrides the formal separations of public good from self-interests, the line separating government and the private sector becomes blurred and vulnerable to corruption. State Capture is also not unique to South Africa and is part of a much bigger breakdown of democracy. The same objectives, strategies and 'modus operandi' exists throughout the world in rising authoritarian states like Kenya, USA, Russia, etc. (Grzymala-Busse, 2008; Yakovlev & Zhuravskaya, 2009; Ungar, 2016; Meirotti & Masterson, 2018; Hertel-Fernandez, 2019; Maina, 2019). Part 5 of this book takes the exploration of State Capture into a discussion of the role of the private sector and how the culture of corruption and impunity has proliferated across an array of governance oversight bodies across public and private sectors alike.

It is important to acknowledge that the selection of cases is not definitive, nor do they address all of the dynamics which have been highlighted in this introduction. However, each case does present invaluable insights that reinforce the analysis presented above.

The essence of our argument is that corruption is not in and of itself the key strategic problem. Yes, it is a scourge that must be eliminated. But in reality, it is a symptom of a much larger process of subverting democratic principles of justice, equality and rule of law. Much of current discourse uses the analogy of comparing corruption (and State Capture) to a 'disease' or an illness that can be cured, with a focus on 'removing' or 'ending' or rather 'cutting out the cancer' of corruption.

We argue that this is an incorrect diagnosis as it is based on a few incorrect premises, namely: that corruption is an aberration and that it is not a derivative of an underlying environment/condition. Referring to corruption as a 'cancer that can be cut out' creates the impression that corruption is an isolated phenomenon, something physical and tangible that can be removed from society by an appropriate law enforcement strategy. This diagnosis limits the perspective that is needed to identify the required remedial actions and the structural changes that must be introduced to address the deeper economic challenges of poverty, inequality and the persistence of a class structure

rooted in South Africa's harsh colonial/apartheid history. Many of the policy responses and most inquiries/commissions have thus been limited to addressing particular instances of corrupt rent-seeking behaviour as one dimension of State Capture. They have failed to address the embedded systemic failures that created the conditions for State Capture and how the various rackets were executed to facilitate State Capture.

State Capture is not just about corruption (though it is key). It is ultimately about the abuse of power and the dismantling of the social compact between society and those who should be considered the 'guardians of governance'. The perpetrators of this subversion of the social compact are the politicians, civil servants, directors and executives of companies, auditors, lawyers, financial institutions and journalists that have enabled and executed the political project of State Capture and the broadening out of corrupt practices beyond the state. It is important to note that even though this can be reduced to the decisions and actions of individuals, it is enabled by the underlying rackets that get reproduced within the wider governance ecosystem within and beyond state institutions. It is for this reason that, looking forward, we emphasis the following:

- Government alone cannot address the underlying systemic challenges.
- Removing a few 'sore thumbs' or rotten eggs and tweaking policies and processes will not be sufficient.
- Governance as we know it across the public and private sectors needs to be reformed in ways that explicitly acknowledges the power of rackets and how these have 'normalised' a particular predatory way of doing business in South Africa.
- Mainstream political parties need to re-invent themselves – a new type of leadership is required.

This book is not intended to provide answers or 'solutions' to address State Capture, but rather to provide a foundation for the difficult discussions and complex actions needed to unravel the rackets and address the systemic causes of State Capture.

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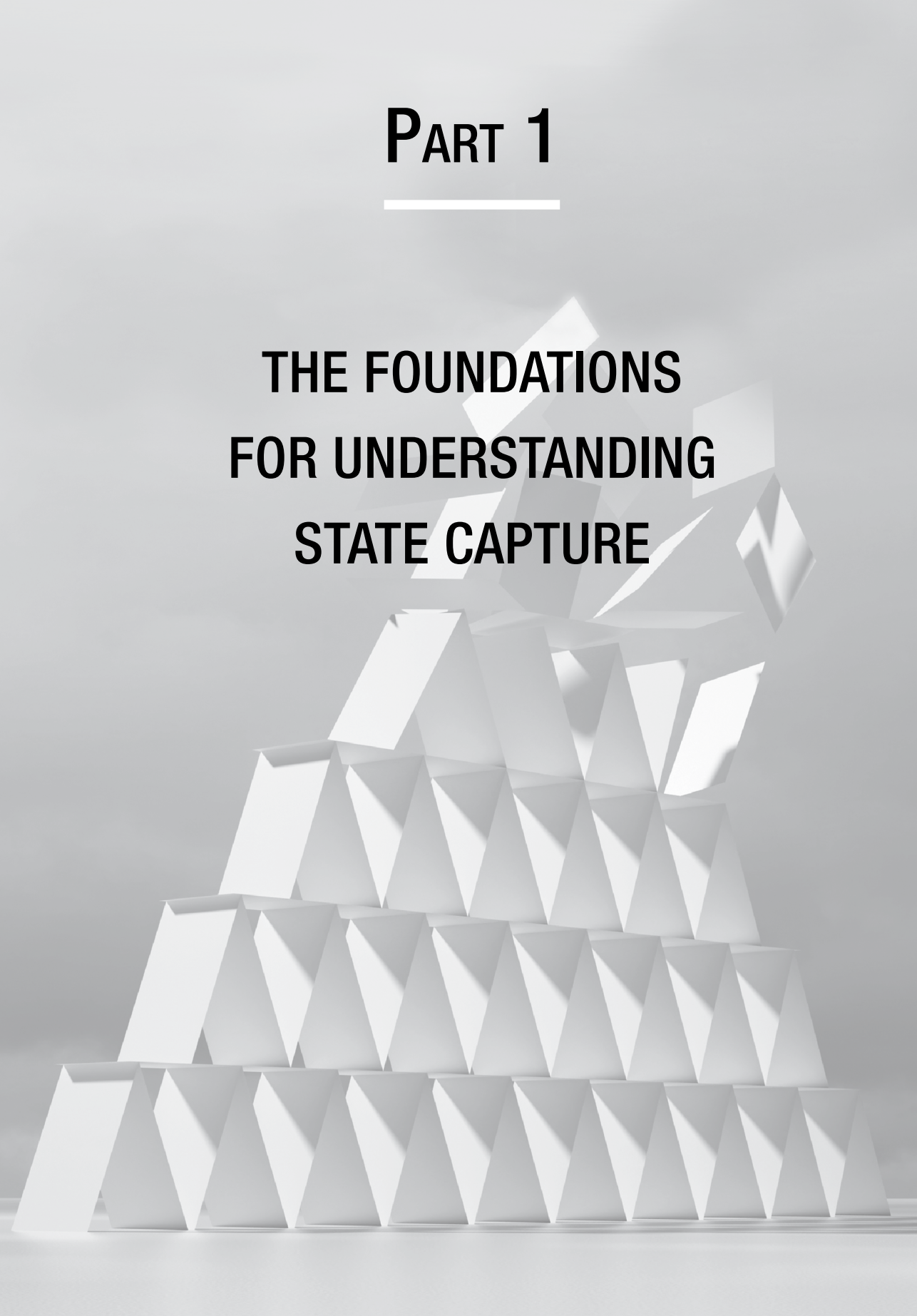
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Part 1

THE FOUNDATIONS FOR UNDERSTANDING STATE CAPTURE



2 TOWARDS A POLITICAL ECONOMY OF SOUTH AFRICAN RACKETS

Sanet Madonsela and Mark Swilling

2.1 INTRODUCTION

As argued in the Introduction to this book, we need to understand *what* state capture is all about and *how* the actual participants in state capture engage and make deals. To answer this more granular question, it was proposed that there is a specific 'way of doing business' in South Africa that involves ways of enrolling significant numbers of people into a particular set of 'rackets'. A racket, it was argued, "can be defined as a pattern of behaviour that enables the racketeer to enrol others into acting out a fundamental untruth that is often masked by a seemingly credible story". Ultimately, rackets are about the abuse of power to secure consent. The rackets that were discussed were as follows:

- **Conspiracy**: here two or more relatively autonomous parties mutually agree to cooperate in secret to achieve a shared goal.
- **Collusion**: this refers to the way a relatively more powerful racketeer uses various 'coercive feelings' to ensure that one or more 'junior' parties agree to actively collude in ways that are often denied by the story that the racketeer tells, and the enrolled person chooses to believe.
- **Coercion**: this refers to the way a racketeer uses various direct and indirect threats to coerce a reluctant party to actively participate in a particular racket.
- **Complicity**: this racket is similar to coercion, but the aim is not active enrolment in the racket, but rather passive compliance of someone who knows what is going on but is enrolled to say and do nothing.
- **Con**: this refers to complex rackets where the racketeer sells a story to enrol others on false pretenses that the enrolled person fully believes.

This chapter contextualises these rackets within an understanding of the interaction between economic policies, the dynamics of the polity and South Africa's challenging economic context. The core proposition is that the black political elite that gained control of the state after 1994 used political power to create the economic conditions

of elite accumulation that may have reduced absolute poverty, but did little to reduce inequality. Learning from the way elites have always done business since colonial times, the new black elite replicated the rackets that were needed for this politically enabled mode of accumulation. Understanding this wider economic context is essential for making sense of state capture, and in particular how racketeers enrolled others into their increasingly sophisticated networks that eventually resulted in the repurposing of an entire set of state institutions during the Zuma era.

2.2 CONTEXT

South Africa has a population of 59 million and has been a democracy since 1994. It has a strong democratic constitution, a relatively mature institutional regulatory structure, a solid core of economic infrastructures and a market economy. Between the 1960s and 1980s, the South African economy diversified by expanding the manufacturing sector off the back of the mining and agricultural sectors. But following global trends from the early 1990s onwards, it was the growth of the financial sector that became a key driver of growth thus disincentivising diversification (Mohamed, 2010; Black & Gerwel, 2014). Financialised growth exacerbates inequality and increases volatility.

According to the Gini coefficient, which measures income inequality, South Africa is one of the most unequal societies in the world (National Planning Commission, 2011). In 2018, more than 50% of its population lived below the poverty line, while 20% of its population could be classified as middle class and 5% as the elite (Chutel, 2018). Recent research on asset inequality based on data from two databases has reached an even more shocking conclusion about the class structure of South African society:

> ... [B]oth sources agree that wealth inequality is extreme: ten percent of the population own more than 90 percent of all wealth while 80 percent have no wealth to speak of; a propertied middle class does not exist. (Orthofer, 2016)

In addition to this, the 2017 Land Audit found that white South Africans owned 26.6 million of the 37 million hectares of land classified as farmland and agriculture holdings (72%) in the country, while Africans who make up 80% of the population only owned 4% (a mere 1.4 million hectares). With that said, of the total land area of 121.9 million hectares, only 114 million hectares are registered as 'owned' by the Deeds Office (94%). The state owns 14% (17 million hectares) of this total. The difference between the land area (121.9m ha) and the registered land (114m ha) is 7.9 million hectares (5 times what Africans formally own). In short, 90% of the wealth is owned by 10% of the population, and 72% of the productive privately-owned farmland is owned by the minority (Department of Rural Development and Land Reform, 2017). Almost

three decades into democracy land ownership patterns have remained the same. Growing service delivery protests and land occupation movements are increasingly the norm as racial polarisation and growing disillusion with the state intensifies.

Despite moderate growth between 1994 and 2007 and substantial real increases in fiscal expenditures to extend service provision (Swilling, Van Breda & Van Zyl, 2008), unemployment and poverty have persisted. The official rate of unemployment, based on the 'narrow' definition, has not dipped below 25%. Using a R524/month poverty line, 53% of the population lived in poverty in 1995, declining marginally to 48% by 2005 and remaining the upper forties since. This decline was attributed largely to the impact of social grants, which now benefit more people than the number of people in formal employment. It is worth mentioning that one in every three South Africans received a social grant in 2019. Many critical writers blame the failure of the state to initiate employment-creating industrial growth via structural transformation for the persistence of poverty and inequality since 1994 (Wolpe, 1995; Habib & Padayachee, 2000; Bond, 2002; Gelb, 2006; Swilling, 2008; Hart, 2008; Mohamed, 2008, 2010; Freund & Witt, 2010; Netshitenzhe, 2011; Marais, 2011; Khan, 2013; Khan & Pillay, 2019). However, what exactly the portmanteau concept of 'structural transformation' (ST) means is rarely spelled out in any detail.

Regardless of this, the South African Government continues to formally define itself as a 'developmental state' committed to the structural transformation of the economy to deal with the legacy of apartheid (Republic of South Africa National Planning Commission, 2012). It aims to stimulate economic growth primarily by increasing public investment in national infrastructure to crowd in private sector co-investments. This is complemented by an inflation target of 3-6%, a floating exchange rate, government deficits of 5-10%, extensive fiscal expenditure on education, health and welfare, and incentives to promote raw material exports and expand the manufacturing sector. Despite all this, South Africa's economic growth rate is one of the lowest in Africa. For mainstream neo-classical economists, this is due to labour market rigidities, inflated government expenditures and energy shortages. While these are certainly a factor, the underlying resource drivers are as important, especially the rising cost of minerals, energy, water, waste and mobility (Swilling, Musango & Wakeford, 2016).

Contrary to this, South Africa's key economic indicators post-1994 were a cause for optimism. Its average economic growth rate of 3.4% for the period 1994-2013 was an improvement from the 1.4% for the period 1980-1993. By 2012, the country's national GDP was 77% larger in real terms relative to 1994. Similarly, export growth per year increased from 2% to 5% between 1980 and 2000, cooling slightly to 4% between 2001 and 2007. The South African economy has struggled to regain its early momentum

during the post-2007/9 period. In 2015, economic growth slumped to little more than 1%, and in 2016, growth limped in at 0.5%. By 2019, debt reached almost 69.1% of GDP (from about 26% in 2008), the Rand continued its trend of depreciation – the nominal effective exchange rate of the Rand lost around 50% of its value between 2010 and 2017 – all culminating in the country's credit-rating being reduced to one notch above junk in 2017. Growth oscillated between 0.6% and 1.1% in 2017 and in April 2017 rating agency *Standard & Poor* downgraded South Africa's credit rating to BB+ or junk status. This provided the context for political struggles that brought the Zuma Presidency to an end between December 2017 (when Ramaphosa was elected ANC President) and February 2018 (which Zuma stepped down as President of the country).

Following others writing in the sustainability transition tradition (Swilling & Annecke, 2012; Baker, Newell & Phillips, 2014; Mark Swilling, 2020), the core structural problem of the South African economy is the dominant influence within the polity of the 'mineral-energy complex' (MEC) (Fine & Rustomjee, 1996; Mohamed, 2010). The MEC refers to a coalition of interests that have a firm grip on energy production and extractive industries and their up- and downstream partners in the manufacturing sector. Up until 2009/10, this set of interests had well developed policy networks within the polity to protect their interests, legitimised by a carefully crafted 'transformation' (i.e., deracialisation) agenda. This explained the politics of socio-technical lock-in which ensured that South Africa continued to be committed to energy- and carbon-intensive pathways and under-committed to supporting manufacturing subsectors that are not MEC-dependent (Black & Gerwel, 2014). A purposive transition in these non-MEC sectors would require a substantial shift in the power relations within the polity to significantly reduce the policy leverage of the powerful mining and energy companies and in so doing respond to global landscape pressures relating to resource prices and competitiveness, the energy transition, as well as domestic labour strife. This would have meant establishing a radical new paradigm that Latin Americans refer to as 'post-extractivism' (Economic Commission for Latin America and the Carribean, 2013). The rootedness of key political interests within the MEC effectively made post-extravism a non-option for the post-1994 government.

At the core of South Africa's developmental failure is the fact that the negotiated settlement that took place between 1990 and 1994, after Mandela was released from prison, left the basic structure of economic power intact. Since 1994, black elites were incorporated into the share-owning class in return for maintaining the basic structure of economic power by limited state intervention in economic ownership and redistribution (Habib & Padayachee, 2000; Hart, 2008; Glaser, 2011). Along the way, as described below, these black elites quickly learnt about the pre-existing rackets

deployed by the white elites during the apartheid era, adjusting them to suit the new state-centric accumulation context in post-apartheid South Africa.

To rapidly stimulate growth and address inequalities, policy choices were made within the polity that reflected this power deal: neo-liberal ideologies were adopted (Hart, 2008), financialisation was promoted as a growth strategy (i.e., essentially debt-funded consumerism to expand the black middle class, ensuring that the financial sector grew faster than any other sector), capital flight for South African corporates (Mohamed, 2010) and non-developmental welfarism was implemented on a massive scale to quell popular unrest (Khan, 2013). Welfare grants increased from 3 million beneficiaries in 2000/2001 to 17 million in 2017 – from below 1% of GDP to over 3.5% of GDP in a decade (Khan, 2013).

Following Bhorat, Cassim and Hirsch (2014, p. 4), South Africa exhibits all the features of a middle income growth trap, including an "overdependence on resource-based foreign exchange for export revenues and short-term growth; a capital intensive path of industrialization; a consumption – rather than investment-driven – growth trajectory; reliance on state infrastructure for domestic growth, or simply a growth path built on sectors that are not employment-intensive".

This was the context for the recomposition of state apparatuses at the centre of the polity during the post-1994 era: with exceptions here and there (e.g., some housing, rural development and job-creation projects), instead of focusing on building new developmentally-oriented state institutions to drive a non-MEC employment-creating 'developmental welfarism' (Khan, 2013), the focus was on replacing white with black officials as part of a state-driven 'new racial nationalism' agenda (Glaser, 2011). This strategy, coupled to debt-financed consumerism, stabilised the multi-racial middle class base of the post-apartheid polity, but at the expense of what Khan calls the 'bioeconomy' – the bodies of the poor black majority and the resources of nature (Khan, 2013).

2.3 ECONOMIC POLICY SINCE 1994

It is arguable that South Africa has never had a national consensus on economic policy. The closest it came was the original Reconstruction and Development Programme (RDP). However, this was replaced by the Growth, Employment and Redistribution (GEAR) policy in 1996 – a policy that was imposed by the Minister of Finance with minimal consultation to promote 'macro-economic stabilisation' as financial conditions worsened. This was later upgraded and renamed ASGISA, which included a reference to 'binding constraints' that needed to be purposively addressed by state

action to unleash economic potential. This was a marginal but significant shift from free market-oriented rationale of GEAR.

In the early 2000s, as the debt-financed consumer boom reached its limits, public sector funding of national infrastructure emerged as a substitute. This underpinned the adoption of the 'developmental state' discourse from 2002 onwards. It was this shift that brought into focus public sector investment resources such as those controlled by the Public Investment Corporation (PIC), Development Finance Institutions (DFIs) and State-Owned Entities (SOEs). This was followed later by the New Growth Path (NGP), and the National Development Plan (NDP). The former was driven mainly by the Department of Trade and Industry (DTI), but with little funding for the central tenet of this policy which was industrial policy. Industrial policy has never been a policy priority for the post-1994 governments. Despite promises given to the COSATU (The Congress of South African Trade Unions) by the NDP Commission that the rather weak economic chapter of the NDP would be revisited, this never happened. Trevor Manual claims this was because COSATU never came to the meetings. COSATU insists that this was an ideological move to avoid facing the challenge.

What followed during the Zuma years was 'radical economic transformation' and (later) references to 'inclusive growth' after Gigaba became Minister of Finance. Under Ramaphosa, we have the stimulus package, which is a mixed bag of short-term stimulus measures and longer-term structural change interventions. It is arguable that the inadequacy of both will result in an outcome that will be neither short-term growth nor longer-term structural change. The *Economic Strategy* published by National Treasury in 2019 focused on a range of micro-economic interventions, some of which made a lot of sense (Economic Policy National Treasury, 2019). However, a coherent macro-economic framework was not provided, other than a commitment to austerity economics. The austerity-oriented Supplementary Budget released by the Minister of Finance in May 2020 put all the focus on managing down the expanding debt. A bold and ambitious macro-economic policy framework to guide high impact counter-cyclical interventions has never been attempted in the post-1994 era.

2.4 FROM THE MBEKI TO ZUMA ERA ECONOMIC POLICIES

During the Mbeki era, economic policy emphasised market-oriented strategies coupled to a BEE approach that linked emerging black business to contracts and deals with white business. This took place within a wider corporate-driven restructuring of the real economy. Three economic forces interacted in ways that undermined investments in the productive economy, namely financialisation, the shareholder value movement and BEE. Financialisation was about stimulating economic growth

via consumer spending funded by the expansion of access to credit by the growing middle class and increasingly desperate working class. Shareholder value was about unbundling the conglomerates and increasing returns to shareholders. This resulted in a greater proportion of wealth accruing to shareholders than to labour during the post-1994 era. And finally, BEE resulted in the transfer of wealth from white to black shareholders and Managers. Together, financialisation, shareholder value and BEE undermined what South Africa needed most, namely an increase in investment in the productive economy. An increase in investments in the productive economy (guided by a coherent set of industrial policies) would have resulted in increased rather than reduced economic diversification, infrastructure investments that catalysed manufacturing and not mainly the primary extraction/export sectors, as well as a massive expansion of SMMEs (Small, Medium and Micro Enterprises). Financialisation, increasing shareholder value extraction and BEE transfers tend to be inconsistent with these kinds of real-economy investments (Mohamed, 2010).

Strategic refocusing (as required by the shareholder value movement – or following the slogan of the time: 'focus on your knitting') resulted in a massive increase in returns to shareholders which, in turn, undermined reinvestment. A total of R384bn was extracted by shareholders between 1999 and 2009, equal to 17% of gross fixed investment during this same period (Zalk, 2011, 2016). This was reinforced by transfers to BEE groups. An equally massive R317bn was transferred to black shareholders between 2000 and 2014, equal to 8% of gross fixed investment during this period (Zalk, 2016). While this may seem significant, it is worth noting that the number of black-owned and -controlled companies have precipitously fallen from an average of 7.1% for the period 1995-2000 to a mere 0.5% of the JSE capitalisation in 2016 (Bosiu, Goga & Roberts, 2017). These two sets of transfers (both underestimated here because they exclude transfers to external shareholders, and are only for specific periods) dis-incentivised reinvestment because of the need to service the debt-based equity of these groups. Debt-based buyouts of key SA manufacturers (such as ISCOR, Dorbyl, Scaw, etc.) by local and international companies limited investment in expansion because of the need to service the debt rather than reinvest in expansion (Roberts & Rustomjee, 2009). Furthermore, international listings of South African companies promoted dis-investment rather than the much-promised capital raising for inward investment (Schneider, 2018). And debt-based expansion of consumption to de-racialise the middle class resulted in consumer growth rather than production-based growth.

As this shareholder extraction and debt-funded consumer boom reached its limits in the early 2000s, Mbeki led the ideological shift from hardcore neo-liberalism to a 'developmental state' narrative that focused on what the ASGISA framework had

already defined as 'binding constrains'. This may have brought an end to the obsession with privatisation of SOEs, but it did not translate into a full-blown Asian Tiger-type developmental state with the capacity to drive accelerated economic growth and development.

Instead of using the post-1994 moment to attack the unproductive structure of the economy, the Mbeki-led political coalition adopted economic policies that were inappropriate to direct the restructuring of the extractive institutions at the centre of corporate South Africa. They assumed that a remarkably simple (and with hindsight, naïve) mix of economic policies would provide the framework for macro-economic stabilisation and growth of a market-driven economy. These included inflation and public expenditure controls; removal of market 'distortions' such as tariffs, capital controls, excessive labour market protections and requirements to lend to particular sectors (to avoid inefficient rents); as well as a faith in foreign direct investment and the associated transfers of technology and management efficiencies (Habib & Padayachee, 2000; Zalk, 2017). This economic cocktail was coupled to an equally simple equation of development with fiscal policy, resulting in a massive expansion in expenditures on welfare, housing, health and education (Freund, 2010).

The combination of market-oriented macro-economic stabilisation and development-as-welfarism did not adequately address the problem of low investment levels caused by the way the profoundly extractive South African corporate structure was being transformed by a combination of shareholder value, BEE deals and financialisation. An alternative would have been state interventions that directly imposed conditionalities on these transactions. For example, BEE deals could have been conditional on re-investments in industrial diversification; financialisation could have been conditional on financial institutions lending to support manufacturers and SMMEs; and shareholder value extraction could have been redirected by major players, such as the PIC, if it was required via legislation to be far more than just another investment fund.

Critics of the Mbeki era macro-economic policies argued that South African policy makers ignored the fact that public investments in other jurisdictions did not in fact displace private investment, but instead catalysed private investment. They also argued that the lowering of tariffs without industrial sector restructuring using industrial policy had proven unviable in other contexts (Zalk, 2017). Instead, developmental management and the allocation of rents needed a measure of protection until local industries were robust enough to compete internationally. Furthermore, critics argued that capital account stability was a good thing. Finally, critics argued that a stable well-paid workforce was preferable to an over-indebted underemployed poorly paid workforce, especially if economic growth depended on an enlarged the domestic

consumer market. A general conclusion shared by many critics of the Mbeki era of neo-liberal reformism is that the state needed to actively lead corporate restructuring to ensure that investment in the real economy became the primary focus, rather than the extraction of dividends and rents for elite enrichment.

Although the adoption of the developmental state discourse in the early 2000s marked a realisation that the state needed to play a stronger leadership role in the economy, this translated into a narrow focus on infrastructure-led growth to draw in private investors rather than strategies to guide corporate restructuring and private sector investment into wider strategic industrial sectors.

By the time Thabo Mbeki was forced to resign as President, the ANC was facing the consequences of growing inequalities, persistent poverty and remarkably high unemployment levels. This prompted the ANC Youth League (ANCYL) to lead the way in calling for more 'radical economic transformation'. All talk of privatising SOEs fell away as SOEs came to be seen as key instruments for ratcheting up investment levels in the wake of the ongoing failure of the corporate sector to adopt a long-term, dividend-oriented approach to investment. At the same time, there was growing dissatisfaction in the black business sector – the slow pace of accumulation in this sector was blamed on an over-dependence on the largesse of the white corporate sector.

2.5 ZUMA ERA

During the Zuma era, the focus shifted to the procurement spend of the SOEs as the primary vehicle for building a black industrial class. This had two consequences. Firstly, it reinforced a questionable assumption that capital intensive investments in large-scale infrastructures (i.e., 'capital deepening') leads to the type of growth and development that is needed. Capital intensive investments have a poor rand-to-job ratio (Rodrik, 2006). Secondly, it prepared the way for state capture as the shadow state networks came to broker the deal-making process that a focus on procurement spend opened. Within this context the rackets thrived.

The rise of the Zuma-led power elite can be understood in this context. The economic environment was already prepared by the adoption of the developmental state discourse introduced during the Mbeki era, coupled to an emphasis on infrastructure-led growth, the need to expand BEE, the emerging significance of the SOEs (resulting from the 'developmental state' narrative) and a realisation that state-investment institutions like the PIC have real leverage. The conditions were ripe for an assertive power elite to repurpose state institutions in the name of addressing the contradictions of the Mbeki era.

The solution Zuma's policy group offered was therefore unsurprising: heavy dependence on the use of the procurement systems of the SOEs. As articulated by the DTI from 2014 onwards, SOE procurement spend held the key to building a 'black industrial class' (Department of Trade and Industry, 2014). In reality, this meant re-purposing the SOEs to become the primary mechanisms for rent seeking at the interface between the constitutional and shadow states. This became the strategic focus of the power elite that formed around Zuma. To facilitate this, they needed brokers to help by-pass regulatory controls and shift money around (through local and international financial circuits) to finance deals as well as the transformation of the ANC into a compliant legitimating political machine. The Gupta networks emerged as the anointed brokers of this expanding rent seeking system. They were the grand masters of the dark arts of racketeering. They actively and systematically established an interlinked set of rackets across the apexes of key SOEs.

The difference between the economic policies of the Mbeki era neo-liberal reformers and the Zuma era revanchists lies in how the transition to democracy is understood. The institutions produced by this transition are associated with two different ways of doing politics. Mbeki's neo-liberal reformers were content to operate within the confines of the Constitution and were invested in institution building. That is, social and political transformation was deemed contingent on giving flesh to the socio-economic rights mentioned in the Constitution by building state administrations able to work programmatically to achieve progressive policy outcomes. Building a capable state was their aim, including limiting corruption wherever possible – at least in theory. The rackets existed (e.g., the arms deal), but the repurposing of state institutions in favour of these rackets was not the dominant agenda.

Starting as a revolt against Thabo Mbeki, though not yet associated with a clear ideology, the Polokwane moment in 2007 gave rise to a new power elite that used the language of 'radical economic transformation' to bind together the new Zuma-centred political coalition. Claiming to speak for 'ordinary people', those who are not well educated, who do not speak English well, who live in shacks or small towns and rural areas and who are excluded by the economy and the formal institutions of the state, this narrative gave rise to a politics profoundly mistrustful of the formal 'rules of the game', whether of the Constitution or legislation. The formal rules are rigged, this position proclaimed, in favour of whites and urban elites and against ordinary people. Radical Economic Transformation was thus presented as a programme that required changing – and frequently breaking – the rules, even those of the Constitution. The argument was compelling when viewed from the perspective of those who did not benefit significantly during the Mbeki era. More significantly, it was a license to unleash the rackets on a grand scale. At the centre of it all was an eminently believable

lie: breaking the rules is a necessary condition for building a robust black industrial class to displace the dominance of 'white monopoly capital'.

2.6 RACKETS FROM THE ZUMA ERA

During the decade that started with the election of Jacob Zuma as President of the African National Congress in 2007 followed by his ascendance to the Presidency of the country in 2009, South Africa experienced a silent coup that led to what is generally referred to as 'state capture' (Chipkin & Swilling, 2018). By the time he was elected, Zuma still faced 786 counts of bribery and had been questionably acquitted of rape in 2007. He proceeded to lead, if not entirely orchestrate the labyrinthian project of state capture. This was a political project initiated by a power elite coordinated by an alliance of families, which included amongst others the Zuma family, the Watsons and the Gupta family – the latter consisting of a group of three brothers who moved to South Africa from India in the late 1990s. At the centre of this silent coup was a determined effort to implement what came to be referred to as the 'nuclear deal' that was struck between Zuma and Russia's President Putin in 2014. This should, however, be seen for what it was in the mind of Zuma and his advisors: the vanguard of an economic strategy to recompose the mineral-energy complex in the hands of a new black industrial class.

The Zuma-led power elite was loosely held together by a political project that depended on two means of violent control: the systemic use of violence to manage political dynamics (Von Holdt, 2013) and the reinforcement of misogynistic masculinities (Gqola, 2007; Kopano, 2008). Drawing on a rich tradition of writing about masculinity, it is clear that misogyny was enlisted together with violence to secure political control (Posel, 2005; Walker, 2005; Gqola, 2007; Morrell, 2007; Motsei, 2007; Kopano, 2008; Hunter, 2011; Morrell, Jewkes & Lindegger, 2012; Ratele, 2014). The latter has been explored elsewhere (see Swilling, 2020, Chapter 9) and will not be further referred to here.

The nuclear deal with Putin (see Chapter 16) that Zuma drove hard to conclude and implement was effectively an agreement that South Africa would become a key element of Putin's global nuclear-based energy strategy, which aimed to break Russia's dependence on fossil fuels but was also a bid to mount a global alternative to renewable energy. For Zuma, this R1tn project was the crown jewel in his policy of 'radical economic transformation' aimed at creating a black industrial class that would displace the white capitalist elite. However, in order to implement the agreement, extra-legal means were required which, in turn, depended on state capture and the consolidation of a shadow state for managing the multiplicity of rackets required to

enlist vast layers of across the state, politics, media and business. Over the course of 13 Cabinet reshuffles between 2009 and 2017, Zuma appointed 6 different Ministers of Energy, each with a renewed mandate to accelerate the nuclear build programme and, after 2014, to execute the nuclear deal.

To prepare for his global strategy, Putin signed a decree in 2007 that provided for the restructuring of the Russian nuclear industry that effectively integrated the entire value-chain into a single unified SOE (Merdan, 2018). Building on Russia's long Cold War history of nuclear armament (including the accumulation of vast technical know-how, large-scale nuclear infrastructures and uranium mining capabilities), this strategy to build a civilian nuclear energy sector made strategic sense. Rosatom was tasked with increasing nuclear energy in Russia's energy mix to 25% by 2030, and in parallel it concluded agreements to build nuclear plants (including floating nuclear plants) in Egypt, Jordan, Algeria, UAE, Kuwait, India, Turkey, Thailand, Indonesia and a number of Eastern European countries (Merdan, 2018). Reports on Russian nuclear plants built outside Russia suggest they are a kind of hybrid between a military base and an embassy, underwritten by state guarantees that effectively gives Russia extensive control of these country's energy economies (Armstrong, 2015; Gallucci & Shellenberger, 2017; Schepers, 2019). Russia's 2010 Energy Strategy document clearly stated that Russia's commitment to sustainable development means reducing dependence on fossil fuels by increasing the supply of nuclear energy (Safronova, 2010). Later drafts reinforced the commitment to nuclear-based sustainable development (Ministry of Energy of the Russian Federation, 2014). Nevertheless, as Eberhard and Lovins conclude, buying a Russian nuclear plant is an inadvisable high-risk venture:

> Russia is facing economic challenges, sliding in terms of rated world economies to number 15, below Mexico. Sovereign debt is a real concern and low oil prices and Western sanctions in response to Russia's aggression towards the Ukraine and other areas are making matters worse. … Russia wants to build nuclear power plants and needs huge amounts of capital to finance its nuclear commitments around the world. It hardly appears to be a stable financial partner. (Eberhard & Lovins, 2018)

In the shadows of the nuclear deal, in May 2010, a Gupta-owned company, Oakbay Resources and Energy, which included Zuma's son Duduzane Zuma as a shareholder via his company Mabengela Investments, quietly bought the Toronto-listed Uranium One's Dominion mine in Klerksdorp, located in the Northwest Province. The state-owned investment fund, the Public Investment Corporation, was hauled in to partly fund this transaction on suspect terms. The rationale was obvious: based on the assumption that an expansion of the nuclear energy sector was inevitable, the demand for uranium was set to skyrocket. The (largely illusory) foundations of a new supposedly black-owned mineral-nuclear-energy complex were being put in place

by the power elite managing the symbiotic relationship between the shadow and constitutional state.

While recognising the endemic nature of corruption in the pre-democratic polity (Hyslop, 2005; Van Vuuren, 2006), Zuma's potentially productive strategy of using state intervention to build a national developmentally-oriented capitalist class (with many positive precedents elsewhere in the world, especially the 'Asian Tigers') was corrupted, as the resultant flow of rents got captured by an increasingly confident power elite clustered around President Zuma. Via a distinct set of rackets, the power elite captured the polity and repurposed state institutions by appointing loyalists to the Boards and Executives of key state-owned enterprises (e.g., Eskom, Transnet, Denel and many others) and strategic institutions (e.g., the South African Revenue Service [SARS] and security agencies). The result was the consolidation of neo-patrimonial governance (Pitcher, Moran & Johnston, 2009; Lodge, 2014), with the constitutional state manipulated by what we called the 'shadow state' (Chipkin & Swilling, 2018).

Two case studies reveal the direct connections between the Zuma-led power elite's political project and the disastrous economic consequences of this mode of neo-patrimonial governance. Two international companies were prepared to risk their reputations to secure lucrative contracts with SOEs. The first case is the infrastructure and energy policy recommended by Bain & Co directly to Zuma; and the second is the way Salim Essa strong-armed the CEO of T-Systems into a racket that allowed T-Systems to collude with state capture actors in order to land the IT contract for Transnet.

2.6.1 Three Delusions of Bain & Co's Grand Strategy

Bain & Co is a Boston-based global consulting firm. With a turnover of $4.8bn in 2019, it is often counted as one of the 'big three' that dominates global consulting services. As described in Chapter 15 of this book, it was the focus of the Nugent Commission on Inquiry into the capture of SARS. Sometime in 2012, Bain & Co started informal engagements with Zuma, presenting their extremely ambitious strategic proposals for directing the capital expenditure budgets of strategic SOEs under the direct authority of the President (Massone, 2018). Several presentations, most of which took place at the President's official residence in Pretoria, reinforced the unconstitutional impression that the Presidency could become the centre of strategic gravity for all SOE capital expenditures. Bain & Co did a presentation for Zuma in March 2014, tellingly titled *Reshaping South African economy* [sic]*: Discussion on a possible Central Procurement Service*. Premised on the assumption that SOE procurement spend was R500bn at the time, Bain & Co proposed the complete centralisation of all procurement via the creation of a "Central Procurement Agency" (CPA) that would

report directly to the President (Bain & Company, 2014a). Based on highly suspect estimates, Bain & Co argued that this would enable a 10% cost saving, equal to R50bn per annum. Following the classic consulting modus operandi designed to secure client compliance, the Bain & Co consultants argued that this would require far-reaching institutional reorganisation to 'pay for itself'. This was the second delusion that Bain & Co fed into South Africa's increasingly corrupt governance ecosystem.

The first delusion was presented a year earlier on 25 April 2013. In a presentation titled *Infrastructure Development in South Africa: Holistic approach to infrastructure development – initial considerations,* Bain & Co presented what they called an "organizational solution to improve infrastructure delivery". Citing examples from Dubai, Malaysia, Shenzhen and Dublin, and using SAA as a potential success case, Bain & Co recommended the establishment of the SA Infrastructure Delivery Agency (SAIDA) to coordinate national infrastructure planning. The "benefits" were presented as "central control", "leverages the private sector" and makes "[o]ptimal use of limited overall funding pool and scarce human capabilities". SAIDA's role would be to ensure "strategic alignment", "process re-design", "financial control", "supervising of project budgets" and would have the "power to intervene in cases of failure and move to central execution model" (Bain & Company, 2013). With the CPA and the SAIDA reporting directly to the President, this would have given the Zuma-led power elite complete control of the R500bn procurement spend.

The third delusion was the presentation of an energy solution that would have catapulted South Africa back into a global technological dark age. In essence, just as global investments in renewables were accelerating and nuclear fleets were being wound down, Bain & Co recommended a national energy strategy based on nuclear power and fracked gas. In a presentation titled *Sirius Program – reshaping South Africa's Energy sector* [sic]*: Discussion Document* presented on June 2014, Bain & Co presented proposals for how to "[t]ransform Eskom", "solve short and medium term energy capacity/mix challenge" and "redefine energy ecosystem/governance". To "transform Eskom", Bain & Co recommended a "new leadership" (which led to the appointment of Brian Molefe), more "immediate funding" from the fiscus, an "Eskom turnaround" plan and the resolution of the Medupi and Kusile overspend which was described as a "national security matter". To address the short and medium capacity challenge, Bain & Co recommended investing in Coal 3 (another mega-coal fired power station) and the Inga hydro scheme (despite 20 years of planning for this that has resulted in nothing), a joint venture (JV) between Eskom and PetroSA to "aggressively pursue shale gas", and "launch [of] nuclear development". The long-term plan was to unbundle and privatise generation, but to "maintain state ownership" of transmission. Bain & Co estimated that R330bn would be needed to implement this plan, resulting in GDP growth of 5.4% by 2025. This excluded the cost of the so-called

"new build" programme which Bain & Co estimated would cost between R638 and R833bn made up as follows: Coal 3 (4.8 GW at R120bn), renewables (1-3 GW – uncosted), Inga hydro (2.5 GW – uncosted), shale gas (8-14.4 GW at R106-R190bn), nuclear (7.4-13.8 GW at R326-R608bn) plus a 15% contingency. In short, an energy future based on coal, shale gas and nuclear (Bain & Company, 2014b). To motivate this archaic vision, and contrary to all the available empirical evidence, it was argued that nuclear would cost less per MWh than wind and solar CSP over the long term – solar PV was not included in the analysis.

Bain & Co injected these three grand delusions into South Africa's body politic at exactly the moment when the Zuma-led power elite was commencing the implementation phase of its strategy to repurpose state institutions. Significantly, they were presented as a strategy to 'reshape the economy'. Mountains of empirical evidence now exists to show how procurement spend was intentionally hijacked to promote the interests of a narrow power elite in the name of 'building a black industrial class'. The next case reveals how this was done.

2.6.2 T-Systems Aids and Abets State Capture: How the Racket Works in Practice

T-Systems is a German-based global IT company that employs 45 000 people. Its turnover in 2015 was €8.6bn. Gert Schoonbee (2017), a self-declared patriotic Afrikaner, was Managing Director of T-Systems South Africa in 2012 when T-Systems was awarded Transnet's IT contract. It was a 5-year contract with an option of a 2-year extension ending in 2019. However, this contract was only awarded after Schoonbee agreed to abide by terms of a collusion racket laid down by Salim Essa, close business associate of the Gupta family. The terms were that either agrees to transferring a top slice of the contract to Essa's company, or T-Systems agrees to sub-contract a list of BEE companies that Essa provided. Schoonbee selected the latter because he could fool himself into believing he was not directly guilty of corrupt behaviour. The companies were Zestilare (Essa's wife had a share in this company), GSS, Sechaba, Vumela and Ngwete. Schoonbee knew these companies would then provide the kickbacks required by Essa. To make this racket work, the contracts with the BEE subcontractors stipulated that T-Systems staff to be deployed into the subcontractors to manage the work. After the *Betrayal of the Promise* report was released in May 2017, Schoonbee ordered a forensic audit of the subcontractors after which T-Systems terminated the contracts with the subcontractors. The T-Systems staff deployed into the subcontractors returned to T-Systems and just continued to do what they had always done while seemingly 'employed' by the subcontractors (Schoonbee, 2017). In other words, this collusion racket included the believable lie that it empowered BEE companies, but in reality it was 'fronting' of an extreme kind.

Replicate the T-Systems racket many thousands of times over and it becomes very clear how these typically South African rackets drain resources from productive activity. The rackets are deeply entrenched because convincing and believable lies are told to justify the implementation of a seemingly patriotic benefit, namely to black economic empowerment. The role of international companies in aiding and abetting these rackets has gained increasing attention in recent years (some of which are discussed in this book).

The construction of a shadow state is effectively the archetypal neo-patrimonial form of governance. It entails the restructuring of the polity: the constitutional state remains intact, albeit hollowed out by the rackets, and interacts symbiotically with a shadow state comprised of a powerful network of powerbrokers who manage extra-legal rackets sanctioned by the patron-in-chief (Zuma).

None of this would have been possible without the deployment of violent practices which, in turn, limited the rights promised by democracy. Von Holdt has analysed how the use of violence during elections, violent settling of disputes within organisations, political assassinations and the violent subversion of the rule of law by democratic institutions generates and shapes violence, while providing a certain level of constraint on violence (Von Holdt, 2013). The result was the emergence of an institutionalised "violent democracy" (ibid., p. 602) after 1994 that abetted the construction of the increasingly authoritarian neo-patrimonial mode of governance after 2009.

Despite the assault on constitutional democracy, not all state institutions were compromised. Despite evidence of corruption of the lower levels of the judiciary, the judiciary as a whole – often prompted by the Office of the Public Protector – became a bulwark against state capture. The fate of the nuclear deal is a case in point. Under the leadership of two women anti-nuclear activists, Liz McDade and Makoma Lekalakala,[1] two NGOs – Earthlife Africa and the South African Faith Communities Environmental Institute (SAFCEI) – instigated a court case in 2015 against the President, Minister of Energy and other government bodies, challenging the legality of the signed Inter-Governmental Agreement (IGA) between Russia and South Africa (Chutel, 2018). To everyone's surprise, the court ruled in favour of the applicants in 2017 and the nuclear deal was effectively scrapped.

Significantly, the court noted that the IGA included wide-ranging binding provisions that did not appear in any of Russia's IGAs with other countries. Specifically, "the IGA provides for a strategic partnership, which would focus on the development of a comprehensive nuclear new-build programme, including the design, creation and

1 In recognition of their efforts, they won the Goldman Environmental Prize in 2018.

decommissioning of nuclear plants; use of the Russian Water-Water Energetic Reactor (VVER) technology for a total capacity of 9.6 GW; collaborating on implementing two units of 2.4 GW at specifically stated sites and with additional IGAs to be signed on how this would be done, with joint committees to oversee this; favourable tax regimes and other incentives provided for Russia; and with South Africa incurring all liability as a result of any nuclear incidents." (Prins & Davies, 2018) The court ruled that the wide-ranging nature of these provisions were such that Parliament was legally obliged to "approve" the IGA – instead, ignoring the advice of the State Law Advisor, the Minister of Energy at the time only tabled the IGA in Parliament for "noting" (Prins & Davies, 2018). The National Treasury's criticism of the financial provisions of the deal were also ignored, including public statements to the effect that South Africa's national sovereignty was at risk.

The only way to understand why the authors of the (originally secret)[2] IGA had mistakenly over-reached their legal mandate is to recognise how Zuma had effectively consented that South Africa would become a pawn in Russia's new post-2007 grand strategy to become a global nuclear power. In return for subverting the much-lauded South African Constitution, there is evidence the Russians funded the ANC's election campaigns and inserted key intelligence operatives into the Presidency to bring the deal to closure (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017).

2.7 BEYOND ZUMA

After nearly 8 years in power, a broad-based coalition of civil society, business, faith and human rights organisations coalesced around a demand for Zuma's resignation and a (notional) return to constitutionalism. In December 2017, the governing party voted to replace President Zuma with Cyril Ramaphosa as President of the ANC. After Zuma resisted pressures to resign to buy time to finalise the nuclear deal (Swilling, 2019), he eventually 'resigned' as President of the country in February 2018, and Ramaphosa replaced him. One of the first acts of Ramaphosa's new Minister of Energy, Jeff Radebe, was to sign 27 renewable energy contracts that the previous President put on hold to prepare the way for the finalisation of the nuclear deal. Ramaphosa informed the World Economic Forum in January 2018 that nuclear was not affordable and there were rumours that Putin tried to strong-arm him into respecting the terms of the IGA. The Department of International Relations/Foreign affairs (DIRCO) had to send a high-ranking official to Moscow to explain the South African case, much to

2 Vladimir Slivyak, head of Ecodefence, a Moscow-based NGO, found the 'secret' IGA lodged on the website of the Russian foreign ministry and he conveyed it to Earthlife Africa in Johannesburg, which made the court application possible.

the displeasure of the Russians. Ramaphosa, however, may support renewable energy (with evidence that his personal investment fund has renewable energy investments), but given his history (as Secretary-General of the National Union of Mineworkers), he is also a strong supporter of the coal industry, describing it in his maiden speech as a "sunrise industry" without referring to renewables despite the remarkable growth of renewables in SA since 2011. However, in his 2019 State of the Nation address he corrected this, referring to climate change and renewable energy investments. His Minister of Finance reinforced this in his Budget speech a few weeks later. In September 2019, the President sent a message to the UN Climate Summit confirming his support for a Just Energy Transition (Ramaphosa, 2019).

Ramaphosa has re-established constitutional governance by ensuring that new leadership is appointed across the board, from SARS to the NPA, criminal justice system and the SOE Boards and CEOs. However, this does not mean the rackets have disappeared. There is a constant stream of evidence that the rackets are alive and thriving. They may no longer enjoy the legitimation of the Ramaphosa-centred power elite, but they continue to morph into the new environment. The so-called 'fight back campaign' by the self-proclaimed 'radical economic transformation' forces effectively masks the re-positioning of one set of rackets; while another set of racket-based networks emerge to extract rents in more subtle and sophisticated ways. This emerges when one looks closely at who is behind the push to re-introduce nuclear power and the related proposals to introduce a new gas infrastructure (with reports that this is linked to Russian interests) – this includes the group that self-identifies with the South African Energy Forum (for example, Advil Nchabeleng) and various networks coalescing around the Department of Mineral Resources and Energy (DMRE) that share an interest in promoting nuclear. Undoubtedly, gas will play a key role as back-up for a post-coal renewables-based energy system, but this would be, at most, 10% of total energy supply.

2.8 CONCLUSION

Although all South Africa's economic policies proclaim laudable commitments to reducing inequality, unemployment and poverty by stimulating economic growth, in reality sustained economic growth was not achieved over time. Even if it was, the type of economic growth was not driven by fundamental shifts in the structure of economic power. Instead, the post-1994 black elite used state power to create the conditions for elite accumulation rather than a redistribution-driven mode of economic development. During the Mbeki era, economic growth was stimulated by financialisation, BEE transfers and shareholder value extraction rather than productive investments in the real economy.

Like most neo-liberal macro-economic policy frameworks, the GEAR and ASGISA economic policy frameworks envisaged a limited role for the state in promoting significant levels of redistribution (notwithstanding the reference to 'binding constraints' in the latter policy framework). This created the conditions for Zuma's rise to power on a populist ticket, with a promise to deploy the state for developmental purposes. The rackets during the post-1994 period were there, but they never became a central organising principle of the Mbeki-led power elite. This changed during the Zuma era when state resources and interventions were directly used to build a 'black industrial class'. Disguised behind the language of 'radical economic transformation', economic policies were adopted that simplistically defined the procurement spend of the SOEs as the most decisive strategic lever of redistributive economic change. Although in theory it all made sense, in practice, under Zuma, the rackets were licensed to proliferate on a grand scale, with key brokers – such as the Guptas and Watsons – playing key enabling roles. The end result was not 'radical economic transformation', but economic stagnation, looting, worsening inequalities, rising unemployment and increased poverty.

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3 STATE CAPTURE: WHY NOBODY DID ANYTHING TO STOP IT

Songezo Zibi

"State capture" has become a euphemism for rampant looting of state resources, but it is a far more sophisticated enterprise than that. State capture is a form of organised political corruption in which private interests, typically business people, are able to influence the decisions of state organs in order to serve their profit motives.

Writing for *International Finance & Development*, a magazine of the International Monetary Fund (IMF), Joel Hellman and Daniel Kaufman (2001) said: "We define state capture as the efforts of firms to shape the laws, policies, and regulations of the state to their own advantage by providing illicit private gains to public officials."

The term was virtually absent from regular conversation until the former Public Protector, Advocate Thuli Madonsela, released a report in November 2016 titled *State of Capture*. The report was the outcome of an investigation into complaints of alleged improper and unethical conduct by then President Jacob Zuma and other government and state officials,

> relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of State Owned Entities (SOEs) resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses. (Public Protector, 2016, p. 27)

The report detailed what appeared to be a crude and *de facto* takeover of various state institutions, in particular SOEs, to facilitate the siphoning of large amounts of money through irregularly awarded contracts, an endeavour that was pursued with incredible zeal and on an industrial scale. In the recommendations contained in the *State of Capture* (2016) report, Advocate Madonsela asked the President to appoint a Judicial Commission of Inquiry whose powers would be no less than those of the Public Protector in order to perform a deeper investigation into the matters unearthed in her voluminous report. Deputy Chief Justice Raymond Zondo was appointed to head up such a commission, whose work was still continuing at the time of writing in 2020.

The *State of Capture* report is over 400 pages long, and details some of the most egregious acts of impropriety imaginable. Many of these were, in any event, widely reported in the media. For instance, the *Mail & Guardian* newspaper and investigative journalism outfit, amaBhungane, had been publishing stories about alleged corruption at Transnet many years before the Public Protector's investigation even began.

If the *State of Capture* (2016) report gave an account of how the initiation and awarding of contracts in state-owned companies was rigged to the liking of the Guptas, it was the explosive revelations by the then Deputy Minister of Finance, Mcebisi Jonas, that brought the point home more than at any other time. On 16 March 2016, he released a televised public statement that Ajay Gupta had offered him an immediate R600 000 cash bribe and R600m in total if he took up the position of Finance Minister and subsequently do their bidding (SABC Digital News, 2016). This rightfully shocked and outraged the country in that it was a first-hand public account of the extent to which the Guptas were seemingly in control of affairs of the government.

As South Africans have come to know through the *State of Capture* report and various witness submissions at the Judicial Commission of Inquiry on State Capture, various powerful interests exerted significant influence on state organs and officials and was spoken about in political and government circles but was never reported publicly. It was seemingly an open secret.

Why did no one speak out? How was this phenomenon allowed to take root since it did not occur suddenly?

It is a critical question whose answers lie in a complex set of circumstances that require nuanced deconstruction in order for them to make sense. While the Judicial Commission of Inquiry on State Capture (the Zondo Commission) will detail a lot of what happened, not just within the Gupta axis but also Bosasa, South African Airways (SAA) and other institutions, it is unlikely to answer the question that is central to this chapter.

In my opinion there are six reasons why very few were able to raise a noticeable and consistent alarm, let alone mount a serious challenge to state capture.

3.1 THE ANC'S INTERNAL CULTURE AND ORGANISATIONAL CHARACTER

The South African Constitution conceives a State that, in its conduct, is non-partisan and is there to serve the interests of all South Africans. It directs the South African parliament to enact laws that create a fair, transparent system of government.

However, that same Constitution does not set clear parameters on the level of influence political appointees may have on the administration of government departments, agencies and SOEs. For instance, the ANC has a Deployment Committee chaired by the Deputy President of the party (ANC, 2021). It deliberates and decides on key party and state appointments which includes key roles in parliament. While such a committee makes sense in the case of Parliament, it is difficult to see how it can make the same appointments in the civil service given that all civil service posts are supposed to be advertised and follow a fair process of selection without undermining the legal requirement to give all applicants a fair chance. Provincial, regional and local structures of the party engage in similar actions at the congruent level, raising similar questions throughout.

In my view, the concept and practice of limitless "deployment" of party cadres to key positions of state introduces a level of party influence on the affairs of state that is antithetical to what is envisaged in the Constitution. State organs are supposed to be non-partisan.

During the first term of democratic government (1994-1999), there was a compelling rationale for deployment of people from outside existing state structures because the ANC was anxious to not retain apartheid-era civil servants in key positions who may have been an obstacle to its policy agenda (Maphunye, 2002). However, as the organisational culture began to deteriorate, and corruption in party structures took root, it became inevitable that membership of the party offered opportunities for lucrative "deployments" in government, and with them the possibility to influence state decisions in favour of the party and private interests that supported their election in the party structures.

Making for fascinating reading, in this context, are the political and organisational reports by the President and Secretary-General of the ANC to the 51st National Conference in Stellenbosch and the now fateful 52nd National Conference in Polokwane. On both occasions Thabo Mbeki and Kgalema Motlanthe were President and Secretary-General respectively, and their reports demonstrate the extent to which the party degenerated, laying the seeds for state capture – a project that should have been predictable.

In his *Organisational Report* to the 51st National Conference in Stellenbosch during which time he was still ANC Secretary-General, Kgalema Motlanthe stated:

> We found that issues dividing some of the leadership of some of our provinces are not of a political nature, but have mainly revolved around access to resources, positioning themselves or others to access resources,

> dispensing patronage and in the process using organisational structures to further these goals. (Motlanthe, 2002)

Over time this resulted in a crude, transactional approach to the appointment of senior state officials. In the period leading up to Elective Conferences at different levels, those who wished to be appointed in government would begin by supporting a particular faction within the party, and when that faction became successful, it would facilitate those appointments.

In return, the said officials would facilitate access to government contracts, a series of "gratifications" that are regarded as criminal by the Prevention and Combating of Corrupt Activities Act of 2004 (PRECCA) (Republic of South Africa, 2005). It will be difficult to find any instance where someone was successfully prosecuted in terms of this law, even though it was established to combat just this sort of transaction.

There were suggestions as to the depth of the problem in an article in the *Financial Mail*, authored by Carol Paton (2007) in which the Kimberley Municipality was used as an example. The article suggests that political seniors in the ANC 'deployed' cadres to businesses, and in this way decided the tender process.

> Soon a handful of ANC-aligned businesspeople were winning contract after contract – whether in security, transport or construction. A minor revolt in the party ended in defeat, when a group of rebels from the Kimberley region tabled a resolution at the party's 2001 conference, arguing that BEE should be broad-based and not favour just a selected few. (Paton, 2007)

In the article, Motlanthe is quoted as saying

> This rot is across the board. It's not confined to any level or any area of the country. Almost every project is conceived because it offers opportunities for certain people to make money. A great deal of the ANC's problems are occasioned by this. There are people who want to take it over so they can arrange for the appointment of those who will allow them possibilities for future accumulation. (Paton, 2007)

In his final political report to the 52nd National Conference of the ANC, held in Polokwane in December 2007, former President Mbeki said:

> 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. (Mbeki, 2007)

Mbeki and Motlanthe held the two most powerful positions in the party, President and Secretary-General, for a decade. Their insights into the culture of corruption in the party, and how party structures fell into the hands of rogue elements who were interested in self-accumulation are not guess work, but the result of personal experience as they watched the party they led deteriorate.

The practice of private interests colluding with ANC leaders in order to direct state organs in their favour is not new. It simply became bigger, and in the case of the Gupta family, systematic and on an industrial scale.

3.2 THE DESTRUCTION OF THE SCORPIONS AND THE BIRTH OF SOPHISTICATED DISINFORMATION

The second reason state capture later accelerated at an alarming rate is that the only crime-fighting force that had any chance of pursuing complex corruption cases, the Directorate of Special Operations (DSO) otherwise known as the Scorpions, was disbanded because of an ANC National Conference resolution in December 2007. This followed several high profile prosecutions, the most prominent of which was the conviction of a Durban businessman, Schabir Shaik, on corruption charges in 2005 (High Court of South Africa: Natal Provincial Division, 2005).

The charges were that, over several years, he had paid a series of gratifications to Jacob Zuma in exchange for the latter to use his political office (he was KZN's Member of the Executive Council [MEC] for Economic Affairs at the time) in order to advance his business interests. Indeed, according to evidence led at the trial, which the court found to be credible, Shaik would wheel Zuma out whenever he needed to convince potential business partners and investors that he had the backing of powerful politicians.

In his judgment, Judge Hilary Squires said:

> It would be flying in the face of common sense and ordinary human nature to think that he (Shaik) did not realise the advantages to him of continuing to enjoy Zuma's goodwill to an even greater extent than before 1997; and even if nothing was ever said between them to establish the mutually beneficial symbiosis that the evidence shows existed, the circumstances of the commencement and the sustained continuation thereafter of these payments, can only have generated a sense of obligation in the recipient. If Zuma could not repay money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. (High Court of South Africa: Natal Provincial Division, 2005, p. 52)

And later in the judgment, he said:

> It seems an inescapable conclusion that he embarked on this never ending series of payments when he realised the extent of Zuma's indebtedness . . . and the extent to which Zuma was living beyond his income; and he also realised the possible advantages to his business interests of providing the means to retain Zuma's goodwill by helping him to support a lifestyle beyond what he could afford on his Minister's remuneration. (High Court of South Africa: Natal Provincial Division, 2005, p. 53)

Shaik's conviction in 2005 led to the dismissal of Jacob Zuma as Deputy President that same year, an event that kicked off a wave of political machinations against such prosecutions, with the Scorpions being the main target. The narrative that won the day was that these prosecutions were designed to prevent Jacob Zuma from ascending to the role of President, and that he was in any event 'innocent until proven guilty', as the common refrain went.

Soon thereafter, Zuma was charged with rape, a case in which he was found not guilty. The feeling within the party that he was being persecuted, accelerated at an alarming rate. The narrative morphed from targeting the Scorpions alone to the National Prosecuting Authority (NPA) as well, to which the Scorpions belonged. This was not just a conspiracy peddled within party structures and dinner or barroom conversations. It permeated deep into the news media.

While the "State" is composed of three arms, namely: parliament, the judiciary and the government Executive as led by the President, our democratic architecture has a fourth, albeit informal arm. This is the news media.

Not only do all arms of the state rely heavily on the news media to inform citizens, the latter also rely on it to shine a light on impropriety so that citizens may do something about it. This role is entirely dependent on a relationship of trust between the public and news organisations. Journalism's sacred role involves gatekeeping, essentially the careful checking and verification of information before providing it to the public as news.

While these days most will remember the role of the now-defunct British "dirty PR" firm, Bell Pottinger, in creating false narratives and distributing false information at the height of the Gupta-led state capture project, the practice was not new. It went as far back as 2005, the year Jacob Zuma was fired as Deputy President by Thabo Mbeki and was facing indictment for the same corruption charges Schabir Shaik had been convicted of in the Durban High Court that same year.

The detailed background is to be found in a 2005 article published in the *Mail & Guardian* (Sole & Dawes, 2005). In short, an elaborate attempt to provide "proof" of

a conspiracy to discredit and compromise Zuma was made, seemingly by elements connected to the then National Intelligence Agency (NIA), some of whom were known to be loyal to Zuma. The so-called proof was in some allegedly intercepted email communication between various ANC politicians, such as Ronnie Kasrils, Phumzile Mlambo-Ngcuka, Mzi Khumalo, the then National Director of Public Prosecution, Bulelani Ngcuka and others. Ngcuka is the husband to Mlambo-Ngcuka who had been appointed Deputy President following Zuma's dismissal from the government (Sole & Dawes, 2005).

The emails were clearly fake as the time lapse between responses was sometimes a matter of seconds, and the language used was hardly that of people involved in a clandestine conspiracy. Everything was said in as crude a manner as possible, such as tribalistic references. For instance, Zuma was ostensibly referred to as "the Zuluboy", something his supporters were to later take up as a mantle while protesting against his reported persecution. The Office of the Inspector General of Intelligence (OIGI, 2006) would later confirm the emails as fake. It was an astonishing development that took many years to debunk but formed a substantial basis for a narrative of persecution that Zuma pursues to this day despite any and all proof that he has a case to answer for.

The Scorpions were said to be the spear of Zuma's victimisation. The narrative also had the support of other, questionable initiatives by the NIA, such as Project Avani (OIGI, 2006). This project was supposed to be a 360-degree scan of the political horizon but somehow ended up targeting figures and institutions that were perceived to be either close to then President Mbeki or acting on Mbeki's behalf against Zuma.

At this point it became clear that various parts of the law enforcement and security apparatus were either being used to fight the ANC's internal battles or were caught up in those battles. This assertion was confirmed with the revelation in April 2009 by Acting National Director of Public Prosecutions (NDPP), Advocate Mokotedi Mpshe, that former deputy NDPP and head of the Scorpions, Advocate Leonard McCarthy, had sought the advice of his former boss, Bulelani Ngcuka about the 'best' time at which to charge Zuma with corruption. It was alarming as Ngcuka was no longer NDPP and McCarthy had no business consulting him about an ongoing case, especially since the considerations were political.

It was not surprising, therefore, that in December 2007 the ANC's 52nd National Conference took a decision to disband the Scorpions and replace them with a new unit. Early 2008, then Minister of Safety and Security, Charles Nqakula had announced in parliament that the Scorpions would be disbanded (Roelf, 2008) – by October 2008 it was done.

I believe that this is the inflection point at which it became possible for state capture to happen on the industrial scale we were to witness in the coming years, for two reasons. First, the politics surrounding the law enforcement and security agencies meant that they began to be discredited and lose the trust of citizens. Secondly, the news media began to be caught up in ANC politics, too. Instead of analysing and surfacing sharply the *meaning* of what was going on, the reporting merely focused on what was going on. This robbed South Africans of the ability to correctly perceive the political events and assist them in forming useful opinions on the political choices they would subsequently make.

This is not to say that no one in the news media attempted to do this, but the kind of reporting that quoted unnamed ANC factionalists *ad nauseum*, making assertions that they did not back up with any facts, was not helpful at all. The "so what" was lost, reduced to the fight between "Zumaites" and "Mbekites", with very little attention paid to what this portended for the future of the rule of law.

I also believe that it was in this climate that ANC members with a solid moral fibre no longer cared when Mbeki delivered his final political report at the ANC's Polokwane Conference in December 2007. In it he warned:

> All of us are aware of the poisonous phenomenon foreign to our movement, which many of us have characterised as the ownership of some members by other members. These are people who, while holding ANC membership cards, do not belong to the ANC but belong to those who paid their subscriptions. This includes unqualified people who get appointed to such positions as Municipal Managers, place men and women who serve as the pliable tools of their political masters, and who are used to advance the commercial and political interests of their handlers and patrons. (Mbeki, 2007)

The phenomenon above fits the textbook definition of "state capture", with the only difference being that during the Zuma Presidency, this phenomenon accelerated to an alarming speed, and took on key national institutions.

In fact, another event that does not get mentioned in the same vein as state capture was, in fact, the beginning of the end for the South African Police Service (SAPS), which was headed by the late Mr Jackie Selebi as National Police Commissioner. On 10 September 2007, the NPA issued a warrant for his arrest on corruption charges. The story of what happened next is too long to repeat here, except to say that the National Director of Public Prosecutions at the time, Advocate Vusi Pikoli was suspended as a result.

In his memoir, Pikoli describes what led to Selebi being investigated, detailing how police officers were moonlighting for a private security firm, Palto, where they

effectively became "Selebi's own dirty tricks squad of vigilante freelancers who were using the SAPS and commissioner as cover" (Pikoli & Wiener, 2013, p. 236). He continues:

> Most alarming was a claim by Stemmet about how he had tipped Selebi off about Agliotti's involvement in a R105 million drug bust in Kya Sands in 2002, but the commissioner chose to ignore the warning. Instead, Selebi's photograph at the drug bust appeared on the front page of national newspapers. It would later emerge in court that Agliotti was, in fact, paid an informant's fee for the bust rather than having been arrested. (Pikoli & Wiener, 2013, p. 236)

Glen Agliotti was an underworld criminal who later entered into a plea bargain and testified against Selebi at his corruption trial. While Selebi was to later be convicted and sentenced to 15 years imprisonment for corruption (Basson, 2010), this incident shows once again how it was possible for criminal elements to commandeer state officials and institutions in cahoots with those entrusted with the task of overseeing them, for their own criminal ends.

For his part, Pikoli was suspended on 18 September 2007 pending an inquiry into his fitness for office. Despite being vindicated by the subsequent Ginwala Inquiry (2008), Pikoli was nonetheless removed from his position by Mbeki's temporary successor, Kgalema Motlanthe. The government later settled its legal dispute with him over the matter, and he never returned to office.

It was clear that there was simply no intention on the part of the new ANC leadership to investigate corruption or prosecute it. If anything, the party made every possible attempt to ensure that Advocate Vusi Pikoli, the man who replaced Bulelani Ngcuka as National Director of Public Prosecutions, was removed from his post despite being found to have been fit for the job by the Ginwala Enquiry (2008).

Pikoli was for a time replaced by Advocate Menzi Simelane, a person the courts deemed not fit and proper for the role in light of having lied under oath during the inquiry into Pikoli's fitness for office, referred to above. The courts eventually found that the President had not properly applied himself and the appointment was set aside (Constitutional Court of South Africa, 2012).

By 2016, when the term 'state capture' was in vogue, most people seemed to think of more immediate cases, such as SARS (see Chapter 15). In my view, the phenomenon of decimating law enforcement and prosecutorial agencies had been in process for a very long time. An environment in which the corrupt could act with impunity was being steadily created, but as it happens with grand schemes over a long time, it is difficult for most ordinary people to keep track and continually connect the dots.

This is yet another reason, the third, why no one raised the spectre of "state capture" at the time. Facilitating institutional weakness through a gradual erosion of integrity, governance and installing key capture allies is a process that has been happening under our noses for a while, without the picture coming into full view.

3.3 BLACK ECONOMIC EMPOWERMENT AS A COVER FOR CRONYISM

The fourth reason is one of the most common, generally known as BEE – black economic empowerment. The exclusion of black people from the mainstream economy continues for various reasons, and it remains critical that the government's policies advance their meaningful inclusion.

It is common cause that one of the most effective ways for doing this is to mandate that state and private enterprises ensure that a certain percentage of their suppliers are either black-owned or have a significant black and woman shareholding. It was generally under the cover of this rule that some apparent state capture initiatives were pursued.

In July 2015, *Moneyweb* published a story to which they appended a letter from industrial giant, Bidvest, to SAA in which the former questioned a "request" from the airline that it sets aside 30% of its procurement business for allocation to black-owned businesses (Slabbert, 2015). To demonstrate the difference between "real" BEE and what appears to have been attempts to shake down suppliers for shareholding, I extract part of the article below:

> In the letter the company explains that BidAir Services is a 100% owned subsidiary of Bidvest Ltd and only the parent company can make decisions about ownership and shareholding.
>
> It further states that BidAir Services is already 63.42% black-owned and a transfer of a further 30% to a black-owned small business will therefore result in 74.39% black shareholding. "Does this imply that SAA's supplier black ownership requirement is now closer to 75%?" Bidvest asks.
>
> It explains that BidAir Services provides similar services to other airlines and a new company would therefore have to be established for the SAA contract to accommodate a 30% partner, which the SAA will apparently nominate. The company asks questions about, among others, the ability of the unknown black small business to contribute to the capital cost such a new company would incur, estimated at R20 million.
>
> In its response to questions from Moneyweb, SAA said: "We confirm that the company is in receipt of correspondence dated 30 June from Bidvest which canvassed a number of issues regarding SAA transformation requirements. SAA is neither oblivious nor in doubt of the BEE ownership of Bidvest. The intent was hardly to influence the existing shareholding at

> Bidvest. If anything, SAA's intention is to contribute to transformation of services rendered by Bidvest to SAA. The 30% applies to (the) SAA contract, not to Bidvest as a company. (Slabbert, 2015)

At *Business Day*, where I was editor at the time, we also covered the story. The National Treasury, which is responsible for setting government procurement policy, confirmed that this was not official government policy and could not be pursued unless it was. Nonetheless, reports of such "requests" continued to persist.

In June 2019, the former Head of Procurement at SAA, Dr Masimba Dahwa, testified before the Zondo Commission of Inquiry into State Capture that apart from being a "request", within SAA, this was an "order" from the Board (Zondo Commission, 2019). Testimony at the Commission was continuing at the time of writing, and it was yet to reach its conclusions on the matter.

The point of this example is not to prove that certain individuals were responsible for "state capture" at SAA, but merely to demonstrate how difficult it would be for most people to claim that they were not against transformation under such circumstances. Because black people continue to have limited participation in the mainstream economy, many black people simply will not bother all that much about a case where a "white-owned" company is being compelled to have an even higher level of black shareholding, even if no rule exists to make it so.

It is even more remote that people will have the means to ascertain whether the companies that eventually benefit from such interventions are owned by real entrepreneurs or those who have access to people with political power and therefore are benefiting from cronyism. As an editor who published many stories that questioned what was going on throughout the government at the time, I was often labelled "a puppet of white monopoly capital" by supporters of "radical economic transformation" on Twitter and other social media platforms. Our reporters suffered a similar fate, too.

The intensity of the cyber bullying required targets to develop a thick skin. It goes without saying that it is especially difficult for a white South African to question such actions for fear that the "anti-transformation" label will stick.

In 2018, I attended the gala dinner that marked the end of the Black Management Forum's Elective Conference where its new President, Andile Nomlala, spoke frankly about the years of state capture. He emphasised the importance of "real" transformation where black entrepreneurs were afforded a fair opportunity to participate in the economy, but he was also clear that the conspiracy of silence during the years of state capture was not acceptable. In subsequent public engagements, he has continued to advocate for transformation that is free of political favouritism and corruption.

During the years of state capture there were not many like him, and one can only wonder how different things may have turned out had his voice been heard sooner. Judging by the reaction of the audience, he would have had no shortage of supporters.

3.4 BLACK SOLIDARITY AND "RADICAL ECONOMIC TRANSFORMATION"

In his 1993 book, *Race Matters*, Dr Cornell West writes about the cynical nomination of Judge Clarence Thomas to the US Supreme Court in order to replace Judge Thurgood Marshall, in what he referred to as "failure of nerve of black leadership" (West, 2017, p. 90). This was because no black leaders or commentators had the courage to challenge Judge Thomas's nomination on account of his poor competence for the role.

Judges Marshall and Thomas are both black. The former had been an esteemed lawyer in the civil rights movement, while the latter was the ultimate antithesis, apart from his track record of incompetence, which was available for inspection at the time. West notes:

> The very fact that no black leader could utter publicly that a black appointee for the Supreme Court was unqualified shows how captive they are to white racist stereotypes about black intellectual talent. The point here is not simply that if Thomas were white, they would have no trouble shouting this fact from the rooftops. The point is also that their silence reveals that black leaders may entertain the possibility that the racist stereotype may be true. (West, 2017, p. 24)

He continues:

> Of course, some privately admit his mediocrity while pointing out the mediocrity of Justice Souter and other members of the Court – as if white mediocrity were a justification of black mediocrity. No double standards here, the argument goes, if a black man is unqualified one can defend and excuse him by appealing to other unqualified white judges. This chimes well with a cynical tokenism of the lowest common denominator – with little concern for the goal of shattering the racist stereotype or for furthering the public interest of the nation. the public interest of the nation. It also renders invisible highly qualified black judges who deserve serious consideration for selection to the Court. (West, 2017, p. 24)

On this point, I will draw from my own personal experience when I was editor of *Business Day*. On 24 August 2014, Cabinet announced the appointment of Tshediso Matona as the Chief Executive Officer of Eskom. Matona is a long-standing public servant and was the Director General (DG) of Public Enterprises, the department that oversees Eskom.

At the time of his appointment, Mr Matona already held a Master's Degree in Development Economics from the University of East Anglia (UK, 1994), a Bachelor/Honours degree in Economics and Political Science from the University of Cape Town (1992). He had also completed various certificates including in Executive Management (2005) and Infrastructure Development (2011) from Harvard University's Kennedy School of Government (USA). He was the former DG of the Department of Trade and Industry, a post he held from 2006-2010 before serving as Trade Diplomat for South Africa at the UN and World Trade Organisation in Geneva.

I also wish to add that there was never a whiff of impropriety that I was aware of in relation to his tenure in government. However, I felt that for an industrial institution that was already in crisis, the government should have appointed someone with extensive industrial experience who had managed large capital budgets and complex operations. He had none of this experience. I desperately wanted to publish an editorial saying exactly that, but I stopped the process. I realised that there would be a significant body of opinion that *Business Day* was "pulling down" a suitably qualified black Executive. Of course, my view was not *ad hominem* at all, and was a technical one, but I ended up thinking that the storm created would defeat the purpose of the editorial. In the end we never wrote it.

This self-policing is common. It is part of the reason why, unless an appointee was hopelessly unqualified, it was difficult to question the suitability of appointees during the years in which state capture occurred. In a society where racial stereotyping and racism are still rife, one has to be extremely careful about expressing public opinion about the suitability or otherwise of black appointees to senior roles, however well meaning.

It was particularly difficult for an editor of a newspaper that fell under the colloquial "white media" pejorative, where, however well argued the case, it would be almost automatically dismissed as expressing the views of "racist white owners" of the newspaper. It has taken people a very long time to accept that some of the people they were happy to see ascend to dizzy heights, were either unqualified or rogue. There was a time when, I believe, many people simply "refused" to listen.

The revelations contained in the Public Protector's *State of Capture* (2016) report were not all new. Various newspapers, especially the *Mail & Guardian*, had been publishing detailed stories about the same networks and their alleged corruption for many years. It felt as if people had become numb to it all. Others, it seemed, were perpetually angry about what they felt was "racist stereotyping". Whatever the reasons were, the outcome that is beyond doubt is that there were few loud voices outside the media until it was too late.

One of the fundamental questions to reflect upon following the years of state capture is how black people can regain a positive sense of self that does not rely on the worst examples of whiteness. This is too often the criteria used to determine which position black people are going to take in relation to other black people who wilfully fulfil racist stereotypes about what black people do when they get an opportunity to govern.

These stereotypes say black people are incapable of governing effectively. When they get the opportunity to govern, they steal public finances and collapse economies, which is largely what happened over the last ten years. It has to be possible to separate the economic empowerment of black people, which is absolutely non-negotiable, from looting by people who use their blackness as cover to escape accountability. For Zuma, radical economic transformation became the legitimating narrative of state capture.

The all-winning card to play was to make angry remarks about white domination of the economy as cover for the looting, which invariably involved collusion with corrupt white people or foreigners. Once this card was played, the often-abused card of "black excellence" was also brought out in defence of people who, it has now come to pass, never had the interests of black people in their hearts to begin with. Instead, they often tormented those black people who actually deserved to be hailed as examples of black excellence.

This shameful spectacle continues to instances where black professional associations and newspapers are lobbied to fight for their reinstatement while nothing, absolutely nothing is said about and for the many black professionals who were hounded out of their jobs for refusing to engage in corruption. An almost untold aspect of some of the testimony before the Zondo Commission is the long list of victims and their stories of torment at the hands of the corrupt. These are strong, ethically upstanding and committed servants of the South African public who were harassed, victimised, threatened and ejected out of state and public institutions, some of whom underwent immense personal strain over a very long time.

There is Dr Masimba Dahwa who was Chief Procurement Officer at SAA for some of the ruinous time Ms Dudu Myeni was Chairperson. Upon refusing to obey patently unlawful instructions that included awarding contracts to companies chosen by Ms Myeni without following procedures, he was victimised, harassed and hounded out of that organisation. He left for Zimbabwe for a short time fearing for his life, as was heard in his testimony at the Zondo Commission (Zondo Commission, 2019:263).

How did we get to this dark, self-destructive space? How did so many of us black people become captive to cheap tricks that rely on evoking the emotional trauma of racism in order to cause us to submit to people who are, essentially, anti-black?

The most central reason for this degenerative state is our history of racial oppression itself, whose purpose was to destroy any sense of black communal and cultural cohesion. Today, so-called black radicalism sometimes amounts to a foul-mouthed argument for mediocre, corrupt black people to fill the roles of and behave like corrupt, mediocre apartheid apparatchiks. Through our silence or tacit support of these corrupt elites, we perpetuate rather than stop the destruction of black people's social and ethical fabric, relegating it to mimicking the worst vices of our racist oppressors.

At the same time, competent black people are left to rot on the vine because they do not have access to the patronage system that places the incompetents above them, or they refuse to bow and scrape to low-esteemed politicians who prefer to be treated like 17th century monarchs and overlords.

In this way, we teach legions of young people, some of whose sole lived experience is a political system that hails and elevates the corrupt and incompetent, that black leadership is inherently corrupt and unable to govern effectively. They see and experience this not because they are told, but because we have chosen to place in leadership those who will, through their actions, give credence to this racist stereotype.

3.5 CONCLUSION: NOBODY COULD HAVE SAID ANYTHING

While the history of how we came to gradually accept state capture and the rampant corruption it facilitates, the reality is that there are other reasons why it would nonetheless have been difficult in any event. The following is my sixth reason.

I believe that human beings are more likely to believe that others are sincere, than not. Even when there is a whiff of suspicion, such as when the Scorpions were disbanded, many people appear to have convinced themselves that their replacement, the Hawks, could do the job. This was naïve in the extreme. Knowing how desperate Zuma and many of his allies were to escape prosecution, as well as others who had been part of the ANC's "dealership" culture, there was no way they would have wanted to maintain strong law enforcement and prosecution capacity.

But people persevered in the mistaken belief that state capture actors, veiled as some of them were, would act against their own interests. This phenomenon has been the subject of many an academic study and is well established.

Peter Ditto and David Lopez (1992) compared two groups of study participants between whom favourable and unfavourable medical tests results were divided. People belonging to the group that had been told that they had a (fictitious) illness were more likely to rate the test as less accurate. In contrast, those who were given

a clean bill of health instantly believed that it was accurate and were far less likely to seek a second opinion, unlike the first group. "It takes more information to make you believe something you don't want to believe than something you do," Ditto said (1992, n.p.).

One of the pillars of investigation of the State Capture Inquiry is to find out if President Jacob Zuma's Cabinet reshuffles were informed by the need to serve private interests. When the Public Protector published her report and touched on this very issue, there were people who were genuinely surprised, but they should have never been. If Schabir Shaik was convicted in 2005 of bribing him with small amounts of money over time, surely a logical person would easily conclude that larger amounts of money would induce him to do considerably more?

One would think so, but human beings do not generally think that way. This type of detailed, curious enquiry to reach nuanced and clear-headed conclusions is the preserve of a few who may do so for professional reasons or have peculiar intellectual interests.

Knowing this, a more enduring question is whether we will ever not be vulnerable to state capture happening in future?

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4 A LONG SHADOW: STATE CAPTURE UNDER APARTHEID AND AFTERWARDS

Hennie van Vuuren

4.1 INTRODUCTION

There is an obsession with the politics of the moment in South Africa that risks trapping our imagination. Political scandals and human rights abuses are magnified by an intense social media focus of millions of eyes on screens on any given day, only to be dropped by the next morning for another, equally compelling, focus of outrage. Missing in our collective understanding seems to be a consensus that these patterns of abuse and behaviour are replicated over years. When the past is brought into focus, it is too often only as a proxy to again reinforce existing positions.

The same could be said of how we view corruption and state capture – the economic crimes that have settled in our politics to such an extent it dominates part of the public discourse. The cast of the corrupt who benefit from these crimes is complex and the voices of the people who carry this burden are treated as marginal. The intersection of groups of political elites in each scandal ensures that a constituency of supporters can be rallied to supply disinformation or claim political victimisation.

This is a situation that favours the powerful. Some of the more recent analysis of state capture that characterised the administration of Jacob Zuma is an example of this. This suggests that the set of conditions which allowed such rampant state looting to take place are not in fact a culmination of practice years which preceded Zuma's administration. This view fails to identify the role of the economic crimes of apartheid and the early democratic period as contributors to state capture. By ignoring this evidence, we fail to recognise that there was no neat clean break with the past.

Instead, networks of corporate influence and the middlemen who often broker shady deals have morphed and persisted since apartheid. We see these continuities in the multi-billion-rand arms acquisition of the Mbeki administration, which was bedevilled by large scale corruption and represented continuity of apartheid practice. It also signalled the beginning of a sustained fightback against the promised new norms of a Constitutional democracy. The politicians, middlemen and corporations

who befitted from the arms deal and subsequent malfeasance worked relentlessly to dismember independent democratic institutions – setting the scene for state capture.

While Jacob Zuma's political fire may have been largely vanquished, the networks have not simply disappeared overnight. Many of these people and institutions have worked hard to launder their reputations, just as they did at the end of apartheid – and threaten to continue the process of extraction and looting in a different guise. It remains imperative that any analysis of state capture and large-scale corruption is anchored by an understanding of the past. Our failure to deal decisively with networks of the past should not present a constraint on present action, rather it helps us understand the linear nature of processes of criminal extraction. If we fail to do so, we risk being trapped by cycles of repetition and the deepening inequality and poverty which these entrench.

Much of the analysis in this chapter is attributed to work produced as part of *Apartheid Guns and Money: A tale of Profit* (Van Vuuren, 2017), one of the few texts to attempt to grapple with the full extent of a 'hidden' aspect of South Africa's recent past. It draws from five years of research and sifting through millions of pages of archival documents and dozens of interviews which inform this analysis.

4.2 BACK TO THE ORIGINAL SIN

To understand state capture today, it is crucial that we examine the period in South Africa's history from the mid 1970s to the mid 1990s. During this 20-year period, a mix of factors gave rise to a perfect storm that left an indelible impact on our history and society. It was a time of unparalleled abuse of power. When the struggle for South Africa's freedom was at its fiercest, economic crime not only festered, but became state policy. Corruption, money laundering, sanctions busting and organised crime, the elements of such economic crime, had become a necessity for the survival of the state.

An outlier in our understanding of apartheid practice has been the issue of corruption and economic crime in the post-apartheid period. It did not start to manifest the day that the Mandela administration was inaugurated. Our conception of South Africa as a 'new' nation was a helpful tool to build national unity at a key moment, but it has also meant that we have denied uncomfortable truths. When Nelson Mandela was elected President, his government had to craft a new administration from disparate authorities in former white-administered provinces and ethnic black homelands alike. He had to deal with the internal contradictions of a liberation movement that was infiltrated by the apartheid regime and also counted crooks and opportunists amongst its ranks. Some individuals of questionable ethical character, such as uMkhonto we Sizwe (MK) leader Joe Modise, would become South Africa's first Minister of Defence

and a beneficiary of commercial contracts linked to the corruption riddled Arms Deal of the late 1990s (Holden & Van Vuuren, 2011). Added to this mix was the existence of a powerful private sector dominated by white business interests that had a habit of betting on the short term.

The democratic elections in 1994 and the finalisation of the Constitution two years later signalled a commitment to integrity and to the creation of public institutions that sought to uphold these principles. With this, a message was sent that corruption at all levels would not be tolerated. But this important process had a caveat: corruption and economic crime in the past would be left to lie, like fat, rich sleeping dogs. To have looked backwards and prosecuted past crimes at that exact moment could have wrecked the peacemaking process.

Firstly, it would have led to the seat of power in various apartheid Bantustans, many of whom had become mired in corruption and the politics of patronage, which we have seen deep into the political DNA in a number of present day local and provincial government institutions (Lodge, 1998, 2014).

Secondly, and importantly for the focus of this chapter, thorough investigation would have touched powerful interest groups across the globe: bankers, arms dealers, political parties, foreign leaders, arms companies, oil traders, lobbyists, foreign intelligence agencies and the domestic military. They were all implicated in a largely criminal economy that was thought best left buried – even if we recognise, in hindsight, that this was folly.

The apartheid economy had, in the preceding 15 years, built a massive infrastructure to bust international sanctions. With the help of friends across the globe who sensed profit, a criminal economy was put in place to sustain white power. A highly secretive machinery was created to protect corrupt politicians, launder public and private funds, and break international sanctions. This effectively criminalised key institutions within the public and private sector, and it relied extensively on the support of right-wing business, political and intelligence networks across the globe.

This pervasive international system – a war machine – remains a largely hidden aspect of our past. So, too, does the identity of the multitude of individuals who created and ran it. Nevertheless, there is no doubt that the war machine was an essential element of the survival of PW Botha's government and the political fortunes of his Ministers, such as FW de Klerk. The machinery funded war and violence in South Africa and elsewhere. National Party (NP) politicians and their allies in business became enmeshed in a sinister world governed by the interests of right-wing forces, neo-conservatives and anti-democratic regimes. Even the South African parliament,

which existed for minorities only, was largely blind to the extent of these endeavours. These were deep shadow state networks that operated outside the law in South Africa and other countries. Gallingly, many of the countries that aided and abetted apartheid had officially supported sanctions against South Africa's racist regime and, in certain instances, openly funded the liberation movements.

All this came at great cost. It required money and a reliance on intelligence structures, particularly within the military, to manage these power networks. To bust sanctions, to buy guns and oil and other goods, required ideological affinity, race-based sympathy and money in vast quantities.

4.3 ELEMENTS OF THE CRIME

Networks of sophisticated corruption in largely democratic environments, such as contemporary South Africa, are faced with the challenge of openness and the resistance presented by social justice movements and public interest minded media who assert their legal rights to accountability and the free flow of information. In comparison, authoritarian regimes, such as the apartheid state, work hard to remain unshackled of such burdens.

Five important elements helped maintain the apartheid networks of economic crime and protect their allies in the private sector and across the globe. It is important to recognise the effectiveness of these given that, despite their dogged efforts, the anti-apartheid movement was only able to scratch the surface in exposing these crimes.

Firstly, heightened state secrecy was key to the plan, criminalising any reporting – be it by journalists or nominally independent oversight mechanisms – that could undermine the anti-sanctions effort. The security state became a central tenet of PW Botha's administration. In the process, the public were fooled into complacency after the apartheid-era Information Scandal of the late 1970s, which led to the more sinister, secret, money-for-arms machine developed by Botha's securocrats. It was far larger than the Information Scandal by an order of magnitude. All government departments were drawn into the anti-sanctions effort in different ways. Within the defence force, the establishment of Armscor as the state-owned arms company was a crucial element. It established an international network to procure weapons and technology, which were reproduced or improved at home, tested in battle in countries such as Angola, and then subsequently marketed overseas to foreign clients as a source of foreign revenue.

Secondly, a secret economy was required that bound the interests of domestic corporations into the 'anti-sanctions' campaign. Reliant on procurement by the state for its growing war economy, corporations were accomplices to the project of the NP

– funding the party, defending the status quo and busting sanctions as required. A key element of the secret economy was the covert channelling of oil to South Africa from across the globe by supplier countries, traders and shipping companies that reaped the profits from the premiums they were able to charge.

Thirdly, trusted banking allies were called on to keep the lines of credit flowing in the face of growing calls from the anti-apartheid movement that apartheid should no longer have access to easy money on international capital markets. This was successful, thanks in part to the European lenders. However, the banks also played a far more sinister role. They acted as money launderers for at least R50bn (more than half a trillion rand in current values) used to purchase weapons on the international market (Van Vuuren, 2017). The 1980s – which ushered in electronic banking systems connected via primitive internet-like networks that made the large-scale, rapid movement of cash across the globe easy and instantaneous – could not have come sooner. Armscor, with requisite approval from the Reserve Bank and the executive, began to move cash between front companies in Panama and Liberia, with the complicity of two notable European banks – Kredietbank in Belgium and its affiliate Kredietbank Luxembourg in particular (Van Vuuren, 2017).

Fourthly, allies were called on to secretly lend a hand. The most important group were the "Big Five" permanent members of the UN Security Council, the most powerful nations on earth at the time and the biggest arms manufacturers. France was an old ally that looked the other way despite a socialist President. The United Kingdom and the United States were far safer bets with the emergence of the conservative governments of Ronald Reagan and Margaret Thatcher. Their brand of neo-liberalism wanted apartheid 'reformed' without fundamentally challenging white rule. Within all these countries there is significant evidence of deep state networks at play – the confluence of interests between intelligence sectors, governments, corporations, arms producers and political parties. At the other end of the Cold War spectrum, we saw that the liberation movement's traditional allies in the Eastern bloc, including Russia and China, were also finding ways to accommodate and trade weapons with the apartheid state (Van Vuuren, 2017).

Finally, we have found evidence of at least four dozen other countries that acted as proxies for the big powers in providing the apartheid state with weapons. They were located in Africa, Asia, Europe and the Americas. In turn, they were matched by the eager assistance provided by fellow pariah states such as Israel, Argentina and Chile, whose authoritarian regimes or domestic policies made them fellow outcasts and natural allies of the apartheid regime. Support for apartheid South Africa relied on more than just racial solidarity: by the 1980s money was driving covert politics across the globe.

4.4 BUSTING THE MYTHS

The apartheid states' secret economy and a network of international allies has for long been shielded and obscured by myths. These in turn have created a misleading narrative about the nature of apartheid and economic crime in that period which should be dispelled.

4.4.1 Myth 1: Corruption is a Racial Phenomenon

A powerful misconception, fuelled both by former NP leaders and persistent racism, is that corruption in South Africa is a phenomenon that is intrinsic to majority rule. It is the subtext of some criticism of the post-apartheid state. It is made more obvious by the singular focus on contemporary corruption in government with little reflection on the private sector where white South Africans are more prominent. The apartheid regime lied, bribed and broke every rule in the book to bust sanctions. The scale of these activities was so large that they should have been included in economic indicators at the time. These were not piecemeal activities. Instead, state capture was systemic.

To refer to white or black corruption is not only crude, but is simply incorrect: there is no basis in evidence to support a racial reading of corruption. Money does not know colour, as shown by the profile of people who assisted with arms sanctions-busting activities. While there was a predisposition to networks of white power, powerful people of all shades, religious beliefs and continents were drawn into aiding and abetting these crimes.

Our understanding of issues of economic crime the world over is still bedevilled by cultural relativism. The consequence of seeing such crimes, which are fundamentally crimes of human rights, as specific to cultural groups is that it shifts our attention away from powerful corrupt elite networks that claim a false cultural neutrality. The propensity for corruption relies on a mixture of secrecy and concentration of power. Apartheid is an excellent example of this. Nevertheless, countless other examples are evident, from New York's Wall Street to the Communist Party headquarters in Beijing.

One of the reasons that South Africa cannot afford to be caught in the bind of what the writer Songezo Zibi refers to as 'moral relativism' is that it entraps us (Zibi, 2014). It leaves us unable to confront contemporary corruption because the practice was largely unchecked during apartheid. This is argument is deployed with some effect by groupings who defend the interests of corporate and political elite (such as Jacob Zuma) who benefited from state capture. When this faction held the highest political office in the country, they never sought any genuine criminal accountability of past beneficiaries of economic crime. Their level of disinterest extended to a range of

human rights violations under apartheid which were all ripe for investigation and prosecution. They however showed little interest in the matter and in some instances enabled efforts to suppress such prosecutions. Now that these political elites are scrutinised for their own alleged wrong doings the lack of prosecution of economic crimes of apartheid is expediently used as a tool of distraction.

4.4.2 Myth 2: Apartheid South Africa was an Isolated State

The sanctions period was known as 'isolation'. This was made tangible at the UN, in international forums and in areas such as sports and culture. Psychologically this was a powerful weapon that was used skilfully by the organised anti-apartheid movement across the globe. From Lagos to London and Washington DC, tens of thousands of activists organised themselves into local groups and rallied against apartheid. It was one of the most significant acts of international solidarity of the 20th century, driven by human rights groups, faith groups and international solidarity networks and a significant contributor to placing enormous pressure on the apartheid state.

While it significantly contributed to the regime's economic woes, it did not provide an existential threat. The apartheid security state under PW Botha used the threat of 'isolation' to its own advantage. As Hannah Arendt (1973) has argued, isolationism is an intrinsic element of totalitarian regimes. The NP could use this, through propaganda, to rally support while heaping on themselves the status of victim.

We need to separate reality from fiction. Isolation was the fiction, widely repeated for political ends. In reality, the apartheid state walked through open doors around the world and had direct diplomatic and economic links behind closed doors. It bought, sold and bartered with the heads of corporations, governments and intelligence agencies. An army of crafty middlemen made a mint of money out of helping to cut such deals. This is a reflection not of how the anti-apartheid movement was defeated, but of how conservative political groupings and their financial interests collude to undermine the work of democrats. Economic and strategic sanctions did little to visibly alter the lives of the white minority: they simply paid more tax. The banks lent money, the oil tankers kept arriving, and weapons systems and associated technology, though more expensive to procure, remained in abundant supply.

4.4.3 Myth 3: Apartheid was Self-Sufficient

Linked to the myth of self-isolation is the myth that in the late apartheid period, the South African state was a self-sufficient arms producer. It was not. It became expert at smuggling technology and expertise into the country and, in some instances, improving on this, before churning out the same goods under other names in its own factories. In other instances, container loads of key weapons were simply imported.

This not only fuelled a war economy but became the driver for a conflict in which the military-industrial complex was deeply invested.

4.4.4 Myth 4: Apartheid was Unprofitable

While the oppressive apartheid project was unsustainable, it was very profitable for some and the South African casino economy of the 1970s and 1980s left a small elite group very wealthy. Money was extracted from the mines, the arms sector and state procurement. All were key to the fortunes made by a tiny elite within the golden circle. There were no doubt major factors which inhibited economic development. These included the debt crisis of the mid 1980s, political unrest, high public debt and spending on war, inflation and a host of other factors. However, for much of the 1980s big business made massive profits from apartheid.

For the captains of industry to arrive, cap in hand, at the Truth and Reconciliation Commission (TRC) and argue, disingenuously, that they too were 'victims' of apartheid is an affront to the truth and an insult to the true victims of apartheid (Van Vuuren, 2017). The business submissions to the TRC were breathtaking in their brevity. No doubt acting on legal advice, many of the corporations and wealthy individuals admitted that apartheid was a crime but neglected to include any significant details of their direct or indirect complicity with the apartheid state. Where detail was included, it erred towards demanding absolution. The industry bosses such as Johann Rupert who were bold enough to appear at the hearings tended to shift the focus to their humble efforts in opposing apartheid and their corporate charity programmes. As the journalist Max du Preez noted, "Despite the many dark suits and striped shirts, one could at times be forgiven for thinking this was a meeting of Anti-Apartheid movements … especially when powerful companies like Anglo and Barlow Rand claimed to have always opposed apartheid" (SABC, 2011).

4.4.5 Myth 5: The Defeat of Apartheid was Inevitable

An idea that has been popularised by some ANC leaders is that victory in 1994 was inevitable. Following this logic is that all concessions that were made were consciously done by the ANC as a calculated political choice. This has, in turn, led critics of the ANC to suggest that it sold out on the cheap to (white minority) capital.

This is a deeply ahistorical understanding of the country's recent history. The capitulation of the apartheid regime was by no means inevitable by the early 1990s. It was undoubtedly under immense internal and external pressure; however, the regime had developed a clandestine supply chain of weapons and was looking at going as far as building its own clandestine ports to deliver goods to foreign countries (Van

Vuuren, 2017). We can speculate, but if the securocrats had prevailed, it is possible that the regime could have lasted for another ten or 20 years. It may have seen a much closer relationship with countries such as China, or isolationism protected by a nuclear shield as in the case of North Korea. However, the military could have very likely kept on fighting, resulting in the loss of tens of thousands more lives. This is not to detract from the struggle against apartheid, but to recognise how powerful the military machinery was that these women and men confronted.

It was this power that helped to secure the survival of this elite and its perpetuation in the post-apartheid period. The negotiation process was not a process of surrender. It was a process of give and take. The power of these groups and the potential they had at the time to wreak havoc by using their military and economic might should not be underestimated.

4.4.6 Myth 6: We Cannot Undo this Wrong

Truth telling and justice are essential components for lasting peace. It is crucial that we continue to unpick the open secrets of our recent past. They inevitably define part of who we are as a country and the factors that represent obstacles in any quest to achieve meaningful social justice. The crimes of profit, just like those of murder, deserve to be challenged, and we can use advocacy and the law to achieve this. There are opportunities in law that should allow us to address some of these issues if there is the political will to do so. Consider the breakthrough in corporate accountability in 2016 when the South Gauteng High Court ruled that 500 000 miners could bring a class action claim against the country's gold mines. This after almost a century during which far too little precaution was taken to prevent workers from contracting silicosis and TB, which in many instances have shortened their lives. The judgment is important in terms of our understanding of corporate accountability and of profit-taking at human expense (Van Vuuren, 2017).

More recently the work of the Zondo Commission in South Africa can be viewed as an example of truth telling intended to benefit justice for the extensive crimes of state capture in South Africa. While the commission has shown a rather lacklustre approach to calling CEO's and Directors of corporations implicated in state capture to account, it has seen expert witnesses provide meticulous detail of money flows and submissions from civil society which fully expose the role of corporations in state capture.

South Africa is also not the only country attempting to clear up the legacy of economic crimes that are linked to human rights violations, and the experience of other countries shows that it is not only never too late, but it is possible. Important

recent examples of this is the establishment of a Truth and Dignity Commission in Tunisia which was specifically tasked with also investigating economic crime which had contributed to human rights violation in the years preceding the Arab Spring. Another important example is a recent Gambian commission of inquiry to investigate ex-dictator Yahya Jammeh's corruption. It has also identified stolen assets which can be used for reparations in the Gambia (Carranza, 2020).

4.4.7 Myth 7: Freedom Signalled a Clean Break with the Past

Everything did not change overnight in newly democratic South Africa. Consider how we continue to battle with the increasing problems of unemployment and inequality. The corporations, middlemen, politicians and intelligence agencies that assisted the apartheid state also did not disappear off the scene for good.

This is most evident in the corrupt multi-billion-dollar arms deal of the Mbeki era. A number of the leading arms, oil and commodity sanctions busters played a role in this. In some instances, tenders were incorrectly and corruptly awarded to the same companies that had kept apartheid alive. If we had investigated these issues at the time – or if intelligence authorities spent time in the state archives – they might have done more to insulate the state from doing business with such corrupt entities. Within the private sector, these tendencies to subvert and undermine the rule of law could be arrested by new corporate governance standards, but they could not be erased overnight.

There was therefore no clean break with our past after 1994: the corrupt networks would soon be back. On their return, they were more nuanced in their approach and deferential to the new elite, who rapidly welcomed them in with a familiar, warm South African embrace. The old and the new were quickly intertwined and found in each other partners and protectors.

In 2018, a group of civil society organisations, with Open Secrets acting as the Secretariat, convened the First Peoples Tribunal on Economic Crime in South Africa. With a focus on economic crime in the arms trade (between 1977 and 2017) evidence was heard by a panel of adjudicators including former Constitutional Court Justice Zac Yacoob and UN Human Rights Commission Chair Justice Navi Pillay. After five days of hearings and a numbers of months granted to the implicated parties to respond to evidence of wrongdoing, one of the trenchant findings by the panel was that the Tribunal had presented strong evidence that the failure to address the economic crimes and sanctions-busting activity from the apartheid era which in part explained the illicit activities later in the Arms Deal and in contemporary state capture (The People's Tribunal on Economic Crime, 2018). In other words, the panel argued that the continuities are obvious should we care to take note.

Squaring off with this past, is not only a matter of truth telling, but should also be about justice as a remedy for impunity. Undoubtedly, one of the most important ongoing prosecutions in South Africa involves the French arms company Thales and its payment of bribes to Jacob Zuma. These bribes were alleged to not only shore up contracts for Thales but ensure that they would not be subsequently troubled by investigations by the South African state into alleged criminality. Thales, in an earlier guise as Thomson CSF, had been one of many key French arms allies of the apartheid regime – yet slid almost seamlessly into its new role as a benefactor of the politicians the apartheid regime had imprisoned during the freedom struggle. This alleged corrupt relationship between Zuma and Thales and the looming threat of a criminal prosecution starting in 2005, spurred Zuma and his network of allies into dismantling key anti-corruption institutions. In so doing, the king would be made untouchable from prosecution and so too would be his kingmakers in the arms trade. However, this fightback against accountability became about more than just the legal troubles of Zuma and Thales. It set in motion a process that rolled out a long red welcome mat for the state capture cabal. Once the key anti-corruption agencies had been closed down and the National Prosecutions Authority fundamentally weakened, it was open season for a new group of allies in the Guptas, their political middlemen and a band of corporate enablers in Sandton, London, Hong Kong and elsewhere.

4.5 CONCLUSION

South Africa's obsession with its own exceptionalism has created a blinkered world view which inhibits us from identifying how we mimic political and economic developments in other states. However, it has also blinkered the country from seeing how different domestic crises are in fact part of a much longer trajectory. There is a golden thread of plunder and which weaves it way from apartheid economic crimes, through to the corruption riddled arms deal steered by Thabo Mbeki and ultimately state capture of the Zuma years which continues to fester in our politics. The underlying reasons for this are manyfold and are linked to the structure of the South African economy, the dominance of deep state actors in decision-making and income and ownership inequality. Nearly three decades of freedom have failed to deliver leaders who have the vision and commitment to constitutional values to fundamentally alter these patterns of behaviour. We have a political and corporate class in South Africa which mimics some of the worst behaviour we have shown to be evident in South Africa's earliest state capture which preceded the country's first free election in 1994.

Justice for past crimes is therefore a necessity if we are to break the cycles of repetition and the stranglehold that powerful global networks and their local frontmen have on democracy in South Africa. The lessons of why we cannot allow state capture networks

to succeed do not lie in some well of wisdom and moral authority or the belief that the governing ANC can return to a state of innocence as some would suggest. The original sin of apartheid and accompanying economic crime has long tainted our politics, while we cannot undo all the harm this has created, future generations should not have to endure the burden of repetition.

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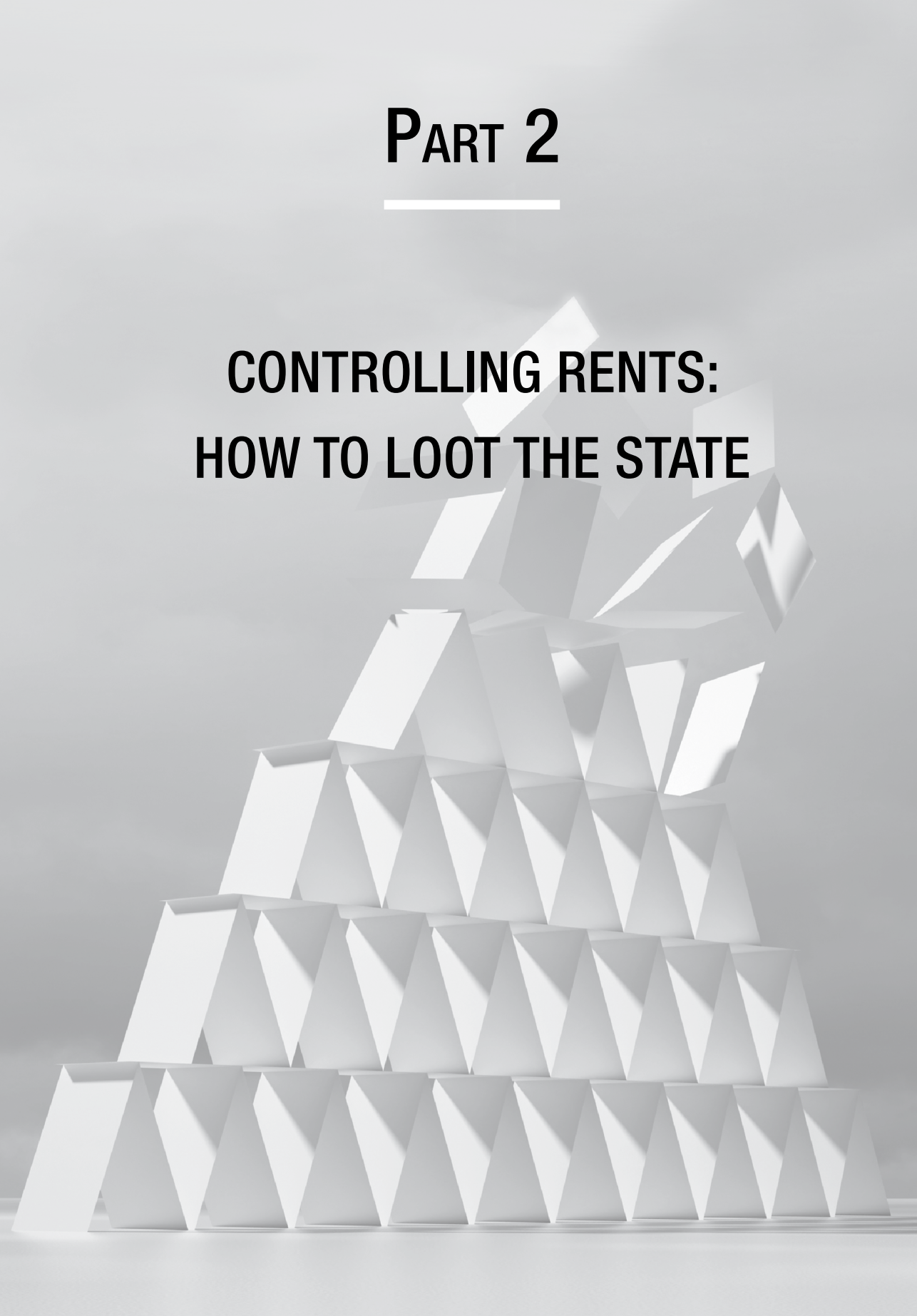
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Part 2

CONTROLLING RENTS: HOW TO LOOT THE STATE



5 BETWEEN LIBERALISATION AND STATE CAPTURE: A DEEPER LOOK AT THE CASE OF ESKOM

Erica Johnson

Current understanding of the phenomenon of state capture in South Africa highlights it as a focused, political-economic project that lead to the repurposing of governance in SOEs and the eventual decline in their organisational ability to deliver on core institutional mandates. While this definition is apt and powerfully explains recent performance failures, it does not explain why, when malfeasance is removed, these organisations are unable to return to functioning productively.

The contention is that the weakening of state-owned institutions has deeper roots than the recent state capture project. In the case of Eskom, it is proposed that over a length of time, weaknesses in and the manipulation of the governance framework fundamentally led to its fragile state and its inability to withstand malfeasance. Jaglin and Dubresson (2016, p. 6) note that "Eskom's crises are institutional in nature and arise above all from the nature of the relationship between Eskom and the state. The succession of mismatches and readjustments has reached its limits and a fundamental redefinition of the relationship has become critical". It is in fact this succession of mismatches and readjustments that has left the organisation unable to deliver securely on its electricity mandate – presenting an existential threat to the South African economy.

5.1 BETWEEN THE DE VILLIERS COMMISSION AND THE ZONDO COMMISSION: KEY INFLECTION POINTS IN THE ELECTRICITY SECTOR

Eskom supplies 90% of South Africa's electrical energy, providing a critical foundation to the Minerals Energy Complex[1] (McDonald, 2009, p. 12) – that includes mining, manufacturing and services in urban centres. Statistics SA notes that in 2019 the primary mining and manufacturing sectors made up 21% of nominal GDP and the urban productive sector 24% of nominal GDP (Stats SA, 2019). Together, these two

1 Fine and Rustomjee conceptualise in the mid 90s, the notion of Minerals Energy Complex (a set of mining activities and related industrial and manufacturing activities) that lie at the core of the South African economy, not only by virtue of their weight in economic activity, but also 'through their determining role in the rest of the economy (Fine & Rustomjee, 1996, p. 5). 15 years later, McDonald in the mid 00s extends this definition to a Minerals Energy Complex plus, acknowledging the growth of an urban producer services sector, in addition

sectors account for 35.5% of employment (Stats SA, 2019). Given this weight, the potential disruption to South Africa's economy is clear if the risk posed by unreliable and unaffordable electricity supply is not addressed effectively.

The key inflection points in the electricity industry in the 35 years between the De Villiers Commission and the current Commission of Inquiry into State Capture (hereinafter referred to as 'the Zondo Commission') are presented in Figures 5.1 and 5.2. It highlights from an internal organisational perspective which events fundamentally weakened Eskom and from which it has not recovered.

The De Villiers Commission was established in 1983 to "examine Escom and electricity pricing throughout South Africa" (Conradie & Messerschmidt, 2000, p. 244). Its far-reaching recommendations included that the public-interest limitation on Escom be lifted, the transfer of ministerial accountability be shifted from minerals and energy to public enterprises, the establishment of a two-tier governance structure, and that the utility operate on a more commercial basis, including paying taxes and dividends to its shareholder, the state. The Zondo Commission was established in 2018 to examine State Capture, Corruption and Fraud in the Public Sector and was guided by the Public Protector's report on SOEs, including Eskom, titled *State of Capture*. The Zondo Commission has not yet concluded its work at the time of this writing.

Following the De Villiers Commission's recommendation, a new techno-political regime was implemented between 1987 and 2001 with Eskom's incorporation[2] as a company and the establishment of the National Energy Regulator (NER) – later renamed the National Energy Regulator of South Africa (NERSA).[3] The period was characterised by a drive for internal modernisation and adaptation to the political changes in the country.

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to the traditional mineral extraction and processing as the productive nucleus of the South African economy (McDonald, 2009, p. 12). McDonald notes that "Producer services firms are those that service the centralization requirements of globalized manufacturing and industrial companies, including mining. Most notable amongst these are accounting, law, advertising, corporate travel, security, public relations, management consulting, IT, real estate, storage, data processing and insurance companies" (McDonald, 2009, p. 12).

2 The De Villiers commission's recommendations on changing institutional form and governance culminated in the amendment in 1987 of the Electricity Act (No. 42 of 1922), creating the parastatal Eskom via the Eskom Act (No. 41 of 1987). The commissions' recommendations to become a dividend-paying and tax-paying entity culminated in the Eskom Conversion Act (No. 13 of 2001). Gentle (2009) notes that the change from Escom to Eskom was merely a change in nomenclature, but marked a radical rupture in the nature of South African capitalism, from a form of Keynesian racial capitalism to a neo-liberal state attempting to open new arenas for commodification.

3 In 1995, NER was constituted legally as an independent institution with authority over Eskom, local distributors and state departments. Eberhard (2007) notes it replaced the anomalous position where the Electricity Control Board, established in 1922, had no direct control over

Within this institutional framework, the rules governing Eskom changed significantly. It went from being self-regulating (in its parastatal phase) to agreeing to price compacts to reduce the real price of electricity by 20% between 1985 and 2000. Thereafter, from 2001-2008, it had an adversarial relationship with the regulator, with Eskom initiating an appeal to the Minister of Minerals and Energy as incentive regulation led to a further reduction in the real price of electricity and away from the principle of moving towards cost reflectivity (Eskom, 2003; Joubert, 2015).[4]

The steady increase in demand and the "sweat the assets approach" in the 1990s and 2000s meant higher volumes of coal were required to support the higher generation load factors. The railing and trucking of coal therefore became a viable option to supplement coal supplies at power stations, in addition to coal supplied from tied collieries. In 2003, the critical year when the net generation reserve margin decreased to 15.3% due to energy demand growth, the corresponding coal purchases increased to 104.4 million tons of coal, 5.5 million tons more than forecast (Eskom, 2003), to support the production requirements and stockpile levels. Road and rail transport also reflected this operational pressure with a total 6.7 million tons being transported in that year; the equivalent of half a power station's annual production.

Recognising the unsustainability of transporting this volume of coal via road and that the full capacity of all power stations would be required in 2006, new coal transport system projects were initiated for the power stations with the most vulnerable logistics chain. This led to a rise in coal costs and became the target of regulatory attention under the rate of return and incentive-based regulatory methodology. In an example of tight revenue oversight and control, the NER in Multi-Year Price Determination 1 (MYPD1) decided to treat future fuel supplies (specifically coal stockpiles) as part of working capital and capped the nominal rate of return on that asset, in addition to disallowing a return on a portion of that stockpile (NERSA, 2006). Financially, this translated in lower expenditure on future fuel supplies. This operational consequence, in addition to the high production requirements across the coal-fleet and an inability to meet planned coal production requirements by the tie collieries, reduced the coal system buffers over a two-year period leading to the eventual collapse in coal security[5] and the January 2008 load-shedding crisis (NERSA, 2008).

municipal electricity undertakings and The Electricity Act of 1987 exempted Eskom from having to obtain a license.

4 Eberhard (2007) notes that despite the NER having developed into one of the more respected independent regulatory institutions in the African continent, it faced huge challenges in terms of building sufficient capacity to regulate Eskom. Eberhard highlights that the creation of new, stable, and competent institutions in developing countries is a formidable task, particularly when there is little tradition and experience of independent regulation.

5 In 2008, NERSA decided that maintaining a minimum of 20 coal stock days across the system would be made an Eskom licence requirement (NERSA, 2008).

LIVING OFF THE PAST & NOT

How a lack of energy & initiative

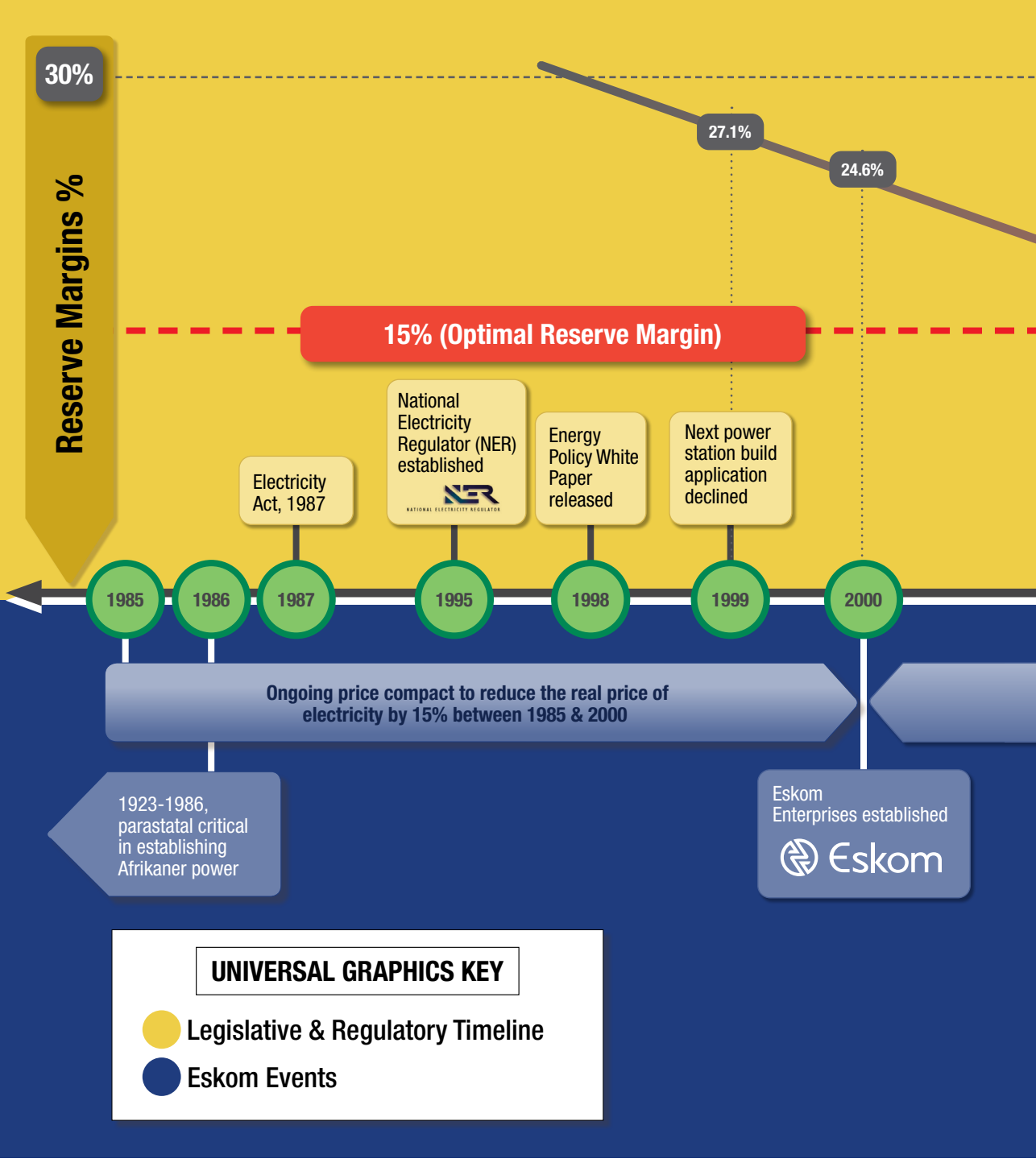
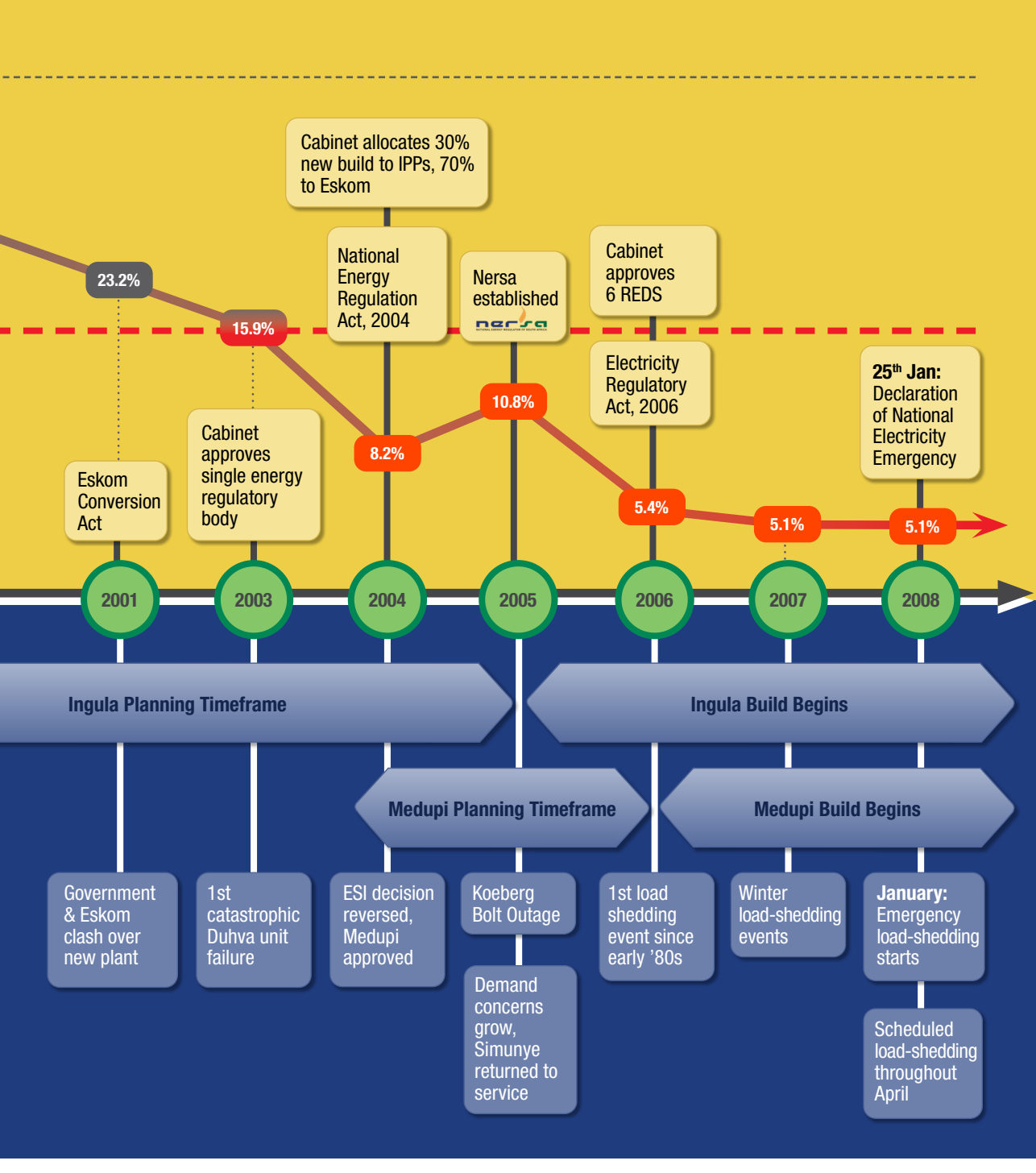


FIGURE 5.1 Two decades of liberalisation of the industry lead to the first coal power system emergency in 2008

PREPARING FOR THE FUTURE
helped push SA into dark times



In the period 1999-2004, there had been several prominent engagements between Eskom and policy makers in the Energy Ministry on the need to ensure security of supply by expanding generation capacity and increasing tariffs gradually to ensure access to commercial funding and adjustment to the price path for new generation capacity. In 1999, the decision was taken by the government and the NER to not allow Eskom to start development on the next base-load power station, critical for the country's supply adequacy. This decision was based on the 1998 energy policy which favoured Independent Power Producers. However, there was an inherent contradiction in the policy between liberalising the electricity industry and commodifying electricity while simultaneously requiring cheap, reliable coal-based electricity to maintain the minerals-energy nexus of the economy. Not addressing this contradiction timeously created severe energy insecurity within the next decade, and South Africa is yet to recover from these reverberations. In 2004, the insecurity of the power system became apparent at an operational level, with the first-generation maintenance requests being deferred and all available generation capacity being utilised at high load factors to meet demand. Cabinet reversed the decision preventing Eskom from building the next power station.

From 2005, there was a sharp adjustment that shifted Eskom to an expansion cycle with order placements for three new power station projects (Ingula, Medupi and Kusile). This massive expansion was in addition to the requirement that Eskom maintain peak performance from existing operating plants to meet demand. With support from the shareholder to respond urgently to the energy shortages (Mbeki, 2008), Eskom, with limited skills[6] and project development capacity,[7] proceeded with the new build programme and internalised all the mega-project risks (engineering, procurement, construction) to gain traction on the build programme.

This decade, marked by major policy reversals, new governance models, cost reductions and abrupt adjustments in organisational life cycle, culminated in the 2008 declaration of an electricity emergency; a major shock to the economy with the mining and manufacturing sectors bearing the brunt of the power rationing. The emergency became a catalyst for a flurry of activity from the government, with the gazetting of an electricity pricing policy (Department of Minerals and

6 NERSA noted that worldwide demand for scarce skills was impacting on Eskom's need for skilled staff (NERSA, 2008). They noted that Eskom had a high vacancy rate of critical scarce skills at power stations (1 500 vacancies out of 3 200 positions).

7 Paul O'Flaherty reported to the Parliamentary Energy Committee that when Eskom started closing contracts in 2005 on the new build projects, the supplier market was experiencing shortages of material, components and engineering skills (PMG, 2012).

Energy, 2008), the approval of a shareholder loan of R60bn, government guarantees of R176bn (National Treasury, 2009), significant tariff re-openers approved, promulgation of new generation regulations and a review of the country's energy security initiated via an Integrated Resource Planning process.

The decade following the 2008 emergency declaration was tumultuous for Eskom, with the viability of the organisation declining progressively as costs increased and revenues declined amid frequent leadership changes.

Between 2007 and 2010, the capacity expansion budget increased from R150bn to R368bn (Eskom, 2007, 2010). The first unit at Medupi was optimistically due in 2012, but eventually completed by 2015. Delays related to civil works, labour disputes and material fraudulent defects on the boiler construction.[8] By 2019, 6 of the 12 coal-fired units had been commissioned; 5 commercialised and in service at Medupi and 1 commercialised at Kusile with other units commissioned but three still under construction. Ingula Power station was commissioned in 2015, two years later than initially planned, with an original cost estimation of around R8bn, surging to R25bn. Delays at this project were due to civil works and an extended labour stoppage after a major accident in which 6 people lost their lives.

With capital becoming increasingly scarce in this period and diverted to the new build programme, the sustained under-investment in the Transmission and Distribution wires businesses and in the cost-plus coal mines became critical. The capital shortage was exacerbated by increasing new build project costs and the continuous commissioning extensions.

From 2015, Eskom made a concerted effort to transform the ownership of the existing 40-year coal supply agreements from the diversified global mining companies to new Broad-Based Black Economic Empowerment entrants. Unfortunately, there was not a robust strategy to ensure security of coal supply in line with this transformation objective. Eskom indicated publicly that they no longer wanted to be contractually vested in the coal mining operations and would prefer to purchase coal from a diversified and competitive supplier mix[9] on the short-term market. This purchasing strategy,

8 In 2015, the Securities and Exchange Commission (SEC) charged Hitachi, Ltd with violating the Foreign Corrupt Practices Act (FCPA) when it inaccurately recorded improper payments to South Africa's ruling political party, the ANC, in connection with the multi-billion-dollar boiler contracts at the Medupi and Kusile power plants. Hitachi agreed to pay $19m to settle the SEC charges (U.S. SEC, 2015).

9 In the Eskom 2016 *Integrated Report* they note that they embarked on "Changes to the Primary Energy business strategy, in order to create a competitive coal market, by creating equal opportunities for emerging mining companies, and collaborating with Transnet to expand the rail network to all coal-fired power stations" (Eskom, 2016, p. 53).

in addition to the sustained under-investment in the tied-collieries, contributed to another decline of the coal stockpiles, leading to a second coal emergency in a decade being declared in November 2018. This purchasing strategy led to a steep increase in coal costs as high volumes had to be trucked over longer distances. By 2019, the Board revoked this decision and reverted their coal strategy to re-establishing the tightly coordinated coal supply and logistics chain between dedicated coal mines and power stations (Eskom, 2019a).

In terms of revenue, in the period from 2008-2012, customer arrear debt levels averaged 0.89% of revenue (~R665m), with Soweto residents' debt[10] comprising the largest portion of this (Eskom, 2013; Khumalo, 2019). From 2013-2018, average arrear debt levels increased to 2.7% of revenue (~R3 500m) and ranged from 1.1% of revenue in 2013 (~R1 500m) to an unsustainable 4.21% of revenue in 2018 (~R7 500m) (Eskom, 2019a).[11] The main contributor, to this phenomenal rise in customer arrears was a decline in municipal payment levels, over and above the continued low payment levels in Soweto. At year end March 2019, total municipal arrear debt amounted to R19.9bn, with 20 municipalities accounting for 81% of that arrear debt.[12] The contributing factors to this revenue loss was an inability to exercise legal credit control processes and the limited results of government-led processes to address municipal government payment performance.

10 There is a long-standing history to the accumulated debt in Soweto. Initially organised as an anti-apartheid protest, continued non-payment of electricity post 1994, was in protest to the commodification of the resources necessary for survival and life (Naidoo & Veriava, 2009).

11 An exasperated Eskom complain in their 2019 *Integrated Report* "that total invoiced municipal arrear debt (including interest) continues to deteriorate, increasing from R13.6bn at 31 March 2018 to R19.9bn at year end, with the top 20 defaulting municipalities contributing almost 81% of total invoiced municipal arrear debt. We have exhausted many of the avenues within our control to recover the money, such as interrupting supply to defaulting municipalities or attaching their assets and installing prepaid meters in pilot project areas. The situation is simply not sustainable, and urgent Government intervention is being sought to resolve the current impasse" (Eskom, 2019a, p. 79).

12 Arrear debt refers only to overdue amounts, excluding interest, and not the total amount due. In August 2019, National Treasury noted, in their report, *The State of Local Government Finances and Financial Management as at 30 June 2018*, that while most of the 257 municipalities are in reasonably good shape, about 125 municipalities are in varying degrees of financial distress. The number of municipalities adopting funded budgets from 2013/14 to 2018/19 declined by 20.7% from 169 to 134. The largest municipal creditors are Eskom and the regional Waterboards. National Treasury also noted that the non-payment risks building up in local government are not systemic in nature but require concerted intervention from government to mitigate.

A feature of this decade was that the source of governance instability shifted internally. As revealed at the Zondo Commission, from 2014, the ethical tone of successive CEOs and the broader leadership declined[13, 14, 15] with direct instructions to over-ride governance controls and intervene in the procurement and supply chains of Eskom (Corruption Watch, 2019e, 2020). Under the Executive leadership of Brian Molefe and Anoj Singh (Corruption Watch, 2019a, 2019c), Eskom's role and actions in the transfer of ownership of Optimum Coal Mine from Glencore to Tegeta[16] is a case in point (Chipkin & Swilling, 2018).

Concurrently, employee relations deteriorated dramatically in this period, affecting operations and energy security in the country.[17] The role of the Board to ensure that the company was a going concern, ensure long-term energy security and to protect it from shareholder and other stakeholder interference, was weak in this period. The corrosive effect of leadership malfeasance left the company scarred with deep levels of distrust. A complete loss of business agility and an inability to control costs and respond to operational crises became entrenched, leading to the second major coal stockpile depletion in November 2018 and deep load-shedding in March 2019.

13 In 2015, external legal opinion found the contract that Colin Matjila irregularly signed with *The New Age* for R43m in 2014 constituted a financial misconduct (Corruption Watch, 2020).

14 Eskom Head of Treasury Andre Pillay revealed under oath at the Zondo Commission, that a R25bn loan facility signed in 2017 by then interim CEO Sean Maritz was a grossly flawed process that exposed interference from then Board Chairperson, Zethembe Khoza, and former public enterprises minister, Lynn Brown. Maritz resigned in early 2018, just before the current Board could institute disciplinary action against him for his participation in the transaction (Corruption Watch, 2019e).

15 Gert Opperman, a coal supply Manager at Eskom, under oath at the Zondo Commission, revealed that he directly received calls from Matshela Koko, former acting CEO, twice, who, as head of generation in 2015 instructed him to accept substandard coal at Majuba Power Station (Corruption Watch, 2019b; Cronje, 2019a). Substandard coal contributes to higher levels of generator unavailability.

16 Evidence presented under oath to the Zondo Commission has described how Eskom's senior leadership Brian Molefe, Anoj Singh, Matshela Koko and Ayanda Nteta, leveraged their positions to allegedly assist Gupta linked Tegeta Exploration and Resources accusation of Optimum Coal Mine. This entailed implementing contract penalties, resisting business rescue solutions for Optimum (Corruption Watch, 2019d; Seleka, 2019) and in 2016, fast-tracking extraordinary Board resolutions and irregularly providing an advance payment of R659m to Tegeta (Corruption Watch, 2019a; Cronje, 2019b).

17 In the Eskom 2019 *Integrated Report*, the outgoing Chief Executive, Phakamani Hadebe, notes "that without the commitment of those employees who worked together to limit the impact (of severe industrial action and breakdown in relations), the results could have been much worse. We are truly grateful for their efforts."

THE HEAVY TOLL THAT POOR
HOW MISPLACED POWER

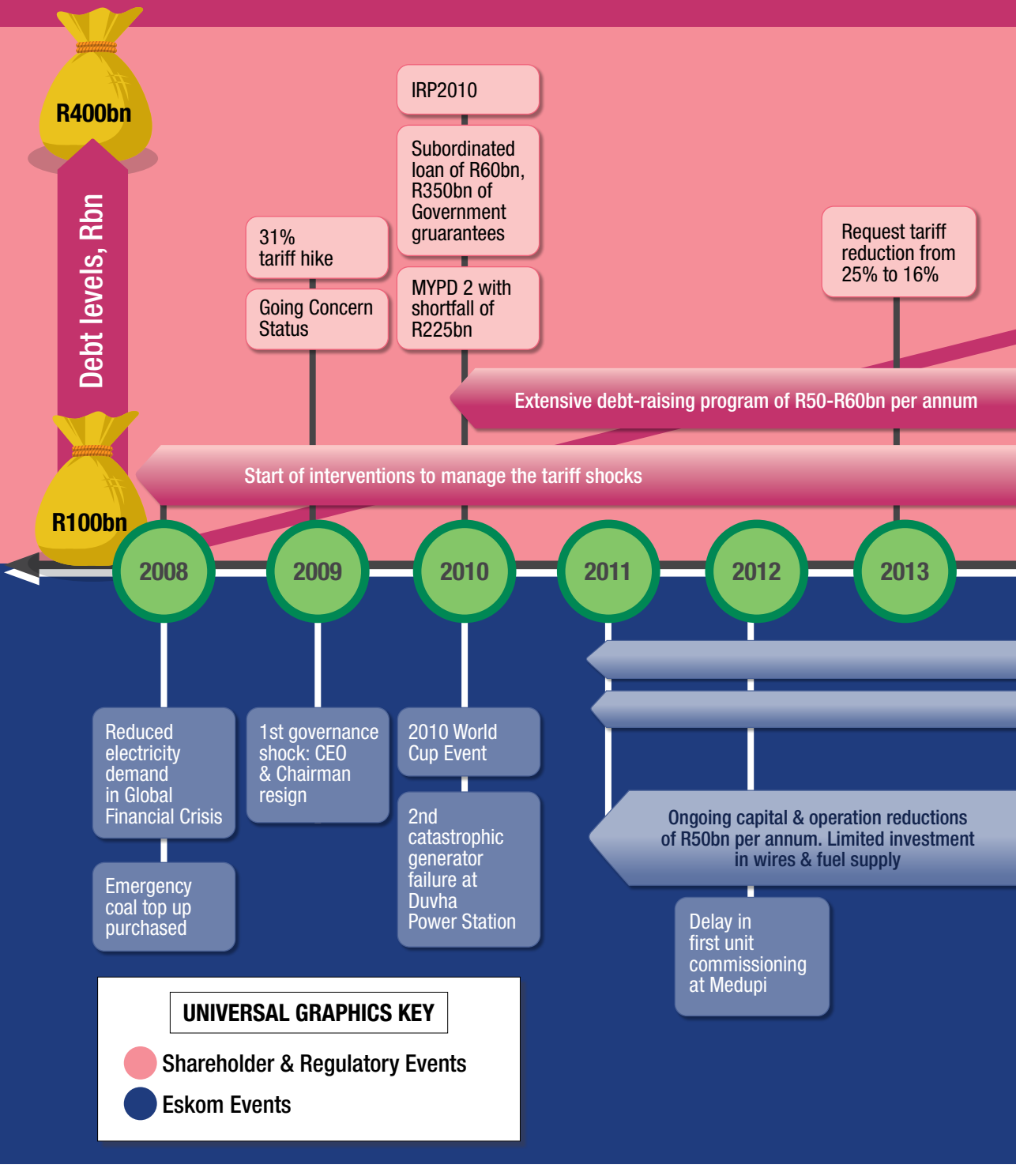
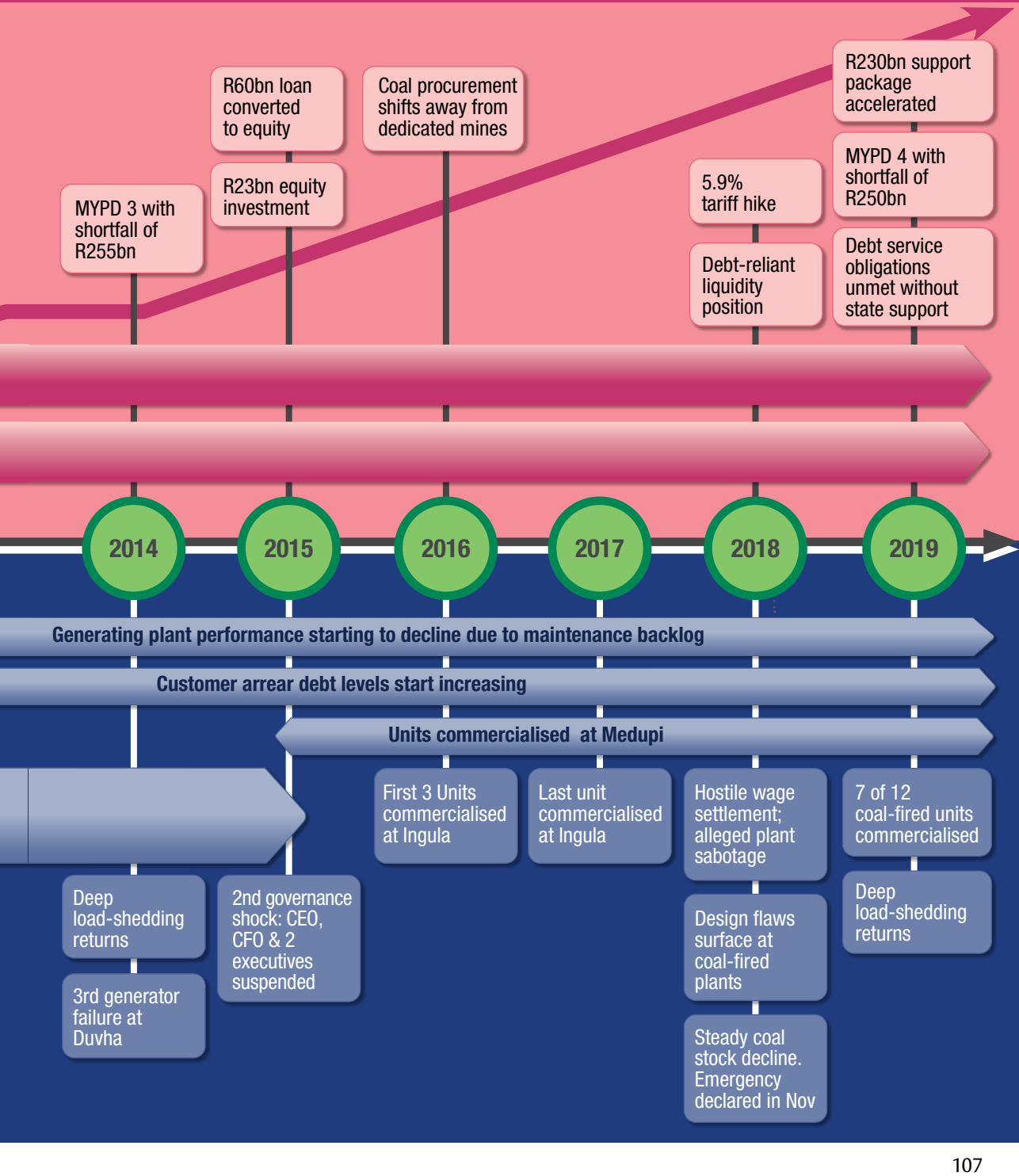


 FIGURE 5.2 A tumultuous decade leading up to the second coal power system emergency in 2018 and the liquidity insolvency in 2019

GOVERNANCE HAD ON ESKOM
DROVE UP ESKOM'S DEBT



5.2 WHAT ARE THE KEY ISSUES AT PLAY?

Having listed critical events where the rules changed in the institutional framework of Eskom, one could attempt to reflect on the dynamics that produced this fundamental weakening of the institution. Jaglin and Dubresson (2016, p. 6, citing Hecht) note that Eskom is fundamentally viewed as a technopolitical object through which technology and politics are entangled for "the strategic practice of designing or using technology to constitute, embody or enact political goals". With this view prevailing, Eskom as a corporatised SOE, is unable to influence its business environment effectively and remains constrained by the following dynamics:

- The contradictions of state policy manifests in the entity with the ultimate price a weakening of the balance sheet;
- The inability to execute any decisions in its own interest as the interests of its stakeholders and shareholders dominate; and
- The demonstration of "lock-in" by all stakeholders and their ability to enact violence on the SOE is a constant imminent threat.

The impact of these three dynamics is particularly important in the economic regulatory regime, the multiple and conflicting decisions of the shareholder, the inability to execute on credit control, the limited flexibility on coal resource management, the internalisation of all risks of the new build programme and engagement on staff remuneration, benefits and job security. In the next section, these dynamics are linked to specific key events which weakened the organisation.

5.2.1 Contradictions of State Policy Manifesting in the Entity and Weakening the Balance Sheet

5.2.1.1 The Shareholder and its Multiple Roles

There is inherent tension arising out of having three ministries playing a role as energy and environmental policy-maker/regulator, equity shareholder, and company shareholder representative, first by virtue of the number of integration points, exacerbated by limited alignment within the administration on the direction of the sector in terms of energy security, cost reflectivity, environmental footprint, electricity industry structure and transformational objectives for economic inclusion and transition.

- **Shareholder Representative**

Continuing with the liberalisation of the institutional framework for SOEs in 2001, the Eskom Conversion Act, (No. 0f 13 2001) replaced the 1987 Act and converted Eskom into a competitive organisation operating in a competitive market (Jaglin &

Dubresson, 2016, p. 26) and subject to the Companies Act (No. 61 of 1973). While the utility remained state owned, the relationship dynamic between the utility and the government shifted critically, with the latter now playing the roles of energy policy maker, economic regulator, environmental regulator, shareholder and appointer of the Board and Executive leadership, with the utility becoming subordinate in the relationship yet accountable for the management of the contradictory requirements from these different spheres of government.

Khoza and Adam (2005, p. 219) noted "within this commercial context, there are mechanisms which can be utilised to accommodate the peculiar needs of the government as a shareholder. One such mechanism is the shareholder performance agreement". While it appears to be a credible legal arrangement, there is no protection for the SOE if a shareholder request is not feasible when balanced against the main mandate of the entity and its cost structure. An example of abuse of the shareholder compact process – to the detriment of Eskom and the country – was the request by the Department of Public Enterprises (DPE) to change the procurement requirements to companies with black ownership of 50% plus 1%. This fundamentally reduced the security of coal supply and increased costs tremendously.

Another example of the entity adhering to contradictory shareholder requirements was the "keeping on the lights" edict by utilising diesel generation without any certainty of recovering the costs from the regulator or the shareholder, to the serious detriment of the balance sheet, while potentially compromising the Board and Executive Management legally. Eskom, being the *de facto* and not *de jure* supplier of last resort created a decision-making bind that was financially constricting which persists till today (Eskom, 2019a). Invariably the trade-offs were made to the detriment of the financial health of the company.

- **Shareholder Equity and Debt Management**

Inherent in the NERSA regulatory framework was an assumption of shareholder equity ratios, generally not met by the National Treasury fiscal support framework. The National Treasury instead opted to support an extended price path to cost reflectivity with a deep government guarantees package that enabled the utility to have enhanced access to the debt capital markets.

Concurrent with the phased approach to cost reflectivity, the lack of an adequate shareholder capital injection, despite the weak balance sheet and deep capital expansion programme, resulted in the new build programme being largely debt-financed. The risk of inadequate utility revenues, either through an inadequate implementation of the economic regulatory model or steep utility cost escalations, was recognised by the National Treasury. However, one of the assumptions underpinning both the Eskom

and National Treasury view at the time, was that electricity volumes would grow and that an appropriate price trajectory would eventually prevail. These assumptions did not materialise. The credit rating profile of the company deteriorated significantly from 2008 to 2019, with the ratings agencies noting the instability in the economic regulatory framework as a key weakness. This was another example where the balance sheet deteriorated due to the choices of the shareholder.

The decision to support the build programme with government guarantees, instead of a larger equity injection in proportion to the size of the capital investment, created a high-risk condition for the Sovereign, which has subsequently materialised. The Sovereign's declining credit profile, due to the extensive support it provides to Eskom, has created a systemic risk for the local financial system.

5.2.1.2 Economic Development Enabler

Between the National Treasury and the Department of Energy, there was an uneven understanding of the implications of the increasing energy insecurity whilst operating an integrated grid. Being the sole shareholder of the dominant energy supplier, the government also underestimated the systemic risk and pressure it would come under from the public. Being the supplier of last resort, in an energy intensive country dependent on cheap, reliable electricity was frequently discussed, but not effectively acted on until the lights started going out; a point at which long-term economic damage had already been sustained.

In the period 2010 to 2014, the major deviations from the economic regulatory rules compounded the severe revenue shortfalls by up to R255bn over the regulatory periods. The shareholder reviewed many funding options to reduce risk in 2010, from the sale and lease back of assets, to strategic equity partners and recapitalisation, in line with the agreed economic regulatory capital structure (60:40), but chose to support the electricity sector with the initial provision of R150bn in guarantees, which were later extended to R350bn. This ensured that Eskom gained secured and preferential access to the commercial debt markets.

Initially, with a 25% per annum increase to the tariff in MYPD2, there was an opportunity for Eskom to achieve tariffs within the cone of cost-reflectivity published by NERSA at the time (Joubert, 2019). However, the shareholder request in 2012, to reduce electricity tariffs from 25% to 16% in the last year of the determination scuppered that path and became a tipping point in the decline of Eskom's financial health. The Eskom leadership, while recognising the danger of reducing the tariff increase, acceded to the shareholder request to provide relief to electricity consumers and requested regulatory approval to implement a reduced tariff of 16%. This was

done on the basis that a new trajectory to cost-reflectivity would be supported in the next regulatory determination. However, the tariff adjustment agreement with the shareholder was not honoured in the light of political pressure from trade unions – in particular the Congress of South African Trade Unions and the National Union of Metalworkers of South Africa. With the threat of limited support for the governing party in the 2014 general election, the integrity of the economic regulatory regime was further diminished and the resultant MYPD3 determination was woefully inadequate, with a price determination of 8% per annum for three years. This was one of the direct contributors to Eskom's technical and liquidity insolvency and subsequent dependency on the fiscus.

5.2.1.3 Regulatory Framework and Energy Pricing Policy

Inherently, the regulatory regime introduced post the De Villiers commission is a credible one. However, in the context of Eskom and electricity industry viability in South Africa, there have been several serious flaws which need to be addressed. There are three areas in which the regulatory regime fundamentally must be reviewed if long term industry viability is to be achieved and they relate to the challenges highlighted in the Eskom tipping points timelines sketched earlier. These areas are: an appropriate implementation of cost-reflectivity which balances consumer protection with industry sustainability, an effective dispute and appeal mechanism,[18] and forward-looking industry investment and expansion.

From the start of the build programme, NERSA attempted to protect electricity consumers from tariff spikes.[19] That culminated in a decade-long series of enormous revenue shortfalls, increased levels of borrowing, and finally a company liquidity crisis in 2018 and a national fiscal crisis in 2019.[20]

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18 In the Eskom Road Map, published by the Department of Public Enterprises, proposed amendments to the NERSA Act strengthening the utilities' ability to have timeous recourse on a regulatory decision, is highlighted (Eskom, 2019b).

19 By minimising the return on assets in the regulatory formulae, NERSA attempted to control the rate at which revenue could increase and hence the annual tariff adjustments that could be implemented. By NERSA granting Eskom a return on assets, significantly lower than their weighted average cost of capital (WACC), the balance sheet weakened over time. The return on asset is also needed to support the debt service requirements for new investments and ensure sufficient surplus operational cash flows to meet short-term liquidity requirements and long-term debt commitments.

20 Eskom notes in the Eskom 2019 *Integrated Report* that, NERSA's revenue decision for 2018/19, which granted a 5.23% standard tariff price increase for the year, indicates that NERSA did not consider Eskom's sustainability when it made its decision, in contravention of its mandate. Other examples of contested regulatory decisions include the precedent not to compensate Eskom for extraordinary diesel usage during periods of generation constraints to minimise

Maintaining a low electricity price (via a price compact or incentive-based regulation) for 20 years (1987-2006) produced a distinct South African electricity cost competitive advantage. However, the inevitable price adjustment to new industry investments was too steep to bear, with inordinate pressure on Eskom and the NERSA during the MYPD processes, especially as the economic strain was severe and had been exacerbated by the global financial crisis. To date, the price path adjustment to cost-reflectivity has still not been achieved with more volatility in applying the regulatory rules consistently[21] and timeously, leading to the liquidity crises at Eskom and a deep exposure for the national fiscus (Joubert, 2015; Eskom, 2019).

5.2.2 An Inability to Execute Decisions in its Own Interest

5.2.2.1 Arrear Debt Management

Another area of conflict between the shareholder representative and Eskom was when the latter tried to exercise credit management with non-paying municipalities. Having followed lengthy public and government-led processes, Eskom was either prevented from interrupting electricity supply to municipalities by political principals or was prevented legally by a customer successfully interdicting Eskom from interrupting the supply despite their municipality, as the direct electricity supplier, being the party in default. This was an instance where Eskom could not exercise decisions in its own interest, suffering dire financial consequences as a result.

5.2.2.2 Coal Contracts and Logistics Management

The most extreme example of Eskom being unable to execute on a decision in the interests of the public good, public safety and sound generation power station production and financial health, is in the coal supply to Kusile power station. The siting of Kusile next to the New Largo coal mine, was based specifically on the ability to use a conveyor belt to transport the coal from the mine into the power station. To date, 12 years after the construction of the power station commenced, the coal mine contract has not been concluded. Largely this has been due to a shareholder request to have enhanced the BEE credentials for the coal mine.

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the economic impact of load-shedding. The erosion of the financial sustainability of the company, finally lead to full dependency on the fiscus for liquidity support and the transfer of extraordinary financial support to Eskom to avoid a call on its existing guarantees (National Treasury, 2019).

21 Eskom took the NERSA 2018/2019 Regulatory Determination to the High Court for review. In March 2020, Judge N. Kollapen concurred with Eskom that the NERSA's decisions were procedurally unfair, irrational and unreasonable and falls to be reviewed (High Court of South Africa: North Gauteng, 2020).

5.2.3 The Demonstration of Lock-in by Stakeholders and the Willingness to Resort to Violence

5.2.3.1 The Integration of the New Build Programme

Eskom integrated the main civil, boiler, turbine, protection, cabling and auxiliary plant component contracts for the coal-fired power stations in the build programme. Having to ensure coordination between all the major contract components presented a massive informational task, leading to integration mismatches and sub-optimal situational awareness. In addition, the equipment suppliers were aware of the utility's vulnerability and the country's energy hunger and hence capitalised on the chaotic trade-offs that had to be made in meeting tight commissioning timelines or in keeping the lights on in the short-term versus properly repairing a defective unit. While not corrupt, this kind of rent-seeking was opportunistic, demonstrating a supplier "lock-in" and was a further drain on Eskom's finances.

In hindsight, bundling the role of the project developer and integrator within the same Eskom holding company as the main operational and maintenance business, was a critical strategic error. It meant that vital resources were diverted from the existing operations to the build programme, a practice that has continued even after the build programme went awry. This decision was taken at a time when the company had limited skills capability to maintain its operations and maintenance activity. It launched into the complex mega-build programme with a very lean project office. In terms of design, the Eskom project teams had all the suppliers' designs verified independently. However, the integration and optimisation of the critical engineering value chain, for example, the extended boiler operations, was not optimised with one overarching approach, leading to operational challenges that are only now apparent, after more than half the power station units at both Medupi and Kusile have become operational.

5.2.3.2 Annual Salary Negotiations

As a result of a bargaining unit wage dispute between Eskom and organised labour in June 2018, national industrial action was instituted by the bargaining unit, which led to rotational load-shedding over three days. Eskom reports that this was the largest and most complex incident ever managed by their integrated incident command structures (Eskom, 2019). Revealing the nature of this incident, Eskom obtained court interdicts to prevent the tripping of generation power supplies, the hijacking of coal trucks, the interference with coal supply logistics, the blocking of building entrances and the intimidation of employees and contractors from doing their work (Gous, 2018). As one of the most critical stakeholders in Eskom, the staff are conflicted because they are well-paid, work incredibly hard and do not feel accountable for

the poor governance decisions taken at a leadership level. However, by disrupting electricity production processes to reflect their anger, they have broken the social compact and raised the risk of the likelihood of a blackout due to labour unrest. The final 3-year wage agreement includes a minimum 7% per annum salary increase, inflationary house allowance adjustments and a once-off cash after tax payment of R10 000, for all bargaining forum employees.[22]

5.3 WHAT DO WE DO NOW?

If viewed through the lens of a complex adaptive system, it appears that Eskom has lost its ability to self-organise for business viability.

This manifests in an inability to execute decisions in its own interest or to manage the prevailing socio-political dynamics to create a conducive business environment, specifically in securing adequate regulatory rulings or appropriate shareholder support when needed.

Lastly, Eskom appears unable to execute any adaptation necessary for it to remain fit for purpose, despite being aware of the extreme nature of the risks it faces.

It is critical that these constraints in its business environment, specifically arising from the multiple roles of the shareholder, are understood and mitigated. Next, it is important to re-establish the rules supporting the industry to ensure that any incumbent survives, has the capacity to access capital markets, and can credibly undertake long-term decisions in the public interest. If not, any attempt to restructure the industry may provide transparency in terms of costs and visibility of services but will not succeed in establishing a new or sustainable industry.

22 Eskom reports that, subsequent to this violent industrial action incident, learnings have been documented and that their Industrial Action Working Group have addressed the gaps identified in securing production processes. Following the conclusion of the three-year wage agreement, the trade unions, as well as non-unionised senior Management, lodged a dispute with the Council for Conciliation, Mediation and Arbitration (CCMA) regarding Eskom's decision to award no increase to senior Management, despite the wage agreement with bargaining unit employees and the inflationary salary increase of 4.7% provided to middle Management/ professionally qualified employees.

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6 THE CASE OF STATE CAPTURE AT ESKOM

Catrina Godinho and Lauren Hermanus

6.1 INTRODUCTION AND CONTEXT

When South Africa's former Public Protector,[1] Thuli Madonsela, released the *State of Capture* report in November 2016, Eskom was the primary site of alleged wrongdoing. The State-Owned Company's (SOC) executives, procurement, and Board appeared to have facilitated public-private collaboration critical to the systematic looting of national resources. Events at South Africa's national public utility were said to proffer confirmation that the "relationship between the President and the Gupta family had evolved into 'state capture'" (Public Protector, 2016, p. 5).

That Eskom is pivotal to the state capture project is not surprising, given the scale and complexity that have characterised the organisation through its successive legal-institutional modulations. It is one of the largest power utilities in the world, operating in one of most energy intensive economy globally (Oyewo, Aghahosseini, Ram, Breyer & Lohrmann, 2019). Its role in South Africa's economy has endowed its leaders with significant influence and power. Eskom and the associated private coal mining operations are inextricably linked to South Africa's industrial and political development, and connected to powerful business interests. The market-dominant utility generates more than 90% of South Africa's electricity. It controls the entire national high voltage transmission grid, and distributes more than half of electricity directly to consumers. With annual revenues nearly three times that of Transnet and six times that of SAA, Eskom is by far the largest of South Africa's SOCs. For the 2018/19 financial year, its assets were valued in excess of R758bn, and its capital expenditure stood at R33.9bn (Eskom, 2019).

The concentration of capital, established resource flows, rich interdependencies, resilient public-private networks and an enduring lack of transparency have been

1 The Public Protector is one of six independent state institutions set up to support and defend democracy, subject only to South Africa's Constitution and the law, and report annually to Parliament (Republic of South Africa, 1996). In 2019, these line ministries and departments were merged again.

critical to the state capture project at Eskom (Fine, 2010; Rafey & Sovacool, 2011; Baker, 2019). As a SOC, Eskom sits at the centre of what has become popularly known as South Africa's minerals-energy complex (MEC).[2] The MEC is a characterisation of a 'system of accumulation' comprising interdependent sectors, and public and private actors and interests, connected to and driven by energy-intensive extractive industries (Fine & Rustomjee, 1996). What is significant about the MEC is that it shows how both positive and negative developments in the energy sector are not defined by a single actor, but arise out of actions across the public and private sectors. Close and murky dealings between Eskom, its suppliers and its large industrial consumers allowed for coherent and merged interests, habitually sheltered from public scrutiny. These long-established relationships between government, Eskom and private companies are often viewed as critical to the national economy. However, the same relationships also have functioned as channels for grand corruption, that have escalated in the absence of checks and balances.

South Africa's parliament and judiciary have laid bare the mechanisms by which Eskom and related institutions were hollowed out, controlled by Gupta-Zuma-allied actors, and used to illegitimately transfer state resources to private companies at a staggering scale. The Eskom Inquiry[3] and Zondo Commission[4] have been instrumental in the iterative process of identifying and displacing the top cadres of state capture in the executive and governance structures of the utility and governing ministries. Unfortunately, remedies have come too late to arrest Eskom's financial and operational failure. The utility has been systematically gutted to the extent that it struggles to fulfil its mandate: to provide electricity in an efficient and sustainable manner to grow the economy and improve the quality of life of the people of South Africa.

This chapter traces the process of state capture at Eskom over time, with a focus on the period from 2010-2019. By constructing a temporal progression, it will explain how the state capture network first infiltrated and then parasitised the utility. It will be shown how veto positions were occupied, and policies and procedures were circumvented and later reformed, all contributing to the erosion of existing governance and accountability. The result was a gradual accumulation of control and power over the distribution of resources to a network of beneficiaries, as well as determining the shape of national electricity policy and the role of the power sector in the economy.

2 See, for example, the National Union of Metalworkers of South Africa's (NUMSA) press releases (NUMSA, 2010).

3 On 21 June 2017, the Portfolio Committee on Public Enterprises (the Committee) unanimously resolved to institute an oversight inquiry (Eskom Inquiry) into allegations of state capture at South African State-Owned Companies (SOCs) (Portfolio Committee on Public Enterprises, 2018).

4 The Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (Zondo Commission) commenced in August 2018.

6.2 SOUTH AFRICA'S LIGHTS GO OUT

6.2.1 Resistance to Eskom's Reform, Oversight and Accountability

Eskom has always enjoyed a level of autonomy, shielded from external input by layers of secrecy. A 1998 Energy White Paper proposed a sweeping set of wholesale reforms to the sector (Department of Minerals and Energy, 1998).[5] The White Paper's proposed reforms were aligned to international best practice, covering sector governance, structural reform, private investment and the introduction of renewable energy. However, resistance was resounding, from, for example, municipal governments and labour. Most significantly, resistance eminated from within national government and the utility itself (Van der Heijden, 2013). Regarding governance, between 1998 and 2019, the requirements for transparent sector planning and policymaking set out in the White Paper were circumvented. Over two decades, Eskom's operations remained opaque, particularly concerning power procurement, covering nuclear, coal and renewables (Baker, Burton, Godinho & Trollip, 2015; Baker & Phillips, 2018; Baker, 2019). Within this context, dysfunction, crisis-driven planning and grand corruption would become routine.

6.2.2 The Lights Go Out

Into the early 2000s, the ANC committed to extend energy access to the 64% of households formerly excluded by apartheid's racist infrastructure development (Baker, 2015). The country's electricity infrastructure that served the narrow needs and interests of the MEC and adjacent industries, as well as a white minority of residents, was reoriented around broad developmental objectives. However, planning failures would soon frustrate these ambitions. In the last quarter of 2007, the country had experienced the first bouts of now familiar controlled rolling blackouts, termed 'load-shedding'. By the end of the year, former President Thabo Mbeki apologised to the nation for failing to respond timeously to Eskom's preceding requests to approve new power generation investments (Van der Heijden, 2013). Demands on the country's limited resources were extensive.

The construction of massive coal-fired power plants, Medupi and Kusile (4 800 MW in capacity each), soon forged ahead, requiring hundreds of billions of rands in international finance from the World Bank and other development finance institu-

5 Reforms included: the restructuring of generation and distribution, the introduction of private actors in energy generation, a transition to a greater share of renewable energy and for planning and policy functions to be formally shifted to what was then the Department of Minerals and Energy (DME)(Department of Minerals and Energy, 1998). Until 2009, the Department of Energy (DOE) had been the Department of Minerals and Energy, reporting to a single line ministry.

tions (DFIs) (Rafey & Sovacool, 2011).[6] Through Broad-Based Black Economic Empowerment (BBBEE), Eskom's procurement spend on these projects and others was seen as one of few mechanisms available to transform the racial profile of industrial elites (Sovacool & Saunders, 2014). The ostensive project of transformation unfolded within the MEC in ways that ultimately subverted this urgent national agenda to benefit only a narrow selection of politically powerful actors. As an example, the ANC's investment company, Chancellor House, was given a 25% equity stake in Hitachi Power Africa, which was then awarded boiler and turbine contracts for Medupi in 2007, in excess of R30 billion. Although illegal and shocking when it was exposed years later, the scale of this transaction would be dwarfed as corrupt deals escalated (Portfolio Committee on Public Enterprises, 2018).

6.3 2010-2014: FROM CORRUPTION TO STATE CAPTURE

From 2010, there was a concerted effort to seize and reshape key institutions that were supposed to regulate Eskom, its appointments, operations and procurement, and ensure that it serves the country's developmental agenda. Historical networks of vested interests inside and outside the state were systematically expanded to include new actors seeking to establish and consolidate power. The first overt signs of this progression was to change the way the Ministry of Public Enterprises functioned in relation to Eskom.

6.3.1 State Capture Cadres are Deployed to Relevant Ministries and Other Key Positions

This reshaping or repurposing of Eskom commenced in earnest with the appointment of Malusi Gigaba as Minister of Public Enterprises by former President Zuma in November 2010. Enabled by Eskom's corporate governance protocol, this Ministry has enormous power, acting as the only representative of the company's sole shareholder (the South African sovereign). The Minister is required to oversee governance, appoint a Chief Executive, approve a Financial Director appointment, make non-executive Board appointments, and approve the Corporate Plan (which includes all planned financing). Gigaba had replaced Barbara Hogan, whose brief one-year tenure was terminated, allegedly for resisting Zuma's intimations at influencing SOC Board appointments (Portfolio Committee on Public Enterprises, 2018).

Former Eskom executives reported that there was an antagonistic relationship between the incumbent Eskom Board and the new Minister (Portfolio Committee on Public Enterprises, 2018). Gigaba's tenure commenced with an unprecedented interest in

6 Other generation expansion plans had included international deals to source power, for example, from Mozambique, as well as the Inga hydroelectricity project in the Democratic Republic of Congo (DRC) (Van der Heijden, 2013).

Eskom's inner workings, policies, Board and significantly, major procurement underway at the time. In 2011, Gigaba quickly moved to supplant Eskom's Board, leaving only Bernie Fanaroff, and Boni Mehlomakulu (both appointed in 2010) in their positions. He appointed Zola Tsotsi to the position of Eskom Chairman. Although not clear at the time, Tsotsi appears to have been appointed to execute orders from outside, particularly those of the Gupta family, whose interests were allegedly taken as proxy for President Zuma's:

> When I had the occasion to discuss something with him [Rajesh Gupta], and when I was not able to give it to him, he turned around and he said he must report me to Baba [President Jacob Zuma] ... The impression he gave me was that he had a very close relationship with Baba and that he could do anything. (Zola Tsotsi quoted in Portfolio Committee on Public Enterprises, 2018)

Tsotsi would be implicated in 2017, by several witnesses, in acts of corruption, as well as being characterised as a conduit for political interference in Eskom's operations and spending (Portfolio Committee on Public Enterprises, 2018). Gigaba and Tsotsi's Board comprised a host of individuals, many of whom were notably conflicted: Queendy Gungubele, Neo Lesela, Bejabulile Luthuli, Chwayita Mabude (removed by Brown in 2017 for Gupta links), Yasmin Masithela, Collins Matjila (linked to the Gupta family in the #Guptaleaks emails), Mafika Mkwanazi (Transnet Chair), Phenyane Sedibe and Lily Zondo.

Eskom's Board plays an important role in approving major procurement, above a material threshold. Within the Board, the Board Tender Committee (BTC) is particularly instrumental in co-determining the procurement agenda, along with the more technical Executive Procurement Sub-Committee (EXCOPS). Gigaba and his new Board undermined procurement processes and expertise within the incumbent EXCOPS. Just months into the position, Gigaba refused to sign off on the award of a R4bn tender for the replacement of six steam generators at Koeberg Nuclear Power Plant (Portfolio Committee on Public Enterprises, 2018). The tender had already been through a technical review, ratified by the executive and approved by the Board. However, when it came to ratifying the decision, Gigaba refused. This was the first of a slew highly irregular procurement processes to take place under Gigaba and Tsotsi's leadership.

6.3.2 Setting Up a False Pro-transformation Smoke Screen to Cover Corruption

Gigaba disingenuously framed his actions as the long overdue reversal of Eskom's historical role in the apartheid economy, of bolstering white business elites and serving white interests, broadly (Portfolio Committee on Public Enterprises, 2018;

Baker, 2019). In contrast, Gigaba styled himself as the architect of a new black industrialist class, which, until his arrival, he saw Eskom as undermining through its procurement decisions. At the Eskom Inquiry, Ms Tsholofelo Molefe, then newly appointed Financial Director at Eskom, testified that Gigaba's Chief of Staff, Nhlanhla Msomi, requested that she take a meeting to address the dissatisfaction of black suppliers with Eskom's procurement processes:

> [Mr Msomi] then indicated that there are [...] black suppliers that are complaining that Eskom is not providing them with contracts and they would like to meet and just lay their complaints [...] When I meet the supplier, it was Salim Essa and when I asked him what company he works for he, he did not divulge the company. (Tsholofelo Molefe quote in Portfolio Committee on Public Enterprises, 2018)

Far from promoting black business, Msomi, acting as Gigaba's emissary, opened the door for the notorious Gupta enforcer and intercessor, Salim Essa. Economic transformation provided the necessary cover for Essa to transplant consulting company, Regiments Capital, and later Trillian Capital, from Transnet's supply chain to Eskom's. Both companies would undertake corrupt deals, and function as agents for corrupt transactions and alleged money laundering, working in partnership with more established management consultancy, McKinsey & Co, as well as other Gupta-linked companies. Direct payments to these companies would cost Eskom more than R1.5bn, excluding the irregular expenditure that they brokered.[7] Gigaba also changed Eskom's rotation of auditors, retaining only one, SizweNtsalubaGobodo (SNG).

Even more boldly, Gigaba used his false transformation narrative to commandeer coal supply contracts in service of corrupt transactions and relationships. He insisted that Eskom's coal must be provided by miners with 50%+1 (fifty percent plus one) black ownership by 2018/19 (Portfolio Committee on Public Enterprises, 2018). While this move appeared to be in line with the spirit of BBBEE, it was never formalised in any policy or clearly aligned to the legislative framework for transformation that exists in South Africa. There was no uniformity or transparency in the application of this rule. Instead, it appears that his vague proclamation was used as a mechanism to arbitrarily unseat incumbent suppliers – the so-called coal majors[8] – and to empower

7 See the Report for Mr T.M.G Sexwale, Chairperson Trillian Capital Partners (Pty) Ltd on Allegations with regard to the Trillian Group of Companies and Related Matters" by Adv. Geoff Budlender, published on 29 June 2017; and the "Interim Report back to Eskom Holdings SOC Limited on an investigation of alleged irregularities in connection with the procurement of services from and payments to McKinsey and Company Africa (Pty) Ltd and Trillian Capital Partners (Pty) Ltd", published by Bowmans on 2 August 2017.

8 At this stage, Eskom's coal supply chain was dominated by so-called coal majors with whom the SOC had established relationships, for example, Anglo Coal, Glencore, South32 (previously BHP Billiton) and Exxaro.

Gupta-linked, and not black-owned companies (Portfolio Committee on Public Enterprises, 2018). In fact, the Eskom Inquiry was presented with evidence that Exxaro (which, until recently, was majority black-owned), was squeezed out to make room for the Gupta-owned Tegeta (Portfolio Committee on Public Enterprises, 2018).

6.4 STATE CAPTURE NETWORKS SEIZE CONTROL OF PROCUREMENT

Evidence presented during the Eskom Inquiry revealed that the Gupta network had been attempting to secure coal contracts with Eskom since at least since 2010 (Portfolio Committee on Public Enterprises, 2018). These early attempts included proposals from Gupta associated Arctos Trading and Gupta-owned Idwala Coal. They were rebuffed due to their failure to meet various technical and environmental standards. The boundary walls were weakened from 2013 onwards, however. Eskom began to lose seasoned executives and senior staff, many of whom were suspended on unsubstantiated charges and refused fair disciplinary proceedings. Following credible threats to his safety, Brian Dames stepped down as Chief Executive Officer (CEO) in March 2014, replaced in an acting capacity by Board member, Collin Matjila.[9]

Matjila, formally of the National Energy Regulator of South Africa (NERSA), had already overseen some suspicious procurement as head of the BTC. Alarmingly, his appointment to CEO, and by implication, his already problematic behaviour appears to have been commissioned by private sector non-Eskom and non-state actors. Evidence presented during the Eskom Inquiry revealed how Matjila's appointment was a coordinated effort on the part of members of the state capture network – perhaps the first overt instance of the Gupta-Zuma families' direct interference in the appointment of Eskom's executive (Portfolio Committee on Public Enterprises, 2018). The #Guptaleaks emails contain alleged correspondence between Gupta broker, Saliem Essa, and the Gupta brothers, circulating and discussing Matjila's resume. The brothers allegedly then forwarded it to Mr D Zuma (former President Zuma's son) on 22 March 2014.

As head of the BTC, and then acting CEO, Matjila undermined existing governance norms and processes to funnel money into corrupt transactions. In this position, he rubber-stamped significant irregular procurement, including deals with the widely discredited Gupta media house, TNA Media. Eskom were to pay the company R14m for a total 12 corporate breakfasts. While acting as CEO, Matjila facilitated the

9 According to Mr Tsotsi, an earlier decision had been made that no Board member would take up the acting CEO position. Mr Tsotsi informed Minister Gigaba of a process to appoint Steve Lennon some time towards the end of 2013 or in early 2014. According to Mr Tsotsi, however, the ministerial approval was revoked in March 2014, shortly before Mr Dames' departure.

ballooning of the TNA deal to R43m over a three-year term. He circumvented proper procurement procedures and also exceeded his mandated authority to get this deal approved, despite internal opposition from Eskom executives, Board members and legal counsel. This procurement is all the more problematic because it has since emerged that TNA Media was used as a mechanism to transmit money into Gupta-connected networks, including most notably, Oakbay Investments (Pty) Ltd, beneficiary of the illegal Optimum Coal Holdings transaction (Public Protector, 2016; Fundudzi Forensic Services, 2018; Portfolio Committee on Public Enterprises, 2018). Matjila facilitated other questionable procurement, including allegedly undermining an effort by Sal Laher (then Chief Information Officer) to save Eskom R1bn by internalising core IT functions. Instead, Eskom continued its relationship with the service provider, T-Systems, which is also connected to the Gupta network. In 2014, the Gupta-owned Tegeta submitted an official but unsolicited proposal to supply coal. With Eskom's personnel and processes significantly reconfigured, the Primary Energy Team accepted, despite Tegeta failing to meet coal quality, environmental and BBBEE requirements.

6.4.1 The Lights Go Out Again in 2014

By the end of 2014, Eskom's governance procedures were in chaos, and key positions were held by people since identified as part of the extended state capture network. Eskom's procurement funneled spending out of state coffers and circulating it through Eskom's suppliers to Gupta and Zuma-linked companies. Irregular and illegal processes ran in the shadows of Eskom's weakened institutions. As the focus of Eskom's leadership and ministry moved further and further away from Eskom's developmental purpose, load-shedding recommenced. Medupi and Kusile's construction was nowhere near scheduled completion, and spending was over budget and under scrutiny for irregularity. In this context, Matjila was replaced as CEO by Tshediso Matona. Mr Matona was tasked to bring order to the apparent chaos but he would be forced out by the same forces that ushered Matjila in (Portfolio Committee on Public Enterprises, 2018).

6.5 MINISTER BROWN TAKES THE HELM AND THE PROJECT EXPANDS

Having changed the character and role of the Minister of Public Enterprises' office, Gigaba was redeployed to Home Affairs. His successor, Lynn Brown, used and expanded the institutional space he created as an 'activist' shareholder. She began as Gigaba had, by replacing all but two non-executive members of the Board on 10 December 2014. Only Tsotsi and Mabude remained. What little institutional memory the Board had accumulated since Gigaba's overhaul just three and a half years

earlier was again decimated. Six[10] of Brown's eight new appointees had connections to the Gupta network and companies (Public Protector, 2016).

Soon after the Board reshuffle, in March 2015, Tsotsi oversaw an investigation into wrongdoing at Eskom, as well as the suspension of four executives, including Matona, Tsholofelo Molefe, Dan Marokane, and Matshela Koko. With load-shedding continuing and the SOC in serious financial trouble, these suspensions appeared unfounded and ill-advised (Portfolio Committee on Public Enterprises, 2018). In Tsotsi's testimony at the Eskom Inquiry, he indicated that his orders came via the Guptas, but went right to the top, to President Zuma himself (Capazorio, 2017). External private and political interests appeared intractably entangled with organisational function and governance. In this morass, the suspended executives had failed to comply with the new rules of the game, resulting in their departures. Koko was the only exception. He alone made it back from suspension, going on to be implicated in multiple irregular and illegal procurement scandals, connected to the Guptas and their political allies.[11] Tsotsi's investigation closed, and the Board asked Dentons, the law firm that had conducted the investigation, to remove the names of any implicated individuals, including Koko, and companies in their final report. It was resolved to destroy all copies of the original draft. The final report then went to the Minister but was kept from the public and parliament.

6.6 2015-2019: CAPTURE INTENSIFIES WITH TWO NEW CAPTAINS

On 17 April 2015, just before Koko would be reinstated as Group Executive for Technology and Commercial in July 2015, Minister Brown seconded Brian Molefe from Transnet and appointed him acting Chief Executive. In August 2015, Brown then seconded Anoj Singh, also from Transnet, and appointed him acting Chief Financial Officer (CFO). Molefe and Singh would be implicated in more corrupt and illegal deals as part of an unofficial network that extended into the Ministries of Public Enterprises, Energy, and Mineral Resources, the Presidency, private companies (including banks

10 The following information was reported to parliament and to the Zondo Commission. Dr Ngubane was a former Director of a company with a shareholding in Tegeta (Essa was also a shareholder). Mr Mark Pamensky has various Tegeta and Gupta-linked interests. Ms Devapushpum Viroshini Naidoo's spouse is a Director of Albatime, one of the companies that funded Tegeta's acquisition of Optimum Coal Holdings (OCH), as well as an advisory to Minister of Mineral Resources, Mosebenzi Zwane. Ms Nazia Carrim is related by marriage to Essa. Mr Romeo Khumalo served on a Board with Essa. Ms Mariam Cassim is a former employee of the Gupta-linked Sahara Computers.

11 A report published by National Treasury found that "Mboweni, Koko, Nteta and Mabelane contravened the provisions of the Medium Term Mandate and section 57(c) of the PFMA in that they concluded or caused to be concluded, a CSA with an entity which was not 50%+ 1 at the time of conclusion" (Fundudzi Forensic Services, 2018).

and management consultancies), and various government departments. The origin and implementation of procurement decisions were unclear and not easily traceable. Official documentation from this time, reviewed through the Inquiry, often did not have requisite sign-off or was incomplete.

According to testimony before parliament and the Zondo Commission, Molefe and Singh were critical to the events that would eventually lead to the unravelling of the state capture web. Tegeta, now wedged in Eskom's supply chain, was undoubtedly the boldest and most costly achievement of the state capture project at Eskom. First, inflated contracts were signed with the Gupta-owned company, which displaced better quality and more affordable coal supply.[12] Second, these contracts were expanded to increase Tegeta's winnings. Next came the most outrageous of all actions. Eskom facilitated and financed Tegeta's acquisition of Optimum Coal Mine (OCM) and Optimum Coal Holdings (OCH) from Glencore (then majority shareholder from Glencore).

The story was astonishing. A public entity, Eskom, leaned on Glencore to force the sale of not only OCM, but also of its parent company, OCH, to benefit another private company. In 2013, Glencore had invoked a hardship clause in OCM's coal supply agreement because costs exceeded the established price. This triggered a series of negotiations that eventually resulted in a new agreement drafted by Eskom. One of Molefe's first actions as acting Chief Executive, however, was to stop this process. What followed was an escalating exchange that would culminate in OCM instating a business rescue process on 31 July 2015. Shortly before, however, KPMG delivered a letter to Glencore stating that one of their clients, later revealed to be Gupta-linked Oakbay Investments (Pty) Ltd, wanted to buy the mine. The business rescue practitioners testified to the pressure from Eskom executives to sell OCM, as well as OCH, which had not originally been planned. Tegata, an Oakbay subsidiary, would put in an offer to purchase OCH. Tegeta's shareholders included Mabengela Investments (Pty) Ltd (owned by Duduzane Zuma) and Elgasolve (Pty) Ltd (owned by Salim Essa). In December, an offer to purchase was indeed accepted, but without funds to close the deal. Eskom executives orchestrated a range of payments to Tegeta and other Gupta-linked companies, as well as an illegal guarantee in the amount of R1.68bn to Tegeta for an 'in principle' agreement to supply coal from a mine it did not yet own. All this was approved by Lynne Brown's Board. A public utility effectively bankrolled a private transaction with enormous risk to the country. The business rescue practitioners filed

12 In January 2015, Eskom entered into negotiations with Tegeta and on 10 March 2015, around the same time executives were suspended, a 5-year coal supply agreement (CSA) was signed, whereby Tegeta would supply 65 000 tons of coal per month to Majuba Power Station at a rate of R277 per ton (a higher price than any other coal suppliers to Majuba and higher than Leeuwpan which is owned by Exxaro) effective 1 April 2015.

a report with the Directorate of Priority Crime Investigation (DPCI) under Section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004). The NPA took years to respond.

Molefe would resign soon after the *State of Capture* report was published. Following his resignation, Brian Molefe received an unheard-of R30m early pension payout, after just 18 months at Eskom. Contrary to the findings of the Inter-Ministerial Committee[13] established by former President Zuma in June 2017, the North Gauteng High Court ruled in January 2018 that the early retirement agreement was a "deliberate scheme devised by Eskom with the involvement of Mr Molefe". What's more, the Court found that Minister Brown and Eskom "acted irrationally in ignoring the damning allegations in the Public Protector's Report" that had precipitated Molefe's resignation. Eskom's payroll was already strained, as employees increased from 32 000 to 47 600 between 2003 and 2017.

Minister Brown reshuffled the Board again in June 2017, following the release of the *State of Capture* report (2016). The report shone a light on the role of a very compromised Board, enabling and legitimating irregular and illegal decisions and processes, particularly for the Gupta-linked Tegeta contract. Several members were patently conflicted when key resolutions were passed. In the fallout, there were several resignations and Chwayita Mabude was removed for alleged Gupta links. New Board members included Pulane Molokwane, Simphiwe Dingaan, Banothile Makhubela, and Sathiaseelan Gounden. With mounting political pressure, further changes were made, and an interim Board was appointed on 8 December 2019 by the Cabinet, presided over by President Zuma.

Zuma instated Zethembe Khoza as acting Chair. He would later also be implicated in the state capture project, allegedly informing Khulani Qoma, Eskom General Manager in the Office of the Chairperson, "Minister Brown is captured", at a meeting on 17 June 2017 (Portfolio Committee on Public Enterprises, 2018). The impact of this constant reshuffling was instability and a continued institutional erosion. Having replaced Minister Brown with former Finance Minister, Mr Pravin Gordhan, the newly inaugurated President Cyril Ramaphosa announced yet another new Board in January 2018. The new Board was also plagued by questions regarding its integrity and ability to steer Eskom towards a more stable and pro-development trajectory.

13 The Inter-Ministerial Committee comprised: Finance Minister Gigaba, Public Enterprises Minister Brown, Justice Minister Michael Masutha, and Energy Minister Mmamoloko Kubayi. This committee found that Eskom had mistakenly paid Mr Molefe his pension, but that "mistakes were made in good faith".

6.7 CONCLUSION: WHAT WAS LOST IN THE LOOTING

The country's first Department-led Integrated Resource Plan (IRP) 2010-2030[14] included a plan, although contested, that appeared to herald an era of increasing transparency and accountability, in a sector so intertwined with toxic colonial and apartheid evolution of South Africa's state and economy. While officials updated the IRP in 2013, 2016 and 2018, the first ratified update was published in October 2019. This signals almost a decade without policy direction. In the interceding years, Eskom's ailing infrastructure continues to generate financial, ecological and social risks for South Africa's people. Additionally, in 2019, Medupi and Kusile had almost doubled projected costs, and have failed to solve the issue of nationwide load-shedding. While Eskom remains a public entity, it functioned as a porous membrane between state coffers and powerful private interests. Not only were institutions and resources captured, so too was the purpose and function of the electricity system

The full financial and opportunity costs of capture at Eskom is yet to be established. Although state capture networks rescinded, Eskom's internal issues continued. Evidence of this failure includes the R19bn in irregular expenditure exposed in the 2017/2018 financial report, increasing costs of primary energy and electricity, continued load-shedding and the risk of Eskom's debt to the national fiscus. The electricity system has been unjust in both process and outcome since its inception and state capture merely continued to entrench this. Structural reform now underway, unbundling Eskom into independent state-owned transmission, distribution and generation businesses, has been positioned as a remedy to the system that existed before state capture and allowed it to thrive. However, the existing crisis of accountability will demand more than a corporate governance fix. As the country transitions to a low-carbon economy, it will need to define and implement that 'more' to design an electricity system that is credibly developmental.

14 The first three national energy plans had been drafted by NERSA (Van der Heijden, 2013). This had drawn energy planning into a more public forum than had been the case during apartheid.

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7 STATE CAPTURE AND THE ECONOMICS OF CORRUPTION: THE CASE OF TRANSNET

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The financial epicentre of state capture in South Africa has been located, without any doubt, within the country's State-Owned Enterprises (SOEs). As we will elucidate below, many of these SOEs have large procurement budgets, which served as the channel through which billions of rands were illicitly transferred to individuals and private companies who formed the core recipients of the state capture project. In this chapter, we present a case study of Transnet – the country's transport SOE – which has been deeply implicated in state capture, with devastating financial results. By focusing on a single entity over several years, we are able to combine various sources of data to analyse the value, evolution and impact of illicit flows. We establish the scale of the rents available, piece together a network of the firms and individuals linked to state capture at the parastatal, produce estimates of the total value of tainted deals and kickbacks, and track one of the largest deals to show how money was paid to third-party firms and laundered internationally. Together, by focusing on Transnet, we provide a replicable empirical case study of state capture in its operational detail at one of the major nodes of organised corruption in South Africa's recent history.

For much of the 20th century, parastatals have been central to South Africa's growth trajectory, accounting for a large share of government expenditure and operating in key sectors of the economy (Freund, 2018). This remains the case today, where SOEs control significant state funds that are concentrated primarily in energy, transport, and telecommunications. In 2017, South African SOEs together earned an aggregate revenue that accounted for approximately 12% of annual GDP (National Treasury, 2018). However, there are a small group of parastatals that make up an outsized proportion of this contribution to national revenue, and many of these are also the biggest spenders. Taking the 11 largest SOEs in South Africa, we estimate that their combined annual revenues amount to over R380bn, with capital expenditure of almost R116bn. To put this into perspective, R380bn of income is equivalent to 28% of total government revenue, and R116bn in spending is 7.5% of total annual government

expenditure. Table 7.1 reports these figures and lists each parastatal to show both capital expenditure and revenue as a percentage of total government spending and income.[1]

7.1 TRANSNET AS A KEY PLAYER

From Table 7.1 below, it is immediately clear that the majority of revenue and investment spending resides with the country's electricity utility. Eskom reports capital expenditure of R66.5bn – making up over half of the total capital expenditure of SOEs listed here – and annual revenue of R177bn. Transnet has the second highest capex and revenue, at R21bn and R65bn, respectively. Taken together, Eskom and Transnet account for around 75% of total SOE capex in the table, and close to 6% of total government expenditure.

Table 7.1 Capital Expenditure and Revenue, selected SOEs: Rm, 2016/17

SOE	SOE Capex	% SOE Capex	% Total Govt. Exp.	SOE Revenue	% SOE Revenue	% Total Govt. Revenue
ACSA	893	0,77	0,06	8 583	2,25	0,63
City Power	1 800	1,55	0,12	15 727	4,13	1,16
CSIR	144	0,12	0,01	2 712	0,71	0,20
Denel	66	0,06	0,00	8 057	2,12	0,60
Eskom	66 578	57,51	4,31	177 136	46,51	13,09
PetroSA	779	0,67	0,05	10 357	2,72	0,77
SAA*	14 863	12,84	0,96	30 385	7,98	2,24
SAPO	54	0,05	0,00	4 539	1,19	0,34
SITA	497	0,43	0,03	5 681	1,49	0,42
Telkom	8 654	7,48	0,56	40 970	10,76	3,03
Transnet	21 438	18,52	1,39	65 478	17,19	4,84
TOTAL	115 766	100,00	7,50	380 822	100,00	28,13

**Note: SAA capex data only available for 2015/16 financial years. Rand values are presented in nominal terms.*

Sources: Own calculations using ACSA (2017); City Power (2017); CSIR (2017); Denel (2017); Eskom (2017); National Treasury (2019); PetroSA (2017); SAA (2016); SAPO (2017); SITA (2017); Telkom (2017) and Transnet (2018)

This scale of spending emphasises the sizeable role of the state in procuring goods and services from domestic and foreign private firms. Access to these contracts, and the facilitation of this access by corrupt officials, has been central to state capture in South Africa. As the country's two largest SOEs, both Eskom and Transnet have

1 According to the national government's website there are currently 171 public entities in South Africa at the national, provincial and municipal level (National Government, 2019).

been crippled to an extent that now threatens their financial viability and capacity to manage substantial government-backed loans (of R350bn and R3.5bn, respectively) (National Treasury, 2018).

7.2 TRANSNET'S SPENDING BOOM

Over the last decade, one of the focal points of Transnet's business efforts has been increasing the capacity of its freight transport operations in order to meet an anticipated growth in demand (Transnet, 2018). This required a significant investment boost, and in 2012 the parastatal began a systematic programme of capital expansion, termed the Market Demand Strategy (MDS). The MDS was a R300bn, seven-year, capital investment plan with an overall operating budget of R420bn – designed to expand rail, port and pipeline infrastructure (PMG, 2015; Transnet, 2018). However, as we will discuss below, it coincided with billions of rands in corrupt deals at Transnet and massive kickback payments on many of the high-value procurement contracts signed during this period. As with Eskom, the considerable scale of the rents available through procurement spending made Transnet particularly attractive as a site for the theft of state funds (Eberhard & Godinho, 2017).

Following its new procurement strategy, Transnet's annual capital expenditure increased rapidly – growing from R28.3bn in 2012 to R31.7bn in 2014 and reaching R36.4bn in 2015, which was the largest amount ever spent in a single year at Transnet (PMG, 2019).[2] However, in 2016, the progressive spending began to falter for a number of reasons. From a financial perspective, there was a re-appraisal of the MDS given that the projected economic growth upon which it was modelled had not been realised (PMG, 2019). Over the next two years, capital spending decreased to pre-2012 levels of around R20bn per annum. As a result, by 2018 only about half of the MDS budget had been spent, despite the strategy being in its final year (Transnet, 2018). This spending revision was not unexpected given that at the outset Transnet's underlying business case for the MDS does not appear to have fully assuaged doubts expressed by the National Treasury regarding its financial viability. In 2013, the then Minister of Finance, Pravin Gordhan, openly expressed his scepticism about the various growth and demand assumptions underpinning the MDS (Werksmans Attorneys, 2017). Gordhan was concerned that the project's profitability was reliant on Transnet's freight rail division experiencing growth in transported volumes in excess of GDP growth, and that a plan to introduce increased tariffs levied at above inflation in order to grow revenues was problematic (Werksmans Attorneys, 2017). It was also midway through 2016 that the first detailed reports of large-scale corruption at

2 Rand values are given in real, 2018 prices.

Transnet began to make national headlines,[3] and in November 2016 the SOE featured prominently in the Public Protector's *State of Capture* report (amaBhungane and *Mail & Guardian*, 2016; Public Protector, 2016; Skiti & Jika, 2016).

7.3 HOW THE RENTS WERE ACCESSED

Transnet's financial operations, including the MDS, were overseen by Mr Anoj Singh, Transnet CFO from 2009-2015. This period overlaps with what we identify as the financial high point of state capture – 2014 and 2015. Evidence suggests that, together with a network of individuals at the parastatal and the Guptas, prominent government official Singh used his control of financial procedures and a ballooning procurement budget to facilitate corruption on a grand scale.[4] The first major move to facilitate access to the large rents available at Transnet, and the billions more to come, occurred in 2010, when Malusi Gigaba became the new Minister of Public Enterprises. This gave him oversight of the parastatal's management and top jobs, as well as detailed knowledge about the MDS and the spending increases it entailed (Bhorat, Buthelezi, Chipkin, Duma, Peter, Swilling & Friedenstein, 2017). With Gigaba occupying a controlling position over Transnet, a string of new appointments to powerful positions began – ultimately putting crucial members of a state capture network in place (Pillay & Prins, 2018). This began in earnest in 2011 with the unusually rapid appointment of Brian Molefe as Transnet CEO. Molefe had close connections with the Gupta family and in a pattern that soon became familiar, their family newspaper – *The New Age* – predicted his appointment (Bhorat et al., 2017).

After being dismissed in 2010 for awarding irregular contracts, Siyabonga Gama was reappointed as the head of Transnet Freight Rail (TFR) in 2011 by a newly constituted Board under Molefe (Pillay and Prins, 2018; PMG, 2019). Then in August 2012, Iqbal Sharma, a well-known Gupta associate, was placed at the helm of the Board of Acquisitions and Disposals Committee (BADC) – a new Board established to oversee large infrastructure spending at the parastatal (Transnet, 2012; Bhorat et al., 2017). Sharma was also a business associate of Salim Essa, a central figure in the state capture web, who was paid billions of rands in kickbacks from Transnet deals between 2012 and 2016 (Bhardwaj, Sole & Brümmer, 2014). Other senior Transnet employees linked to state capture include Stanley Shane, Phetolo Ramosebudi, Seth Radebe, and Richard Seleke (Pillay & Prins, 2018).

3 Although detailed corruption allegations were already being published much earlier (see for example, Bhardwaj, Sole & Brümmer, 2014).

4 Transnet has recently instituted criminal proceedings against Singh for his conduct and the South African Institute of Chartered Accountants (SAICA) has suspended him pending disciplinary action. He left Transnet and moved to Eskom, where he was suspended in 2017 and resigned in 2018. He has also been charged for misconduct at Eskom.

Alongside others at Transnet, these men were the key actors in the looting that took place at Transnet, actively using their positions to enable dozens of corrupt deals, almost all of which have been connected back to the Gupta family network (Public Protector, 2016; Bhorat et al., 2017; Werksmans Attorneys, 2017). This facilitation of corruption includes manipulating management and financial procedures, establishing a culture of deception and mistrust at the parastatal, and sharing confidential information in order to ensure procurement contracts were awarded to firms that paid kickbacks to those in the network. Subsequent investigative reporting shows that the Guptas received kickbacks from at least seven large companies based on their contracts with Transnet (*BizNews*, 2017).

7.4 TRANSNET–GUPTA INTERACTIONS

Additional evidence of the Guptas' interest in Transnet, and their links to key Transnet Executives, emerged from correspondence contained in the so-called #GuptaLeaks. This cache of leaked emails come from the Gupta-owned company Sahara, which functioned as an operational base for the family's state capture activities and contains detailed information about the network that developed around the Guptas from 2012-2016. Much of the incriminating evidence from the emails has already been reported on in detail, but the leak also contains data that offers up a timeline of interactions between the Gupta brothers and various government and SOE officials.[5] What this reveals in the case of Transnet is how these interactions increase and overlap almost directly with the most damaging years of corruption at the parastatal. As we discuss below, estimates indicate that over R37bn was spent on deals linked to corruption at Transnet between 2013-2018, and nearly R8bn was paid to Gupta-linked firms in direct kickbacks. More specifically, the emails reveal how a private software firm with no formal links to the parastatal and no legitimate interest in its activities, or the large contracts it was securing with various international suppliers, was engaged in discussions about the parastatal and in direct contact with top Executives.

To examine the extent to which the Guptas discussed Transnet issues and to look more closely at their correspondence wih Executives at the SOE, we create a searchable database of the full email cache. This allows us to identify and examine conversations between various members of the Gupta family (via Sahara) and specific individuals at Transnet. In Figure 7.1 below, we use this information to produce a simple heat map that tabulates mentions of the word 'Transnet' in the leaked emails over time. We are then able to plot these mentions, which serve as a proxy for all the recorded email conversations taking place regarding the SOE.

5 For an overview of all investigative reporting from the #GuptaLeaks, see https://www.gupta-leaks.com/

The picture that emerges is a useful guide that aligns with the broader story of state capture at Transnet.

The horizontal lines in the figure represent the mean (average) and median number of times the word appears in the email cache over a four-year period. What is immediately clear is the spike in email discussions of Transnet issues in the Gupta archive from 2014 onwards. The box in the figure emphasises how the distribution of these mentions coincide both with the period of increased expenditure at the parastatal, as well as with the most financially destructive period of state capture. The median monthly word count is about 2.5 over the full period, but in mid to late 2014 this number increases to around 10, and in June of 2015 'Transnet' is mentioned 30 times in a single month, in separate email chains. On its own, this data is suggestive and presents circumstantial evidence of just how much attention the Guptas gave to Transnet, reflecting their indirect financial interest in key deals taking place at the SOE. This assertion aligns with a wealth of investigative reporting on the relationship between the Guptas and corrupt Transnet officials, and the looting they carried out. Indeed, recent court papers reveal in relative detail how kickbacks from Transnet deals were channelled to Sahara – as Comrie (2018a) reports, 98% of Sahara's profits in June of 2015 came through illicit payments extracted from Transnet.

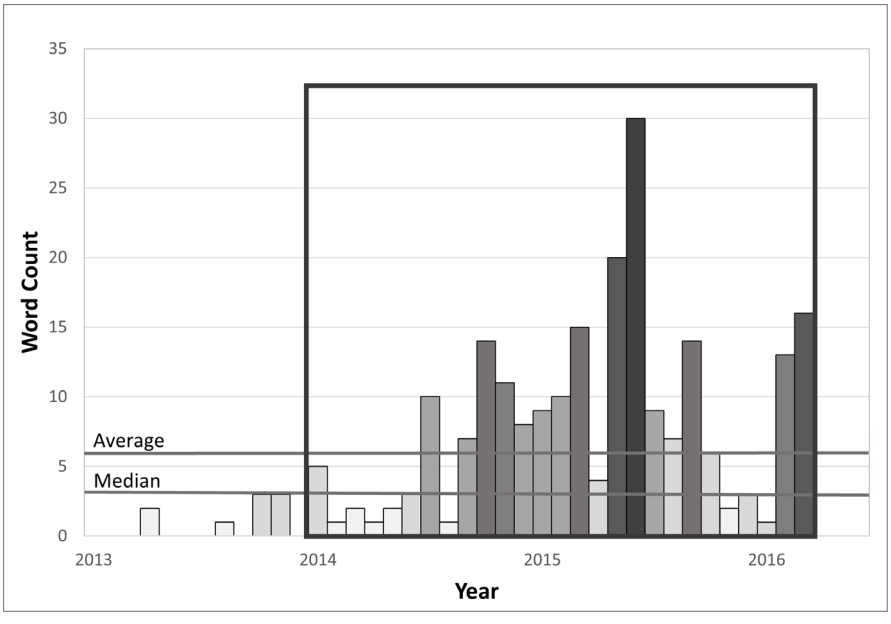


Figure 7.1 Heat map of Transnet mentions in the #GuptaLeaks: 2013-2016
Source: #GuptaLeaks (2017), own calculations

The contents of the emails in this edited archive, as well as attached documents and spreadsheets, are also indicative of the way in which Transnet Executives worked to facilitate corruption. Correspondence with the Guptas, and Managers at Sahara, include

discussions of internal Transnet HR issues, minutes of Transnet Board meetings, specific procurement contracts now linked to corruption, tender documents, and the concerned sharing of newspaper articles exposing corruption at Transnet.[6] For example, on 19 May 2014, Iqbal Sharma sent the draft agenda for a meeting of the BADC – the Board responsible for contracts dealing with large-scale infrastructure projects – to a Gupta family member. This was ahead of a meeting scheduled for 26 May 2014. The agenda noted that Anoj Singh was going to update the Board on the increase in the estimated total cost of a large locomotive procurement project – the purchase of 1 064 locomotives – in which the overall costs had risen from R38bn to R54bn. To state the obvious, this is confidential information about a set of lucrative SOE contracts to which the Guptas should not have been privy. The timing of this exchange is also significant since it happened before the Board had met, giving the Gupta family prior knowledge of what would be discussed. This deal eventually resulted in kickback payments of R6.4bn going to Gupta-linked firms. The figure rises to just over R7bn if payments from consulting services, which helped to structure and inflate the locomotive deal, are included.

7.5 THE COST OF STATE CAPTURE

Over the course of 2013-2018, Transnet rapidly became ever more tangled in a vast web of corruption with costs that are far reaching and remain difficult to fully quantify. However, collating all the information currently in the public domain, we can establish an initial estimate of some of the major financial flows. We do this using data from a wide variety of sources including payments and contracts uncovered by investigative journalists, information contained in the #GuptaLeaks, commissioned reports on Transnet produced by various government departments, Transnet financial statements, court documents, as well as evidence made available through the Zondo Commission. To foreground our two key results on the scale of the looting, Transnet spent a total of R37bn over the 2013-2018 period on contracts that had direct links to state capture, amounting to 60% of the company's capex and 10% of its total revenue over the same period. From these contract payments, we identify kickbacks totalling R7.7bn.[7] These totals are as accurate as possible given the availability of information to date, but we caution that they are almost certainly underestimates. Some of the major tainted deals are briefly discussed from page 142.

6 Several of the emails that provide clear evidence of corruption have been quoted and discussed at length in articles by amaBhungane and Scorpio (see amaBhungane & Scorpio [2017a], for example).

7 The period for which we can identify contract values and payments to Transnet suppliers (2013-2018) differs from the period for which we can identify kickback payments (2012-2015). This is simply because our efforts at piecing together the underlying data only allow us insight into these timeframes.

CHASING THE MONEY TRAIN

HOW THE SHADOW STATE INFILTRATED AND LOOTED TRANSNET

CORRUPTION NETWORK AND INDIVIDUALS

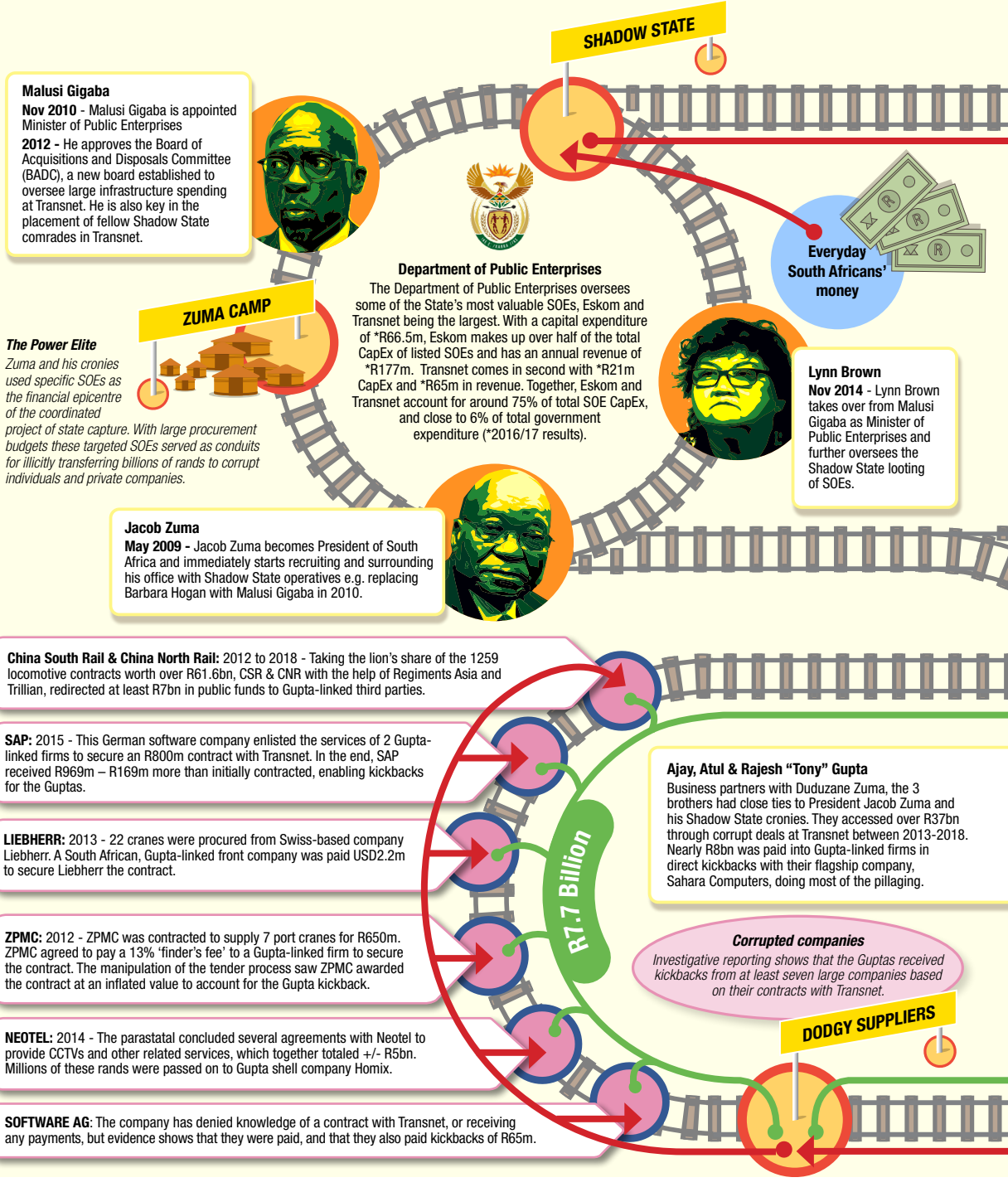


 FIGURE 7.2 Visualising State Capture of Transnet

UNIVERSAL GRAPHIC KEY

- The Shadow State Power Elite
- The Fixers and Enablers
- The Brokers

- Crossroads where dodgy dealings took place
- Corrupt, unethical companies
- In the public's interest

- Tracks of corrupt network
- Where the money comes from
- Kickbacks & fraudulent money siphon flow
- Laundered loot and bribe money

Siyabonga Gama

2010 - Siyabonga Gama is dismissed from Transnet Freight Rail (TFR) for irregular contracts.

2011- Aided by fellow Shadow State operative Brian Molefe, he is reappointed head of TFR, and later CEO of Transnet.



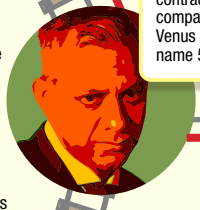
Transnet - The Captured SOE

As one of the largest SOEs, Transnet accounts for almost 1.5% of gov expenditure and near 5% of gov revenue. It has 55 666 employees and assets worth R370bn. Transnet spent a total of R37bn between 2013- 2018 on contracts that had direct links to state capture, amounting to 60% of the SEO's CapEx, and 10% of its total revenue. From these contract payments, kickbacks totaling R7.7bn were identified.

Anoj Singh

2009 - Anoj Singh is appointed CFO of Transnet. With the final say on the SOE's financial matters, he was pivotal in the extracting of rents.

Highlight: 20 Oct 2014, just three days after Transnet awarded China South Rail (CSR) the 359-locomotive contract, the Guptas open up a shell company, Venus Ltd, in the UAE. Venus is transferred into Singh's name 5 weeks later.



CORRUPTED SOE

The Fixers

These Shadow State operatives facilitated corruption by manipulating management and financial procedures (establishing a culture of deception and mistrust at the parastatal) and sharing confidential information - ensuring procurement contracts were awarded to firms that paid kickbacks.

Brian Molefe

2011 - Brian Molefe is appointed CEO of Transnet (after a litany of previous dodgy dealings at Telkom). A newly constituted Board is set up at Transnet at the same time.

2012 - He initiates the lavish MDS (Market Demand Strategy) a 7year investment plan with a R420bn budget.





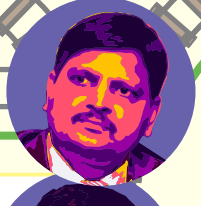
Iqbal Sharma

2012 - Sharma is appointed head of the Board of Acquisitions and Disposals Committee (BADC), a new board established to oversee large infrastructure spending at the parastatal. A business associate of Salim Essa, he was a central figure in the state capture web, and was paid millions in kickbacks from Transnet deals between 2012-2016.

Bribes and power payouts distributed throughout the Shadow State network

SAXONWOLD SHEBEEN

R37 Billion



The Saxonwold Shebeen

The Gupta compound is where the Gupta brothers, Essa and other brokers of State Capture met. As HQ of Sahara, JJ Trading, GSS, Homix, Worlds Window, Regiments Asia,Trillian, and other fraudulent companies, it is where many of the State Capture recruitments, schemes and bribes happened.



Salim Essa

Gupta Lieutenant, Essa, was key in setting up several Gupta family companies in which he has shares, (Regiments Asia, Tequesta and Trillian being most notorious).

Highlight: Essa was paid a R50m finder's fee for securing a Transnet contract for Regiments.





SAHARA | TRILLIAN CAPITAL PARTNERS | REGIMENTS Enabling Progress

Fraudulent Gupta companies - The Trillian e.g.

Set up by Essa, Trillian eventually took over from Regiments. Together the 2 companies were paid R1.1bn by Transnet, with R615m of this being kickbacks.

The Laundromats

These are inactive shell companies used to launder illicit rent extractions. The Guptas' 2 biggest shell companies, Tequesta and Regiments Asia were registered on the same day, with the same address and appear to do no independent business. Their only activity is getting money from CSR and CNR and channeling it to other unknown shell companies in various financial jurisdictions i.e. China, Dubai and UAE.

SHELL COMPANIES



Example of how the laundering happened

Over 2 years Tequesta made 244 separate payments with a mean value of +/- USD250,000 = USD61m

TIMELINE OF KEY EVENTS

Following the locomotive 'train wreck'

MARCH 2014

17 Mar - Brian Molefe announces Transnet signed contracts with 4 separate suppliers for another 1064 locomotives. CSR and CNR due to supply 359 and 252 locomotives, respectively.

20 Mar - Guptas set up Venus shell company in UAE. 5 weeks later Venus is transfered into Singh's name.

22 Oct 2012 - Transnet announces locomotive contract for R2.7bn.

2013 - China South Rail (CSR) to provide 95 locomotives.

End 2013 beginning 2014 - CSR win tender to provide a further 100 locomotives for R4.4bn.

2010

Malusi Gigaba becomes Minister of Public Enterprises

He gains oversight of the parastatal's management and top jobs, as well as detailed knowledge about the MDS and its spending increases.

2011

Brian Molefe becomes CEO of Transnet

Gupta owned paper, The New Age, predicts Brian Molefe's appointment as Transnet CEO. It is noted that Molefe had close connections with the Gupta family and the family newspaper.

Siyabonga Gama reappointed Head of TFR

A newly constituted board under Molefe institutes this despite Gama having been previously dismissed from TFR in 2010 for awarding irregular contracts.

ZPMC awarded contract for 7 cranes

6 Sept - The contract worth R650m sees R95.6m going to a Gupta shell company.

2012

Iqbal Sharma at head of BADC

Aug - The well-known Gupta associate is instated by a new board to oversee large infrastructure spend at the parastatal.

MDS is approved and implemented

The R300bn, 7 year, capital investment plan with an operating budget of R420bn was designed to expand rail, port and pipeline infrastructure.

Highlight: Thanks to MDS, Transnet's CapEx increases from R28.3bn in 2012 to R31.7bn in 2014 and then to R36.4bn in 2015.

2013

Liebherr awarded 22 crane contract

Jul - A South African, Gupta-linked front company is paid USD2.2m to help secure Liebherr the contract.

Pravin Gordhan flags possible over-expenditure

Then Minister of Finance, Gordhan, openly expresses his skepticism about the growth & demand assumptions underpinning the MDS.

2014

Lynn Brown is appointed Minister of Public Enterprises

May - As part of Zuma's 2nd term of office, Brown is appointed new Minister of Public Enterprises. The looting continues.

R46 million Liebherr kickback

May - At least R46m ends up in a Gupta company in UAE from the 22 crane Liebherr contract.

T-Systems contract extended

The IT services contract Transnet had with South African company, T-Systems, is extended for over R2.5bn in payments by Transnet. T-Systems is linked to firms and individuals in the Gupta network.

Transnet approves deals with Neotel

The CCTV and related services provided by Neotel cost Transnet almost R5bn. As before, there is no competitive tender process and kickback payments to several Gupta-linked firms are included.

UNIVERSAL GRAPHIC KEY

- The Shadow State Power elite
- The Fixers and Enablers
- The Brokers

- Corrupt, unethical companies
- In the public's interest
- Highlights
- Highlights

FIGURE 7.3 Timeline of State Capture of Transnet

THE SYSTEMATIC CAPTURE AND LOOTING OF TRANSNET

How the money was extracted

19 May - Iqbal Sharma sends the draft agenda for a BADC meeting scheduled for the following week (26 May) to a Gupta family member. The agenda notes a rand increase for the 1064 locomotives.

26 May - Overall procurement budget approved by the compromised BADC, ballooned by 43% (from R38.1bn to R54.5bn), undoubtedly to incorporate the kickbacks that CSR & CNR had agreed to pay.

JUNE 2014

By end 2014 CNR & CSR deals are concluded with payments totaling +/- R25bn, with kickbacks to the Gupta network accounting for a staggering 25% of this.

Kickbacks from the locomotive contracts continue to flow into Gupta firms and shell companies well into 2018.

2015

Molefe and Singh close in on Eskom

Apr - Brian Molefe assumes CEO position at Eskom. Anoj Singh takes over as CFO of the new cash cow in Jul 2015. Siyabonga Gama takes over as CEO of Transnet and the pillaging of SA's 2 largest SOE coffers continues.

Software AG & GSS pilot project

Transnet approves an unsolicited proposal from Software AG and GSS (a Gupta company) and enters into a pilot IT project with them. Evidence shows kickbacks of R65m were payed to the Guptas by Software AG.

R800 million IT Tender issued

Nov - The tender only invited 1 bidder, SAP. The German software company enlisted the services of two Gupta-linked firms to secure an R800m contract with Transnet. In the end, SAP received R969m – R169m more than the initial contracted amount, the increase for kickbacks to the Guptas.

2016

SAP pay R100 million to Guptas

Apr to Dec - Payments are made to CAD House for landing them Transnet Contracts. CAD House distributes this to Sahara Computers and others.

Highlight: Public Protector's report released

Oct - Details of large-scale corruption at Transnet begin to make national headlines.
Nov - the SOE features prominently in the Public Protector's *State of Capture* report.

2017

#GuptaLeaks come out

Jun - Gupta emails leaked to media and a slew of investigative reports surface in public.

SAP Apologise for corruption

Sept - Co-founder of SAP, Hasso Plattner, makes public apology to South Africa for the R100m-plus bribes paid by the company for contracts at Transnet and Eskom between 2014 and 2016.

UK & US investigate Guptas

Oct - US and UK authorities announce that they will investigate money-laundering and corruption by the Guptas.

Werksmans investigates allegations

Transnet hires law firm Werksmans to investigate media allegations of impropriety linked to procurements of the 1064 locomotives.

2018

Werksmans report over-ridden

Before Siyabonga Gama is booted out as CEO, Transnet calls the Werksmans report "inconclusive" and declines to act on its recommendations.

Height of looting 2013-2018

R37 billion spent on deals linked to corruption

Nearly R8 billion in kickbacks paid to Gupta-linked firms.

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As alluded to above, the launch of the MDS represented a major opportunity for state capture. One of the earliest sizeable capital investment deals tainted by corruption at Transnet was for the supply of port cranes in 2012. The contracted company, ZPMC, had agreed to pay a 13% 'finder's fee' to a Gupta-linked firm in order to secure the contract (#GuptaLeaks, 2017). The resultant manipulation of the tender process saw ZPMC awarded the contract at an inflated value that incorporated the kickback, which was to be paid to the Gupta firm over the next two years (amaBhungane & Scorpio, 2017a). This practice of absorbing illicit payments into the estimated total cost of large contracts at Transnet continued for several years, with the Guptas being primary beneficiaries. Procurement corruption is of course a problem at many SOEs, but the events at Transnet were unique given the level of sophistication, scale and near total monopolisation of control at the parastatal during the heady days of intense and pervasive state capture. As the emails suggest, and our data below confirms, this form of corruption became more lucrative over time as existing procurement procedures and mechanisms in place to prevent corruption were routinely overridden. After the deal with ZPMC, a similar process followed in 2013, when 22 cranes were procured from the Swiss-based company Liebherr. A South African, Gupta-linked front company was paid USD2.2m in order to secure Liebherr the contract (#GuptaLeaks, 2017).

The corruption involved in these two crane deals is overshadowed by the events surrounding the procurement of over a thousand locomotives at Transnet, beginning in 2012 but reaching a highpoint in 2014. Two separate deals concluded in 2014, with two Chinese companies, involved payments totalling almost R25bn, with kickbacks to the Gupta network accounting for a staggering 25% of this. In financial terms, these locomotive deals were by far the most brazen and lucrative operation for the Gupta network. Transnet first contracted with one of these suppliers – China South Rail (CSR) – in 2012 to provide 95, and later another 100, locomotives. Both contracts were awarded through a process of confinement, which bypassed competitive tender procedures – a popular strategy to control which firms were awarded contracts at Transnet and also used at other SOEs (Fundudzi Forensic Services, 2018). Two years later, Transnet signed contracts with four separate suppliers for another 1 064 locomotives. CSR and China North Rail (CNR) were due to supply 359 and 252 locomotives, respectively. The overall procurement budget, approved by the compromised BADC, had ballooned by 43% (from R38.1bn to R54.5bn), in all likelihood to incorporate the kickbacks that both CSR and CNR had agreed to pay.[8]

8 In 2018, the BADC, which oversaw some of the largest corrupt deals, was abolished by the newly appointed Minister of Public Enterprises, Pravin Gordhan, who made it clear that SOE Boards should not be directly involved in procurement decisions (PMG, 2018a).

Kickbacks and corruption on a smaller financial scale also extended to key consulting services that Transnet procured to assist with its costly capital investment plans. In 2014, a firm called Regiments Capital became involved in consulting at Transnet (Pillay & Prins, 2018). Regiments had pre-existing links with several corrupt bureaucrats, as well as the Guptas, and began to use its influence to extract exorbitant rents from the parastatal. While the size of the contracts do not compare to the locomotive deals, the relative amounts that were paid onwards in kickbacks is stunning. In one instance, Salim Essa was paid a R50m finder's fee for securing Regiments a contract with Transnet, and during its engagements with the parastatal Regiments routinely paid kickbacks of up to 50% of its contract earnings to Gupta-linked firms (Comrie, 2018b). A similar role was played by Trillian, a separate consulting firm set up by Essa that eventually took over from Regiments and was awarded several lucrative Transnet contracts (Comrie, 2018b). Together Regiments and Trillian were paid R1.1bn by Transnet, and R615m of this was paid out by them in kickbacks – amounting to 56% of their total earnings. We view the consulting services component of state capture at Transnet as the generator of regular cash flow to these entities, whilst they worked on the longer-run aim of securing larger illicit gains from procurement contracts at Transnet and other SOEs.

As the circumvention of established procurement processes became more widespread at Transnet, and the Gupta-linked network gained increasing control, contracts in other areas of the company were targeted. SAP, a German software company, enlisted the services of two Gupta-linked firms to secure an R800m contract with Transnet (Pillay & Prins, 2018). In the end, SAP received R969m – R169m more than the initially contracted amount – with the increase accounting for the kickbacks due to the Guptas. SAP subsequently made a public apology for their role in state capture at Transnet (*Daily Maverick*, 2017). Another German company, Software AG, was engaged in a similar strategy with the same Gupta-linked firms. The company has denied knowledge of a contract with Transnet, or receiving any payments, but evidence shows that they were paid, and that they also paid kickbacks of R65m (amaBhungane & Scorpio, 2017a).

Other large contracts involving corruption at Transnet implicate a number of additional service providers. In 2014, the parastatal concluded several agreements with Neotel to provide CCTV and other related services, which together totalled almost R5bn (Brümmer, Comrie & Sole, 2016). Again, these were typically awarded without a competitive tender process and included kickback payments to several Gupta-linked firms (Brümmer, Comrie & Sole, 2016). The extension of an IT services contract with the South African company, T-Systems, also in 2014, led to payments from Transnet of over R2.5bn (Pillay & Prins, 2018). Again, there is evidence linking T-Systems to

firms and individuals in the Gupta network, the payment of kickbacks and, according to a Transnet source, the extension of the T-Systems contract in question "bypassed every process that exists in Transnet" (Pillay & Prins, 2018, p. 30).

To summarise the financial information linked to these various tainted deals at Transnet, we combine the data and present it in Figures 7.4 and 7.5 below. The figures are our best efforts to track the payments made by Transnet, and the illicit proceeds from these payments, over the 2012-2018 period.[9] Figure 7.4 plots the amount received by firms engaged in tainted deals with the parastatal – that is, contracts in which there is evidence of kickbacks being paid to third parties, while Figure 7.5 shows what proportion of these payments were passed on as direct kickbacks to firms or individuals.[10]

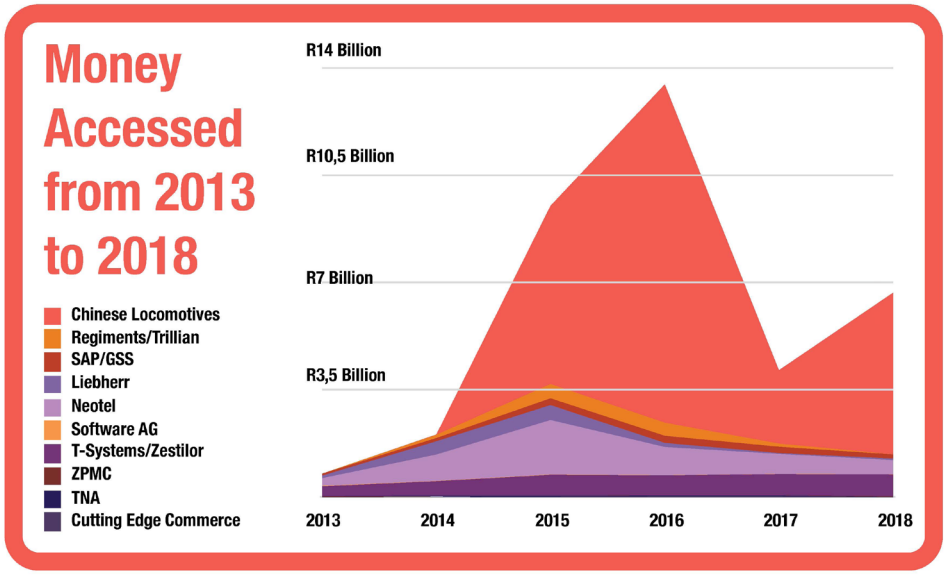


Figure 7.4 Tainted Deals by Supplier: Rbn, 2013-2018
Sources: #GuptaLeaks (2017); amaBhungane & Scorpio (2017a, 2017b); *BizNews* (2017); Brümmer, Comrie & Sole (2016); Comrie (2018b); Fundudzi Forensic Services (2018); Pillay and Prins (2018); Bhorat et al. (2017); Sole (2018)

What is immediately clear from Figure 7.4 is that the height of state capture at Transnet, purely in terms of the value of tainted contracts, was 2014-2016. This includes contracts with Neotel, Liebherr, SAP, Regiments, and Trillian. However, the largest spike in tainted contract payments over the period comes from the locomotive

9 We are unable to accurately deflate many of the illicit payments given the numerous and incomplete sources of data and the fact that we cannot accurately identify exact payment dates in many cases. As a result, all figures presented here are in nominal terms.

10 For Figure 7.5 our timeline ends in 2015 as we could not find verifiable evidence of new kickback payments beyond this date.

deal and payments made to both CSR and CNR. In Figure 7.5, we see the dominance of the kickbacks from these two locomotive contracts – together with the associated consulting services they account for over 90% of all kickbacks for which we can find data. Together then CSR, CNR, Regiments and Trillian are responsible for illicitly re-directing a total of at least R7bn in public funds to Gupta-linked third parties. Indeed, the consulting contracts with Regiments and Trillian, which were initially set up around this deal, but later extended into other areas of Transnet's operations, account for the second largest share of the total kickbacks.

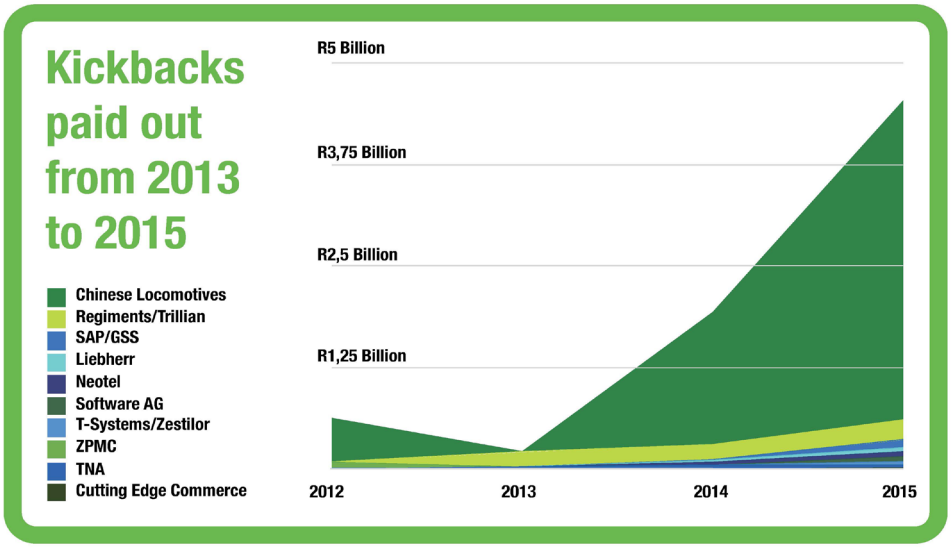


FIGURE 7.5 Kickbacks by Supplier: Rbn, 2013-2015
Sources: #GuptaLeaks (2017); amaBhungane & Scorpio (2017a, 2017b); *BizNews* (2017); Brümmer, Comrie & Sole (2016); Comrie (2018b); Fundudzi Forensic Services (Fundudzi Forensic Services, 2018); Pillay and Prins (2018); Bhorat et al. (2017); Sole (2018)

7.6 FOLLOWING KICKBACKS FROM THE CHINESE LOCOMOTIVE DEALS

In a final effort to examine what happened at Transnet, and where these billions of rands in stolen funds went, others have been able to follow some of the kickbacks paid by CSR and CNR for at least one additional step (Sharife, 2017). This provides a basic insight into how the Guptas' state capture network got their illicit funds out of the country and made the money flows nearly impossible to trace.

The vast majority of the locomotive kickbacks shown above were paid to two companies set up in Hong Kong by Salim Essa (Sharife, 2017). Indeed, data show that between 2015 and 2017, CSR and CNR paid a total of R3.3bn to Tequesta, and R840m to Regiments Asia. This positions these two companies set up by Essa at the heart of all

the kickbacks paid on tainted deals at Transnet. Evidence in the #GuptaLeaks indicates that the two companies were registered on the same day and share a physical address, but they appear to do no independent business. Bank statements show that their only source of income is from the CSR and CNR payments, and their only activity appears to be channelling this money onwards to dozens of shell companies around the world. The payments from CSR and CNR to Tequesta and Regiments Asia were made in a few large tranches, ranging from USD2m to USD11m at a time.

As has been reported, in the days after payments were received by Essa's companies, the money would then leave the accounts in many, much smaller transactions – crediting the accounts of unknown shell companies in various financial jurisdictions including China, Dubai, and the United Arab Emirates. Over a two-year period, Tequesta made 244 separate payments that range in value from around USD4 400 to USD600 000, with a mean value of approximately USD250 000. There is little doubt that the companies simply acted as a vehicle to move the illicit funds out of South Africa and thus limit the possibility of tracing the money. The sequence is the same each time: A large kickback payment is paid from CSR and CNR, and within several days almost all the money is sent on in smaller payments. It is unclear if HSBC, the bank with which Essa opened his company's accounts, notified South African or any other financial authorities about the suspicious transactions.

The picture that emerges from the payments made by CNR and CSR to Tequesta and Regiments Asia certainly fits a common pattern of money laundering. And the use of Hong Kong as a financial jurisdiction for companies with no business interest there is an obvious warning sign that suggests an attempt to avoid investigation by South African authorities. In addition, the structure of the money flows fits a classic money laundering cycle that is common globally and makes the money virtually impossible to trace (FATF, 2009).

This is then the final stage of a state capture project: how to hide the stolen funds. In this regard, several key features are clear. Firstly, the kickbacks are laundered to overseas accounts outside of South Africa, making the funds difficult to trace. Secondly, multiple firms are used in this process. Thirdly, once received, payments are sent onwards to dozens of other accounts in several repeat payment periods. And again, these accounts are in multiple financial jurisdictions, which makes tracking these funds as they scatter around the world in this way, virtually impossible.

What then has been the ultimate impact on a project when billions of rands go towards kickbacks instead of funding the project itself? Perhaps unsurprisingly, in the case of CSR or CNR, neither has delivered on their contract with Transnet. Table 7.2 shows where locomotive delivery stood in December 2018. The contracts were signed in

2014 and fulfilment of the terms was expected in three years. CSR has delivered just over half of its contracted number of locomotives – 208 out of an expected 359, with 42% still outstanding. CNR has only supplied 21 out of an expected 232 trains, with 91% outstanding. Moreover, contractual agreements with both CSR and CNR around local content use, which specified that a certain proportion of the trains had to be manufactured locally, have not been honoured (Fundudzi Forensic Services, 2018).

TABLE 7.2 Expected and Actual Delivery, Chinese Locomotive Suppliers: 2018

Supplier	Contracted Delivery Number in 2015	Actual Delivery Number in 2018	% Locomotives Outstanding
China South Rail (CSR)	359	208	42
China North Rail (CNR)	232	21	91

Source: PMG (2018b)

7.7 CONCLUDING REMARKS

The failed locomotive procurement deal at Transnet, spanning the period 2012-2018, serves as one of the clearest examples of how state capture broke down systems of control and oversight at a key SOE in South Africa. Transnet was successfully infiltrated by a network of corrupt individuals at upper management levels – from the Minister of Public Enterprises to the CEO, including specific Executive Committee Members. Corrupt individuals were placed in strategic positions with substantial discretionary power, which then facilitated the creation and extraction of massive rents. The productive use of state funds was soon supplanted by a well-organised, corrupt network focused purely on rent-seeking activities. This was accomplished through the hijacking of the procurement process, re-orientating it away from its legitimate operation towards a rubber-stamping activity arranged behind closed doors by members of a state capture network.

The immense scale of state capture detailed here was made possible by the appointment of an array of corrupt individuals to key positions within the governing structure at Transnet. For example, the appointment of Brian Molefe to the position of CEO facilitated the sign-off on the excessive contract inflations and amendments to the 1 064 locomotive deal that were not approved by the parastatal's Board. This essentially generated the kickbacks paid to Tequesta and Regiments Asia, which have now disappeared into an untraceable international financial web. Billions of rands in state funds were stolen and most were then moved offshore in a dedicated money laundering operation, with enormous welfare costs for South Africa. Alongside Molefe, other members of the state capture network at Transnet held significant levels of discretionary power across a variety of functions, from business operations to

regulatory oversight. The parastatal has now instituted criminal proceedings against many of those involved. The scale of the theft, the way it affected all spheres of operations at Transnet, and the patently obvious negligence of correct contracting procedure associated with these deals, are evidence of how state capture can blend formalised institutional protection and procurement corruption to result in breath-taking levels of financial and governance misconduct – and all at an institution so central to South Africa's growth and development trajectory.

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8 STATE CAPTURE AT DENEL

Nina Callaghan

8.1 INTRODUCTION

The machinery of war is a lucrative business, it is also a shadowy one in South Africa's history of arms dealing. Highly classified information, secret deals, shady middlemen and a highly concentrated, centralised power structure – this is the nature of arms dealing past and present. All these elements, we argue, make an institution vulnerable to capture.

South Africa develops and sells arms through Denel, a state-owned company that in 1992 emerged out of its apartheid predecessor, Armaments Corporation of South Africa (Armscor) (Cock & Mckenzie, 1998). Central to the capture of state and a recurrent theme throughout this book, is the repurposing of state institutions to funnel finance and influence away from the developmental project towards a sophisticated network of a power elite (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017). This case study locates Denel in the history of South Africa, first as a key prop for the apartheid project (Batchelor & Willet, 1998) and then for the racket of state capture during Jacob Zuma's presidency from 2013 through to 2018.

This chapter will look at Denel as an historical entity and suggests that it has always been captured, first, because of the nature of the armament business and second as a vehicle for select development for both an apartheid regime and a democratic government. In both cases, SOEs played a key role in generating business for the state. For apartheid South Africa, the defence prowess was a means to develop white domination and privilege (Hart & Padayachee, 2013), and shows Denel as a central cog in the apartheid regime. This chapter touches on the dealings between the state and sanctions busters at the time to illustrate the point that corrupt networks and extractive ways of doing business are not a new phenomenon. This point is further emphasised by Denel's involvement in the Arms Deal of 1999. During the Zuma-era, procurement spend at SOEs was used as a way to extract rents under the hijacked ideology of radical economic transformation. This chapter looks at the corporate and

political manoeuvrings of capture actors to eventually decimate governance at Denel and rob the public purse.

The trajectory shows that Denel's successive fates have always been tainted by corruption and that the Guptas and their associates were just the latest in an opportunistic and parasitic network that has historically surrounded the company. The nature of the armament industry and its relationship to the apparatus of state capture is summed up well in the following quote and points to how state capture was able to pull off its grand looting:

> ... once an arms industry is established it is not a neutral agent in the economy. It often spreads new production processes and standards, encourages Research & Development intensive activities, and favours particular management practices. Combined, these factors contribute to the creation of a new technological paradigm and culture embodied in the defence industry but which operates in the larger institutional and social context. (Batchelor & Willet, 1998)

8.2 ARMSCOR DURING APARTHEID

The apartheid regime in South Africa (1946-1994) was a highly militarised institution. Its weaponised command and control culture was designed with the specific intent of enforcing and maintaining minority white power through racial oppression and systematic violence against the majority blacks. Militarism can be understood as the apartheid state's culture – aligned with its local and regional military goals, values and apparatus (Batchelor and Willet, 1998).

During the regime, South Africa was one of the few developing countries in the world that took on the economic burden of developing its own arms industry, alongside a space and nuclear weapons programme (Henk, 2004). From 1948 when the Nationalist Government came to power, until 1989, apartheid nurtured a military might and expertise that was singular on the continent (Batchelor & Willet, 1998; Henk, 2004). It is suggested that the multiple arms embargos imposed by the UN between 1970 and 1977, along with other international boycotts, fuelled the Nationalist Party's (NP) rhetoric of a "total onslaught" against white South Africa (Wessels, 2010). This in turn, Wessels argues, strengthened the regime's support from an all-white electorate, along with resurgent support for South Africa's cross border wars in Angola, Namibia and Mozambique.

The mandatory UN arms embargo of 1977 was enforced because the Security Council considered South Africa a threat to international peace and security. Its decision considered the violent enforcement of apartheid domestically, South Africa's military build-up and acts of war against its neighbours and its nuclear development

programme (Wessels, 2010). The embargo banned all arms exports, ammunition, armaments supplies and licensing agreements to reproduce arms equipment, as well as any support for the country's nuclear programme. The result was that South Africa took on the development of its defence sector with renewed vigor (Batchelor & Willet, 1998; Henk, 2004).

Through Armscor, an entity that was part of the Department of Defence, the country was able to meet all domestic and regional military objectives, and make a roaring legal and illicit international profit through arms dealing (Cock & Mckenzie, 1998; Van Vuuren, 2017).

> By the end of the era, 3,000 private sector enterprises serviced some aspect of the industry as contractors, subcontractors or suppliers. Arms producers accounted for fully 9% of the country's employment in manufacturing. Arms comprised 6.6% of all South African manufacturing output and 1.5% of the country's gross domestic product. (Henk, 2004, p. 14)

Up until 1989, the apartheid Defence Force formed the nexus from which governance radiated into all other aspects of South African life, as well as directing engagements with the private sector (Batchelor & Willet, 1998). These private sector actors, both local and international, were intent on putting profit and political interest before the well-being of the majority of South Africans (Van Vuuren, 2017) with many calls for them now to be held to account. Amongst the businesses and countries accused of profiteering from apartheid are 196 banks across 27 countries, the main one being Kredietbank in Belgium. The French arms company Thompson CF, now known as Thales, and implicated in the 1999 Arms Deal, was also a major player, as well as all five permanent members of the UN Security Council – UK, USA, China, Soviet Union and France, the latter became the kingpin in Armscor's arms dealing (Van Vuuren, 2017).

8.3 DEMILITARISATION, DEMOCRACY AND THE FORMATION OF DENEL

1989 marked a turning point in South Africa's political trajectory. It was the year the war of independence ended in Namibia and the South African army withdrew in defeat. In the build-up to democracy, the defence sector was restructured, the defence budget reduced by 40% and procurement by 60% between 1989 and 1993 (Henk, 2004). During the same time, employment in the defence industry was almost halved to just over 70 000 jobs while investment in defence research and development as a proportion of the country's total, fell from 48% to 18% (Henk, 2004). In the transition from apartheid to democracy, the parastatal Armscor transitioned into Denel in 1992, but many critics say the power structures of the apartheid entity remained. Denel

inherited Armscor's research and development, production facilities and about 1 500 workers (Batchelor & Willet, 1998). Denel also inherited all Armscor's networks, institutional culture and a corrupt culture of doing business (Van Vuuren, 2017).

8.3.1 Denel's Performance 1994-2001

The transition to democracy was a financial blow to Denel. The company's 2007 annual report summary illustrates this drastic downward trend between 1996-1999. Profits dropped from R400m to a staggering R800m in the red. The entire local defence industry was in a fair scramble during this time, with mergers and acquisitions the response to a shrinking local and international market (Dunne & Haines, 2002). Like other defence companies, Denel attempted to consolidate its position in the market, and did away with most outsourcing, preferring to vertically integrate all goods and services. Not only was this an expensive exercise, it also resulted in increased concentration in the defence sector (Dunne & Haines, 2002).

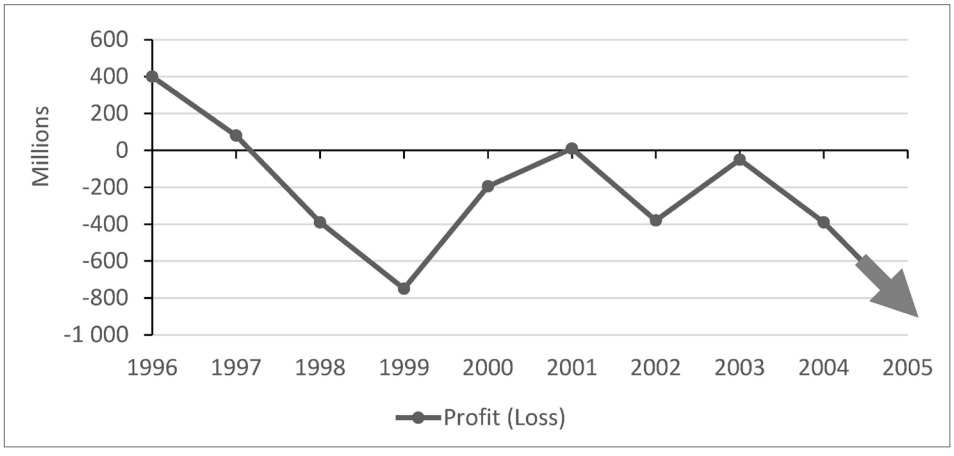


Figure 8.1 Denel Financial Indicators: 1996-2005
Source: Denel (2007) annual report summary presentation

A dramatic spike over the next two years, 1999-2001, allowed Denel to at least break even. Then acting CEO, Flip Botha, attributed the recovery to a much improved export market with foreign orders making up 46% of total sales in 2001 (Leuvennink, 2001). In 2000, Cabinet approved plans for UK arms giant, BAE Systems, and Swiss SAAB to become equity partners in Denel Aviation. But these deals were not just the result of a miraculous recovery in a shrinking global defence market, as Denel's annual reports and sterile financial reporting present. Rather, it must be seen in relation to the Strategic Arms Package, more commonly known as the Arms Deal of 1999 (Sylvester & Seegers, 2011). At first, the deal was pegged at R30bn for the acquisition of sophisticated defence equipment. Fighter jets, warships, submarines

and helicopters made up the package that has eventually cost an estimated R65bn to date with payments scheduled up until 2022 (Davis & Mutemwa-Tumbo, 2019). The Seriti Inquiry was established in 2011 at the behest of former President Zuma to probe allegations of corruption. General Bayne and General Malinga of the South African Airforce (SAAF) testified at the commission that the Defence Force did indeed have a pressing need to replace an aging jet and helicopter fleet or it would face obsolescence (Arms Procurement Commission, 2016, p. 623). This testimony is in contradiction to critics who insist the country had no need for an arms upgrade. It must also be noted that the Seriti findings have since been set aside; the Pretoria High Court ruled that the commission failed to properly investigate the Arms Deal (High Court of South Africa: North Gauteng, 2019).

8.3.2 Denel and the Arms Deal

The arms deal was beset by accusations of bribery and corruption. Chief amongst the alleged benefactors of kickbacks and bribes from the Arms Deal was Fana Hlongwane, a special advisor to then Defence Minister, Joe Modise. Hlongwane later became a Board Member of Denel. Also allegedly profiting from the deal was Major-General Ian Deetlefs, former Board Member of Denel who later became CEO (Corruption Watch, 2018). Former President Jacob Zuma is also implicated in the ill-gotten gains of the Arms Deal, being charged with misuse of power and improper influence. These charges were dismissed in 2009 but reinstated by the NPA in April 2018, just weeks after Zuma was recalled from the Presidency. Zuma's financial advisor, Shabir Shaik, was said to have arranged an annual R500 000 payment for Zuma from Thompson-CSF, now Thales, one of the arms companies involved in the deal (Corruption Watch, 2018).

While there were fixers, middlemen and a host of support players it was the spin-offs from the arms deal that created a local feeding frenzy. These opportunities for rent seeking were generated from offset agreements, which were incentives used by arms companies to sweeten the deal for buyers and were often referred to as 'industrial participation programmes'. It was exactly these kinds programmes that made the investments of BAE and SAAB, mentioned earlier, possible (Sylvester & Seegers, 2011). The Arms Deal created a wealth of opportunities for Denel to sign strategic partnership agreements with foreign arms traders which was supposed to add investment capital, increase procurement spend, support research and development and capacity building for Denel. The financial benefits from the arms deal spin-offs for Denel were pegged at R2.5bn over 10 years (Leuvennink, 2001) with Denel and its subsidiaries producing components for the procured arms. Then Defence Minister Joe Modise (1999) hailed the deal as a development boon for South Africa:

> Reequipping the Defence Force … will benefit our economy by an estimated R110 billion of new investment and industrial participation programmes, and creation of approximately 65 000 jobs. As to concerns that such transactions are open to improper influences, I want to assure you that the bids have gone through a fine-tooth comb to ensure an ethical outcome.

It can be concluded that the biggest corruption scandal to hit South Africa five years into democracy was what greased the wheels for Denel's recovery during this short time, 1990-2001. It also lined the pockets of at least two known major players in Denel's governance structures. Not only did the corrupt deal come under immense political pressure from civil society, but the promised benefits also fizzled away due to Denel's failure to deliver on the contracts. Instead of lining the national purse, Denel became a drain on taxpayers who had to foot a bill of over R660m to help the failing company make good on its arms deal obligations (Ensor, 2008).

Former ANC MP and robust critic of the arms deal, Andrew Feinstein, describes the Strategic Arms Package as the first documented case of state capture (Mitchley, 2019). In many ways the structural plot of the arms deal mirrors how corruption became syndicated in the state capture project. In both instances opportunities to secure rents were identified, the Executive was seduced by potential development interests through state procurement with the private sector, which never materialised. In both cases, deal makers and middlemen negotiated between the state and the private sector, pocketing bribes and fixer fees as they went. Networks were central to enacting this level of systemic corruption. In both cases, multiple levels of state governance and oversight bodies either knew about corrupt activities and turned a blind eye, or actively facilitated corrupt transactions and relationships. In both cases, there was a bending of the rules or a flagrant disregard for them as well as public sentiment. In both cases, a huge amount of public money was used for narrow interests with nobody held to account or prosecuted – yet.

8.3.3 Tall Tasks for Denel Boards

The Board Members of SOEs are appointed by the arch governing body, the Department of Public Enterprises. It is the Minister who appoints the Board and oversees the mandate of that entity. Beset with falling profits since 2003, former Denel Board member, Talib Sadik, was appointed as CEO in late 2008, assigned as a key driver of the SOEs turnaround strategy. By the time Sadik left in 2011, Denel was back to making a marginal profit.

Riaz Saloojee was appointed as CEO in 2011 when Malusi Gigaba was Public Enterprise Minister. Saloojee had extensive experience in the defence and manufacturing sectors, was a former member of the SANDF and headed up other armaments

companies in the past. Under both Sadik and Saloojee, the Boards were constituted of highly professional people. They were recruited for their specialist skills in finance, defence, legal, industrial and labour relations, engineering, management and governance (Denel, 2011). This defining feature of Board expertise would come to be eroded during the most intensive state capture period starting in 2015, where Board appointees were described as ill-equipped to oversee an SOE with industry-specific needs (Janse van Rensburg, 2019).

Table 8.1 illustrates finance results between 2007 and 2018 and tells us that Denel incurred huge operational costs with short periods of marginal revenue. What is perhaps most noteworthy is the massive loss of R1.7bn Denel suffered in 2018. At the same time, rating agency Fitch also downgraded the company, impacting its ability to attract future funding. This was the culmination of three years of poor governance due to a weak Board, systemic corruption linked to state capture actors like the Guptas and their associates and the low confidence trade and financial partners had in Denel during the most intensive period of state capture.

Table 8.1 Denel Profit/Loss Summary over time

Year	'18	'17	'16	'15	'14	'13	'12	'11	'10	'09	'08	'07
	Rand in Millions											
Revenue	4998	8057	8228	5852	4588	3918	3568	3252	3610	3924	3818	3268
Operating expenses	(1726)	(1483)	(1455)	(939)	(879)	(940)	(958)	(897)	(846)	(1285)	(1082)	(1257)
Profit/(Loss) for year	(1758)	333	395	270	194	71	41	111	(246)	(533)	(347)	(549)

Source: Denel Financials 2007-2018

> The image and reputation of Denel, as well as the credibility of its leadership has since 2015 been on a downward spiral within the stakeholder environment, the broader South African public, as well as in both local and international markets. This has had crippling impacts on not only the internal employee environment, the external supplier, customer and industry environments, but also in the banking and financial sectors. (Denel, 2018, p. 36)

It is noteworthy that the annual report states that its leadership and governance trouble started in 2015. This was when a new Board was appointed, when CEO Saloojee was fired, along with the Company Secretary, Elizabeth Africa and the CFO, Fikile Mhlontlo, which is explained in more detail later in the chapter.

8.4 ARRANGING DENEL'S CAPTURE

Forensic investigations into state capture in South Africa by the media and researchers in academia tell us that it takes multiple institutions, multiple players at all levels

and from all sectors to infiltrate and then repurpose a system for looting (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017). In the case of SOEs, there were particular 'tools' used to facilitate this racket, like compliant Boards, hiring and firing of people in key government positions, powerful corporate appointees, fixers and corporate partners to mention some of them. The case of the capture of Denel was no different.

The Board serving together with the leadership of CEO Saloojee came to the end of its term in July 2015. This was when members could be rotated off the forum and new members appointed by the Minister. A report that evaluated Board effectiveness was concluded by accounting firm, Deloitte & Touche in June 2015 and was submitted to the Zondo Commission by former Denel Board Chair, Martie Janse van Rensburg, as part of her statement (Janse van Rensburg, 2019). The report formed part of a standard annual process of observing good governance. The evaluation was complementary of the outgoing Board chaired by Janse van Rensburg, saying, "The Denel Board is consider [*sic*] to be highly effective both in providing the necessary oversight as well as direction to Denel. This has been confirmed and corroborated through the Board Effectiveness Evaluation" (Janse van Rensburg, 2019, p. 35).

In compiling the report, Deloitte was privy to the Board succession plans proposed by the new Minister of Public Enterprises, Lynn Brown, who took office in 2014. Her plan was to replace everyone on the Board, except one member. This was irregular according to the report, which recommended standard practice of retaining at least a third of the membership for purposes of continuity and momentum, especially for a company engaged in a turnaround strategy. The report advised against Brown's plan, "The succession of the Board as a whole as well as the Chairman was noted as an area of significant concern …" (Janse van Rensburg, 2019, p. 36).

Brown's own department compiled a list of candidates for the incoming Board, also advising she retain most members for their good performance and because many had not yet served their maximum two terms (PARI, 2018). It was against the advice from these quarters that Brown made the decision to replace the entire Board with candidates who lacked experience of Corporate Board Membership and the requisite skills needed for a technical company like Denel (amaBhungane, 2017). One Board Member was retained, Johannes Motseki, who enjoyed a close relationship with Zuma's son, Duduzane Zuma, and has been linked to the Guptas through a business partnership in the family's Oakbay Investments (Letsoalo, Faull & Mataboge, 2011; PARI, 2018).

Brown appointed Daniel Mantsha as Chair of the Board and Non-Executive Director, a discredited lawyer who was struck off the roll in 2007 after complaints from clients

that he was dishonest (Hunter, 2018). Mantsha was readmitted as an attorney in 2011, and in 2015 became advisor to former Communications Minister and current Chair of the Justice Portfolio Committee in Parliament, Faith Muthambi. Following his Board appointment, #GuptaLeaks emails shows Mantsha on Gupta-sponsored trips to India and Dubai, and that he allegedly forwarded an outstanding municipal account to a Gupta associate, Ashu Chawla (Hunter, 2018). Mantsha is a key actor in facilitating the capture of Denel. Saloojee accused Mantsha of manufacturing a case against him and the company secretary to get them fired and pave the way to facilitate the Denel Asia deal (Saloojee, 2019, para. 45). Further, it is Mantsha who allegedly shared confidential company information with the Guptas, giving the family a competitive advantage in exchange for favours (amaBhungane, 2017).

Another Denel Board appointee linked to the Guptas was Thamsanqa Msomi, former Chief of Staff to former Public Enterprise Minister Malusi Gigaba. Msomi later served as his legal advisor when Gigaba was Home Affairs Minister. It is alleged through #GuptaLeaks emails that Msomi received and acted on requests from Gupta associate Chawla for assistance with visas for Gupta clients and employees. Details of Msomi's alleged fixing was heard at the Zondo Commission and the Gupta Naturalisation Parliamentary Inquiry in 2018, and remain allegations in the face of no cross examination (Hunter & Cowan, 2017; PMG, 2018).

Following the exodus of the former Board in July 2015, the top officers of Denel were next to go. One of Mantsha's first tasks just two months after taking the Chair was to suspend CEO Riaz Saloojee, CFO Fikile Mhlontlo and Company Secretary, Elizabeth Africa, allegedly for irregularities over a huge contract with BAE Land Systems. This happened despite the outgoing Board making sure to ratify the deal with all processes and motivations expressly communicated. The allegations against the three were later found to be spurious, even so, Saloojee was officially fired in April 2016 and his two colleagues never reinstated.

Testifying at the Zondo Commission, Saloojee mentions meeting the Guptas three times, the first as early as 2012. He details how the meetings were facilitated by Salim Essa, a Gupta associate who made sure Saloojee knew that doing business with the Guptas had "support from the top" (Saloojee, 2019, p. 45). In his statement to the Commission, Saloojee places then Public Enterprise Minister Gigaba at the Guptas' home, saying, "'These people are friends' and that he hoped that we could work together in the future" (Saloojee, 2019, p. 45).

On other occasions, Saloojee alleges Zuma's son, Duduzane, was present at the Gupta residence along with Ace Magashule's son. Saloojee describes these as business prospecting meetings as well as displaying the Guptas' links to political power. Saloojee says

over the course of the meetings and subsequent communications, he reiterated that the Guptas engage through the proper business channels to pursue their interests in defence markets in the Middle East and Asia. Saloojee was evidently not taking the bait, which was eventually met with coercion at his last meeting at the Gupta compound.

> … I was told in no uncertain terms that I was not cooperating, and that my lack of cooperation was a serious issue. Tony said that he did 'not want to elevate it further.' I took this statement as a threat, and the purpose of the meeting as a means to strong-arm me into cooperating with Essa and the Guptas. (Saloojee, 2019, p. 56)

At the last meeting, Saloojee notes how Tony Gupta allegedly made direct reference to bribes, "When the meeting ended, as we walked out, Tony asked me why I don't take money and that I should 'take money because everyone does'. I categorically stated that I do not" (Saloojee, 2019, p. 62).

In the cast of SOE officials approached by the Gupta family, Saloojee turned out to be an obstacle to their plans. Saloojee's suspension and eventual axing comes as no surprise then as we begin to see the capture actors taking hold in Denel. The departure of the previous Board and the top officers smoothed the way for a deal they did not approve of, the formation of Denel Asia which has come to illustrate state capture at Denel.

8.4.1 Securing Business: India Market Prospects

India is one of the biggest arms importers in the world and had been a lucrative trading partner in the early 2000s. During that time, Denel had been contracted to supply rifles and rounds of ammunition, G6 self-propelled howitzers (a kind of artillery weapon) and there was also a pending contract to build an ammunition factory in India. India accused Denel of using and paying a "middle man" to secure the R24m deal, a procurement practice that is illegal in India for defence contracts (Pressly, 2005).

According to news reports in 2005 (Pressly, 2005), Denel admitted that it used British-based Varas Associates to provide technical assistance on the deal. India's Central Bureau of Investigation (CBI) says Denel's 12.75% payment to Varas was a kickback for their consultants exerting influence on the Indian Defence Ministry to choose Denel as the preferred supplier. The CBI also accused Varas of obtaining pricing information, something Denel denies. The CBI filed a case of corruption against Denel in June 2005, which effectively cancelled all contracts. India then instituted a ban on Denel, preventing it from doing any future business until the sanction was lifted.

Eight years later, India's CBI closed the investigations and the case of corruption against Denel without being able to substantiate its allegations of corruption. This meant that the potential to do business with India was again an opportunity that was not missed by Denel.

> The investigation found that there was in fact no illegal or untoward activities that had been conducted by Denel in India. We welcome the removal of the blacklisting because doing business with India again will further strengthen the relationship South Africa enjoys with the country within the context of the BRICS even more. (Qinga in Martin, 2014)

8.4.2 Corporate Arrangements

There are a few criteria that qualify a private business to do deals with a SOE in South Africa. One of them is the BEE rating of that business. In 2008, black businessman Benny Jiyane purchased a 25.1% stake in VR Laser, a company that cut and moulded steel for armoured and heavy vehicles. The R270m BEE deal qualified VR Laser for government tender contracts, and they appeared to be in no short supply. Amongst the lucrative state contracts were the supplying of steel to Transnet Freight Rail for manufacturing locomotives, providing components for armoured vehicles made by Denel, as well as a potential contract to provide components for Eskom's rebuild programme (PARI, 2018).

Things went horribly sour between VR Laser and Jiyane because of a Gupta-linked company acquiring shares in VR Laser. In March 2019, Jiyane appeared before the Zondo Commission as part of the investigations into state capture. He shared at length how the relationship with Gupta associates resulted in him being pushed out of VR Laser.

Jiyane explained how two of his business partners at VR Laser were set to sell their 74.9% shares. This prompted him to search for financiers to buy them out for R120m. Considering the high tech and specialist nature of the contract, Jiyane was adamant that the buyers be South African. It was then that Jiyane met South African businessman Salim Essa at a defence exhibition in Abu Dhabi in 2013 with a view to do business. Essa has been called a "Gupta kingpin", "Gupta associate", "Gupta lieutenant" and "state capture mastermind" in media reports in South Africa for the facilitating role he played in securing deals for the Gupta family (amaBhungane, 2017; Bezuidenhout, 2019).

Essa and Jiyane eventually signed a deal in December 2013, with Essa's company, Elgasolve, acquiring a majority share of VR Laser. When Gupta associates then moved in on VR Laser's operations and ousted Jiyane as CEO, it became clear his continued involvement with the company would be untenable. Jiyane sold his shares at a loss

for R16m, at least R8m lower than the share sale price of previous buyouts. The deal was facilitated by Craysure Investments, which belonged to Tony Gupta and Duduzane Zuma, former President Jacob Zuma's son. The Gupta link to VR Laser also becomes clearer when Khamal Singhala, son of Ajay Gupta, became a director at VR Laser. Testifying at the Zondo Commission, Jiyane says he only later realised that Essa acted on behalf of the Guptas and that Elgasolve was actually a front company to further the Guptas' interests.

> I cannot tell you what my reaction would have been if we had found out that we were dealing with the Gupta family and that Sharma and Essa were just proxies for them ... I had spent years developing and growing VRLS and wanted to continue growing it. I had not intended to sell our shares and only did so after I realised the deception we had fallen prey to. (Jiyane, 2019, p. 63)

Elgasolve's acquisition of VR laser shows how transformation agendas got seriously twisted. Jiyane's principles to enter into business with South Africans and not foreign business in the interest of retaining technical expertise and skills that were not common in South Africa, got him pushed out as lead BEE shareholder. Black business lost to corruption for private gain, executed by another black business.

The acquisition of VR Laser by the Gupta company Elgasolve is a crucial step in the capture of Denel. It sets up the corporate legitimacy to facilitate a much larger deal that involves the formation of Denel Asia, that capitalised on the timing of the opening of the India defence market and Denel's history of doing big international deals.

8.4.3 Denel Asia

Driven by the Denel and VR Laser partnership, the plan was to set up Denel Asia which would have close proximity to the burgeoning Asia-Pacific defence markets. Denel punted the ambitious deal as a sure win and part of its strategy to grow its international footprint. Denel Asia would be established in Hong Kong through a partnership with Denel owning 51% and VR Laser Asia 49%. VR Laser Asia was described as a shell company, being a subsidiary of VR Laser, but having no assets, no manufacturing capacity and no history of doing business in the region. Denel explained the decision to partner with VR Laser in the following way:

> Four potential partners were considered before a decision was taken to select VR Laser Asia based on the company's experience and track record of VR Laser working with Denel. VR Laser Asia is wholly-owned by Mr Salim Essa and the company is familiar with the industrial landscape in the world's fastest growing defence market, specifically in India. (Denel, 2016)

According to amaBhungane's cache of leaked emails called #GuptaLeaks, the family was establishing another tier to the business, to form Denel India. This second entity

was the one that would actually transact with India. Denel's share in Denel India was reduced to 25% with the Guptas controlling a 42% share. The Guptas brought high-level political connections to the table, their associates linked all the way to Narendra Modi, the Indian Prime Minister (amaBhungane, 2017). The structure of the deal meant that Denel would be selling off its intellectual property to India for very little return (PARI, 2018, p. 83).

Former Denel Board Chair, Martie Janse van Rensburg emphasised that the 2011 Board did not have any plans to establish Denel Asia, as was reported on the Denel website press release on 11 May 2016. She positioned herself and the former Board as firm critics of the plan, saying,

> I am convinced that although the 2011 Board was open and continually explored good partnerships ... it would not have considered nor approved a partnership in the form reported to have been the case with Denel Asia ... I respectfully contend that the Denel Asia establishment makes no economic sense for Denel. (Janse van Rensburg, 2019, pp. 44-46)

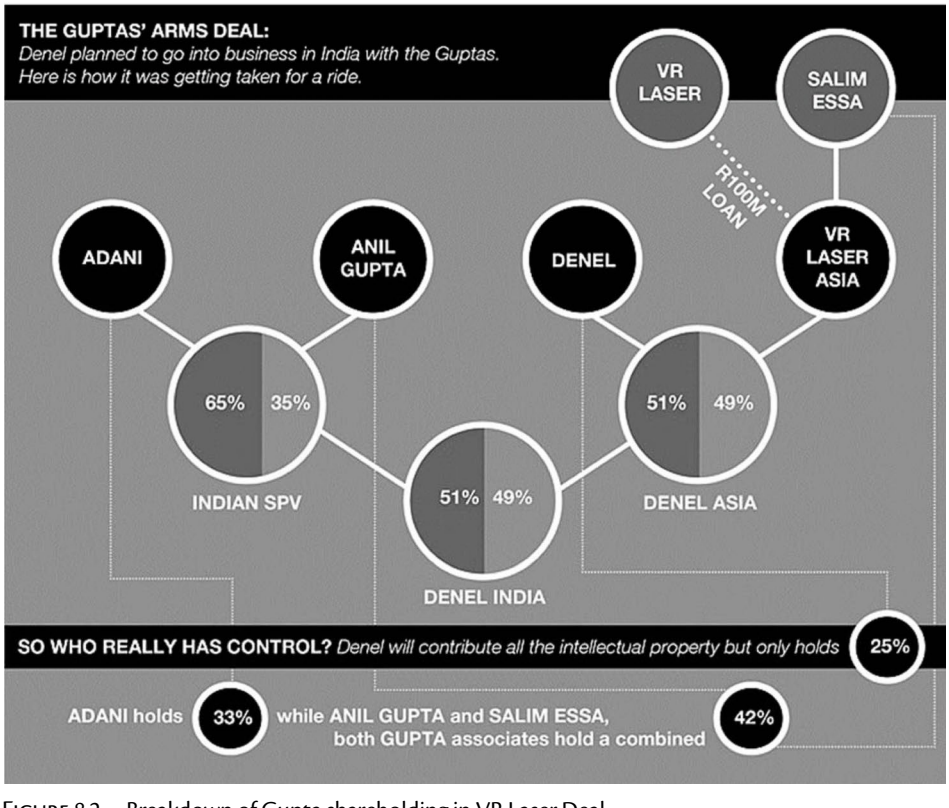


FIGURE 8.2 Breakdown of Gupta shareholding in VR Laser Deal
Source: amaBhungane (2017)

8.4.4 The Costly Treasury Shuffles

The #GuptaLeaks emails indicate that Denel Executives knew they would not be making a windfall and would only take home the spoils of a very skewed deal. Why would an SOE accept such a poor bargain? Why did the Denel Board approve such a loss? From this point in Denel's capture, it is imperative to understand the political manoeuvrings that lined up all the players and institutions.

It is reasonable to deduce that the capture of Denel could not have been affected had those with political power not done the bidding of the Guptas. With the Gupta-orchestrated corporate arrangements in place, governance institutions like Denel's Board and Executives compliant, all was set to launch a deal that would loot the state. The timing and sequence of events of what follows is significant.

In October 2015, the Board, headed by Mantsha, put through a Section 54 application of the Public Finance Management Act (PMFA) to Public Enterprise Minister Lynn Brown's department, a document that regulates all government revenue and expenditure to make sure finances are properly managed by the appropriate people with oversight from the Treasury. On 23 November 2015, Brown conditionally approved Denel's negotiations with VR Laser Asia to form Denel Asia (PARI, 2018, p. 73).

The PFMA for Denel Asia detailed potential business worth R9.3bn, with R8bn coming from business with India alone. Brown's conditional approval was not enough to seal the deal, it also needed the authority of a sympathetic Minister of Finance. On 9 December 2015, Treasury officials met with Denel to grill them about the Denel Asia deal, demanding to know why they had not sought permission from or registered the prospective deal with Treasury with a Section 54 application that oversaw joint ventures (PARI, 2018). Then Finance Minister, Nhlanhla Nene, refused to rubber stamp the deal – it so happens it was his last day in the job. On that day at about 20:00pm, then President Jacob Zuma replaced Nene with little known ANC "back bencher" Des van Rooyen, causing outrage and consternation politically, economically and in civil society (Bhorat et al., 2017). Van Rooyen was at the helm for all of four days, but the damage done was substantial.

Considering all the pending business contracts that required Treasury's authorisation, it is plausible to draw the conclusion that Zuma positioned Van Rooyen to approve the deals the Guptas stood to benefit from and which Nene refused to sign. They were:

- The R1tn Russian nuclear deal that proposed South Africa would invest in a fleet of nuclear power stations. Uranium One, renamed Shiva Mine was acquired by the Gupta business, Oakbay for R270m, thanks to a R250m loan from the Industrial

Development Corporation (IDC), a state development finance institution. The mine was projected to become highly profitable were it to supply the nuclear fleet.

- A Transnet contract initially worth R34bn that eventually ballooned to R54bn awaited approval. This deal would also have benefited VR Laser who were positioned to be the local component producers for the locomotives.
- Denel Asia awaited Treasury's green light to start trading from Hong Kong. VR Laser held 49% shares in this venture and would benefit from Denel's intellectual property.

Van Rooyen's biggest defence is that he never signed off any deals as Minister, but it is alleged that he did facilitate the sharing of confidential government information with the Gupta network (amaBhungane, 2017; Fuzile, 2018). Van Rooyen came on board with two advisors, one of them Mohamed Bobat, a Gupta business associate linked to consulting firm Trillian (Haffajee, 2018). Bobat was later to craft proposals from Trillian to the Department of Co-operative Governance to do business. It is alleged Bobat used confidential government information like strategic government budgets, spending and procurement plans to draft these business proposals and that he had access to this information thanks to Van Rooyen's work during his four day stint as head of Treasury (Haffajee, 2018; Jika & Skiti, 2018). It gave Trillian the opportunity to shape itself into the perfect government partner, an act tantamount to insider trading. This alleged exchange makes Van Rooyen a key agent in state capture.

It is not coincidence then, that after numerous requests, Denel submitted its application to form Denel Asia to Treasury only on 11 December 2015, landing straight on Van Rooyen's new desk. On the fourth day in office, Van Rooyen was replaced by Pravin Gordhan after Zuma bowed to intense pressure, but not before an estimated R500bn was lost in equities and bonds on the Johannesburg Stock Exchange (JSE), not to mention lost opportunities (Hogg, 2016).

8.4.5 PMFA Slip-Ups and Loopholes

Without Treasury's official green light, Denel Asia was incorporated on 29 January 2016 but it still was not allowed to trade without the Department's approval. Three months later in April 2016, then Finance Minister Pravin Gordhan declared Denel Asia illegal because the partnership between Denel and VR Laser had flouted PFMA protocol. In a media statement issued on 13 April 2016, Treasury mentions a violation of Section 54(2) of the PFMA. The section requires the SOE to inform Treasury of its intentions and to exhaustively detail the nature and operations of the future business. Treasury also cites violation of Section 51(1)(g) of the PFMA which requires its approval before an SOE Board can establish a company (National Treasury, 2016).

The Parliamentary Portfolio Committee for Public Enterprises met in May 2016 to discuss Denel Asia's arrested state of affairs. There the acting CFO, Odwa Mhlwana, and the Denel Board, headed by Mantsha, defended their position. They insisted that the non-reply from Treasury to their 11 December 2015 submission of the PFMA was tantamount to a tacit agreement.

> Mr Mantsha said 'If you do not receive any response from the shareholder department you may deem that the approval has been granted after the expiry of 30 days'. Those 30 days expired on the 12 January 2016. (Mhlwana quoted in PMG, 2016)

While such a loophole existed, Treasury did not entertain Denel's defence, reminding the company that a request for outstanding information, prior to submitting its application on 11 December 2015 still had not been satisfied, and that Treasury therefore could not make a decision on the application as they did not have enough information (National Treasury, 2016).

After about a year of standoffs with Treasury, Denel approached the courts in March 2017 asking the court to legalise the Denel Asia partnership. Mantsha argued Denel had a difference of opinion on interpretation of PFMA regulations which did not mean the company had broken the rules (Hunter, 2018). Just days later on 31 March 2017, Gordhan was removed as Finance Minister along with his deputy, Mcebici Jonas, and replaced by Malusi Gigaba. Gigaba took up Treasury's line of argument, instructing Denel to drop its court application, deregister Denel Asia and dissolve the partnership with Gupta-linked VR Laser. Denel officially cut ties with VR Laser in August 2017.

> I wish to welcome the decision by Denel to cut ties with Denel Asia and to call off the legal case against National Treasury. It is a statement of good governance. (Gigaba in CNBC Africa, 2017)

8.5 THE COSTS OF STATE CAPTURE FOR DENEL

Come December 2017, Denel ran into liquidity problems with labour unions sounding the alarm that December salaries and 13th cheques would not be paid in time for Christmas (Child, 2017). An official Denel communication on 15 December 2017 said the company would be able to honour their 4 000 employee salaries after intensive meetings with government. What became clearer was that the Public Investment Corporation (PIC) had bought a large share of Denel's debt in December 2017, and more in September and December 2018. This took the PIC's Denel bond share from R350m in March 2017 to R2.8bn in December 2018 (Winning & Bavier, 2018). From a standing book order of R30bn, Denel's prospective sales plummeted to just R18bn by March 2017. The fallout from the botched Denel Asia deal was severe,

including reputational damage, lost opportunities and millions wasted in consulting fees for a venture that came to nought.

Denel's Annual report for 2017/18 shows how revenues dropped but it is the earnings before interest and tax (EBIT) figures which are most telling, being almost three times lower than the previous year. It points to the devasting loss to the public purse and the need for government bailouts, which has amounted to R1bn for the past financial year 2018 (Masondo, 2019a).

FINANCIAL AND OPERATIONAL REVIEW

	GROUP		
	2017/18	2016/17 (Restated)	2015/16 (Restated)
	Rm	Rm	Rm
Revenue	4 998	8 057	8 422
Gross (loss)/profit	(121)	1 821	1 743
Other income	160	135	288
Operating expenditure	(1 726)	(1 555)	(1 455)
Earnings before interest and tax (EBIT)	(1 461)	556	708
Net finance costs	(292)	(251)	(193)
Net (loss)/profit	(1 758)	282	476

FIGURE 8.3 Extract of Denel Financial Statements
Source: Denel Annual Report 2017/18 (Denel, 2018)

In June 2019, severe liquidity problems again threatened Denel's employees but thanks to an anonymous lender, salaries could be paid in the nick of time. Current Minister of Public Enterprises, Pravin Gordhan, was unequivocal about the reason for Denel's woes saying,

> There is no clearer example of the damaging effects of state capture than the financial strain and uncertainty that the 3 500 Denel employees and the families will feel each month as a consequence of what we actually see. (Gordhan in Matya, 2019)

Despite a new Board and a clean-up strategy, Denel again made headlines in September 2019 after it failed to make good on a R250m deal for 40 Casspirs with Chad (Masondo, 2019a). It is alleged that Denel officials had irregularly appointed VR Laser as manufacturers in 2017 and had given them the intellectual property rights without following procurement procedures. This happened despite Denel having developed the vehicle in the first place and having in-house capacity to produce the Casspirs themselves. VR Laser was placed under business rescue when the Guptas fled the country in 2018, with all assets auctioned and the intellectual property (IP) rightfully returned to Denel, according to business rescue practitioners. But officials were still caught in a fair scramble, unable to agree about the legalities to get the job done (Masondo, 2019a).

8.6 CONCLUSION

The R250m Chadian deal is just one amongst the latest revelations of losses to the company that Denel Executives say amount to R30bn in lost revenue from 2013-2019 (Masondo, 2019b). Claims of kickbacks for Gupta associates, theft of Denel's IP and numerous instances of fraud and corruption are detailed in a Special Investigations Unit (SIU) report that was submitted to the presidency in 2018. President Cyril Ramaphosa has now given the SIU permission to investigate. It is alleged that former and current employees handed IP rights to Saudi Arabian Military Industries (Sami) with at least 20 former engineers now in Sami's employ (Masondo, 2019b). These mounting losses make sense of Denel's revenue of R3.76bn for the 2018/19 financial year, even lower than takings in the previous year (Denel, 2019). It is evident that the cost of state capture continues to batter the company.

Since the new Board took office in May 2018, the company has attempted to reduce its staggering operational costs by cancelling onerous contracts, shedding non-core divisions and portfolios and letting 900 employees go, mostly through voluntary packages (Mabena, 2019). Denel's CFO projects moderate growth over the next four years, but with debt of R3.4bn, being a profitable national strategic asset is still a far way off. Stringent oversight by Treasury and the Department of Public Enterprises is reassuring but not a guarantee that state capture networks have been dismantled.

The culture of corruption dating back to the apartheid era sanction busters and the Arms Deal has not been given a proper reckoning, with nobody yet being held to account. Key Zuma-era state capture actors like Mantsha have been charged with corruption by civil society group OUTA, the Organisation Undoing Tax Abuse, in 2017, along with Eskom and Home Affairs officials. The activists have called for the new Denel Board to investigate former Board member Nkopane "Sparks" Motseki; CEO of Denel Land Systems, Stephan Burger and former CEO Zwelakhe Ntshepe (*Fin24*, 2019).

Coupled with the shady operations and violent ends of the global arms trade through history, Denel's fate will always be tied to profiteering from war. Between 2016 and 2017, Denel earned R3bn from arms sales to Saudi Arabia and the United Arab Emirates, fuelling a humanitarian crisis in Yemen (Dadoo & Adam, 2018). Denel Casspirs have also supported India's occupation of Kashmir (defenceWeb, 2019).

The apartheid relic is not only a drain on the public purse and a threat to democracy, it also taints foreign policy. To keep Denel viable means to support the global war machinery, contrary to South Africa's defence of human rights. Perhaps it is time to sell it off, it serves us none and costs too much – in public money and lives across the world.

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9 STATE CAPTURE AT A LOCAL LEVEL

Crispian Olver

9.1 WHAT IS DIFFERENT ABOUT LOCAL GOVERNMENT?

Local government has not been immune to the politically driven state capture processes unfolding at national level. Many of the same features are evident – the rise of regional patronage-based political machines, rampant political interference in and repurposing of municipal administrations, capture and redirection of municipal rents – with similar consequences in terms of fiscal and institutional collapse and service delivery failure. But there are some distinctive features that provide useful lessons. Not least, in local government we are witnessing a much more widespread and systemic process, which transcends parties and party factions. Further, many of the phenomena described here preceded national corollaries, and at times local government appeared to function as an incubator of capture repertoires which were subsequently scaled up to provincial and national level. This chapter will tease out some of the distinctive features of corruption and state capture in local government and conclude by pointing to ways in which we can strengthen institutional integrity and insulate municipalities from capture processes.

The massive variation in size, budgets and capacity between the 278 municipalities in South Africa is both a blessing and a curse. For people living in smaller municipalities at the bottom of the scale, the amount that their municipality spends per person is one tenth of what people in the larger metros receive and, even then, local government will be noticed more by its absence than its presence.

Financial resources and capacity are concentrated in the eight metropolitan and 19 secondary cities, which between them house 55% of the population and have 73% of the fiscal resources. This has not insulated them from rent-seeking and corruption. In fact, the diversity and scale of rents available from municipal allocation processes in the major cities allows relatively autonomous local political markets to emerge, and the political dynamics around these rents makes metropolitan municipalities unique in terms of the patterns of accumulation that develop.

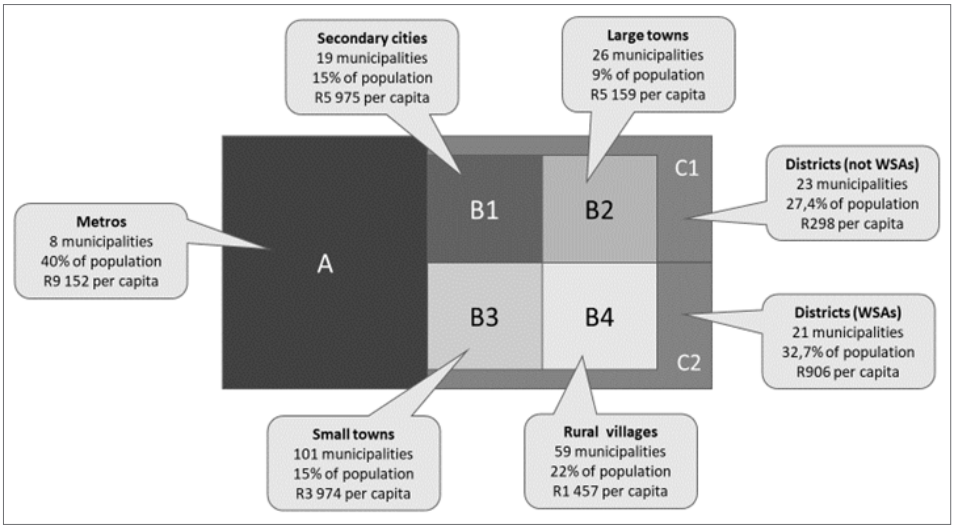


Figure 9.1 Schematic Summary of Local Government System
Source: Own figures based on Municipal Demarcation Board and Statistics South Africa data, 2018.

Unlike national and provincial departments, municipalities are responsible for their own revenue collection, which makes them more akin to SOEs. For rent seekers, this is a double benefit. In addition to the usual spectrum of supply chain and procurement opportunities, corruption also occurs in revenue collection, for instance through kickbacks for reductions in service charges (which make up 53.2% of metro income) or lower property valuations and rebates on property rates (which constitute 18.8% of income).[1] In addition, rents from land enablement and property development, which fall outside of municipal budgets, are considerable. Local government planning and infrastructure functions have a profound impact on property values – for instance, through allocating development rights to property, providing bulk infrastructure such as water, sewage and electricity mains or road networks, as well as controlling the development of surrounding property. Each of these steps progressively lifts the value of the land that is enabled. The value of building plans approved in the larger municipalities (which constitutes only one of the steps in the land enablement process) was R111.4bn (Stats SA, 2019). The substantial rents from land and property development, combined with rents on both revenue and expenditure side of municipal budgets, make local government an attractive target for rent-seeking activities.

1 Percentages based on own calculations using Municipal Money data for metropolitan income and expenditure for the 2016/17 financial year.

9.2 HOW TO STEAL A CITY

The extent to which city administrations were being captured and repurposed was dramatically revealed in my own investigations into Nelson Mandela Bay in 2015 and 2016. Even though the regional economy centred on the motor industry was in decline, the metro still ran ambitious housing and infrastructure programmes around public transport. The city's first democratically elected Mayor, Nceba Faku, had championed a futuristic redevelopment of the city known as Vision 2020, anchored around catalytic property developments. In the build up to the ANC's 2007 Polokwane conference, growing regional factionalism turned the ANC into a battle ground for contending rent-focused coalitions. A left-wing alliance of union, communist party and nationalist politicians consolidated into the anti-Zuma 'Stalini' faction, and enjoyed local hegemony particularly from 2011 onwards.

The political machinery became increasingly reliant on patronage allocations to sustain it, financed through rents derived from the city administration, in particular the substantial Integrated Public Transport System (IPTS) and housing programmes. As the municipality's fiscal position weakened, battles over the control of rents between the factions intensified. A group of SACP/SAMWU leaders set up a parallel network of corruption in the human settlements department, which cohered into a well organised syndicate (Olver, 2017, p. 95). The modus operandi was to restrict the allocation of tenders for construction contracts to a limited pool of handpicked contractors. The contractors used substandard materials and cut corners to deliver houses at a massively reduced cost – or at times not at all – and shared the profits with the officials appointing them. The syndicate channelled resources into political networks in the communities, and also manipulated community protests to push for new housing projects which they then captured (Foresight Advisory Services, 2015). Contestation over these rents led to increasing violence, and eventually the murder of the councillor in charge of human settlements in 2014.

The process of channelling rents was enabled by political control over a weakened administration, and the management of municipal appointments and procurement decisions from the regional party office. Control vested in an informal decision-making network comprised of regional ANC leaders and local businessmen that operated outside of formal decision-making structures. The focus of the political control was on the main decision-making points relating to procurement and land rights. This enabled contracts and remuneration to be rapidly processed through procurement, legal certification, authorisation and payment. It was evident that the metro administration had been comprehensively repurposed for the appropriation of municipal rents in order to sustain a political patronage machine.

Various ANC interventions failed to stem the bitter contestation between groups over resources and the steady loss of electoral support. The scale of the rent extraction and the resultant drop in municipal performance were such that the ANC dramatically lost power in the city in the 2016 local government elections.[2] The flow of resources into the patronage network dried up and the political machinery of the ANC deflated. However, the DA-led (Democratic Alliance) multiparty coalition with EFF (Economic Freedom Fighters) and UDM (United Democratic Movement) support proved to be short lived. The DA faced demands for a parcelling out of spheres of influence and rent from its coalition partners, to which they did not accede. Their coalition eventually fell apart, ushering the ANC back into power under a UDM Mayor, allowing the old networks of rent extraction to reconfigure under a new regime based on the apportionment of turfs.

9.3 NETWORKS OF POLITICAL CONTROL

The micro-management of municipal administrative decision-making from party headquarters, which proved to be so damaging in Nelson Mandela Bay, was by no means an isolated phenomenon. Similar case studies have been documented in each of South Africa's provinces. For instance, in the North West, the rise to power of former ANC provincial Chair, Supra Mahumapelo, was accompanied by intense factional contests over the control of local government in the province. In the ANC's own enquiries into rampant corruption and dysfunctionality in North West municipalities in 2009, the party found that as part of the 'total takeover' by Mahumapelo's 'Taliban' faction, over 90% of the Mayors, Chief Whips, Municipal Managers and key Directors had been removed, and staff in the ANC Provincial Office had been deployed to fill these positions. As the ANC's report noted, the target was to eradicate the legacy of the faction that had been in control of the province since 1994 (ANC NEC Task Team, 2009, p. 9). Political committees were established by regional ANC offices in relation to each municipality. These committees took over decision-making by municipal office bearers, including matters such as appointment of staff and procurement. In order to manage the scale of 'deployment' required, the ANC's Provincial Executive Committee constituted a 'Provincial Roving Interviewing Panel' which operated in direct violation of stipulated procedure. Members of this task team were also deployed as municipal managers themselves (ANC NEC Task Team, 2009, p. 11). The first task of the new managers was to reconstitute the bid committees of the municipalities and gain control over supply chain processes. This was done in order to favour particular

2 The decline started in 2009 with an alarming fall to 50.1% of the vote, linked to the regional factional fallout after the Polokwane conference and the formation of COPE. This was followed by a fatal fall to 4.5% in 2016, placing it in the opposition for the first time.

businesses which financially supported the faction. Municipalities also employed battalions of general workers as a reward for their support during the conferences (ANC NEC Task Team, 2009, p. 11). The consequences of this comprehensive purging of competent staff and leadership had been disastrous. Political conflict became embedded in the Councils, serious tensions arose between the political and administrative levels, finances and service delivery of municipalities collapsed. A full one third of subsequent Special Investigative Unit investigations into corruption in municipalities have been in North West.

The Special Investigation Unit investigation into 23 North West municipalities, initiated in 2009, found manipulation of appointment procedures, illegal appointment and promotion of incompetent officials, excessive remuneration, widespread financial mismanagement, and extensive theft and fraud (Special Investigation Unit, 2009, 2018). A decade later, when South Africa's newly appointed President Cyril Ramaphosa established the Inter-ministerial Task Team to look into systemic maladministration in the North West province, the problems were found to be persistent. Out of 22 municipalities visited, 20 showed evidence of widespread corruption, breakdown of financial administration, hollowing out of institutional capacity, appointment of incompetent officials, and no consequences for maladministration (Makinana, 2018). Clearly the legacy of the 'Taliban' faction's interference in municipal administrations over a decade ago has been both devastating and enduring.

Another political network of control emerged in the Free State where provincial strongman and ANC Chair, Ace Magashule, ran an extensive patronage system from the provincial Premier's office, which included tight control over the municipalities within the province. Magashule routinely determined the appointment of Mayors, Municipal Managers and CFOs in municipalities. Municipal politicians and officials who failed to comply with his instructions were redeployed, suspended or demoted. The former Premier of the province, Beatrice Marshoff, described how "he was in control of people's careers, their futures, so they did as he asked them to do" (Myburgh, 2019, p. 54). His interventions were not just patronage appointments, but more specifically directed at the control of municipal budgets and procurement. Magashule micro-managed most appointments with a financial function, and centralised municipal procurement decisions in the provincial Premiers office, which allowed him to control the flow of economic resources across the province. These resources were channelled into party patronage networks that entrenched Magashule's power base (Myburgh, 2019, p. 120).

A similar repurposing of municipalities took place in Limpopo under Premier Cassel Mathale (2009-2013), who at the time was closely linked to Julius Malema, then

President of the ANC Youth League (ANCYL). The most lucrative scheme involved the Limpopo Department of Roads and Transport, where in 2009 a fraudulent appointment of an unqualified company, On-Point Engineering, into a strategically important project management function gave them control over all contracts for roads projects. This had disastrous effects as it lifted the level of rent-seeking to the entire capital budget of the department (Madonsela, 2013, p. 165). Elements of the provincial scheme were replicated in municipalities across Limpopo with disastrous effects. Management and technical positions in municipalities became political appointments made by ANC deployment committees at provincial and regional level. Newly appointed managers were left in no doubt where their allegiances should lie, and procurement decisions were directed from regional ANC structures. By 2017, the Hawks had confirmed investigations into seven Limpopo municipalities, and political involvement in supply chain decisions was found to be widespread, even routine (Molefe, 2018; Manyane, 2019; Mosola, 2020).

The disastrous consequences of this extensive network of political control were dramatically revealed in the "Great VBS Bank Heist", in which a non-entity mutual bank turned into a vast enrichment scheme for some 53 'persons of interest' who were able to siphon off approximately R1.9bn between 2015 and 2017 (Motau, 2018, p. 140). Amongst the thousands of mostly rural and poor depositors who were defrauded, there were 14 municipalities from Gauteng, North West and Limpopo that had illegally invested R1.5bn in VBS.[3] Municipal officials and councillors were incentivised through a system of "commissions" in order to solicit deposits (Motau, 2018, p. 15). Municipalities were offered suspiciously high returns over very short periods (Kgosana, 2018). The incentives were sufficient, in one instance, for a municipal manager to order a subordinate to deposit R50m into a VBS account within 30 minutes, the rush occasioned by VBS's first "liquidity stress event" (Umraw, 2018). Middlemen and political networks played important roles in the scheme. The network was embedded within provincial and local ANC structures and traded on its political capital, which it was able to monetise to great effect. Given the usually tight Treasury controls that exist over municipal finances, the VBS scheme would not have been possible without the prior level of political infiltration into the municipal administrations occasioned by the earlier repurposing initiatives.

3 According to the Minister of Finance in a written reply to a parliamentary question on 16th March 2018, a total of R1 565,5 million was invested by 14 municipalities in Gauteng, North West and Limpopo, with a further 4 municipalities' investments having 'matured' and not been renewed.

9.4 THE RISE OF PARTY FACTIONALISM

The ANC's 2007 Polokwane National Conference appears to have been a watershed moment for local government in that regional networks of control over municipal administrations were solidified, while factionalism within the ANC became deeply entrenched. Political reports to ANC National Conferences have routinely bemoaned the impact of factionalism on the life of the ANC. As noted by the last such report, "the political life of the organisation revolves around insidious internal strife and factional battles for power. This is a silent retreat from the mass line to palace politics of factionalism and perpetual in-fighting. The internal strife revolves around contestation for power and state resources, rather than differences on how to implement the policies of the movement" (ANC, 2017, p. 16).

While commonplace in provinces such as North West, Limpopo, Free State and Mpumalanga, increasingly such contests have encroached on larger and better run metropolitan municipalities. A case study of the Buffalo City region in the Eastern Cape documented how factionalism was driven by local party elites, while ordinary party members used factional allegiance to access resources in constrained socio-economic conditions. Activists' material interests were overlain by ideological allegiances and party divisions at a national level (Mukwedeya, 2015). In Nelson Mandela Bay, another Eastern Cape metropolitan municipality, I had encountered internal ANC factions whose origin similarly dated to the post-Polokwane period, complicated by the split of COPE members from the ANC and the formation of the NUMSA aligned United Front. The initial dominance of the 'Stalini' faction came increasingly under threat as subordinate rent-seeking elements split from it, such as the rival SACP/SAMWU patronage network in the Human Settlements Department. The increasingly bitter contestation between groups over resources led to the ruling ANC alliance losing power in the 2016 local government elections.

In Gauteng metros the factional battles within the ANC were particularly severe in the Tshwane region. In the build up to the 2016 local government elections, the split between supporters of Chairperson Kgosientso Sputla Ramokgopa and Deputy Chairperson Mapiti Matsena took a violent turn. When the ANC's NEC overlooked both candidates and nominated Thoko Didiza as the Mayoral candidate, the factional warfare turned the townships and large parts of the city into a war zone (Nicolson, 2016). The heightened level of conflict corresponded with a comparatively higher level of corruption in Tshwane compared to other Gauteng metros. The ANC pushed through a costly outsourcing of its electricity metering and revenue collection to an underqualified company, PEU Capital Partners, without competitive tendering. The ten year contract value was estimated at R27bn, and according to the newly appointed

Mayor (at the time), Solly Msimanga, the city was losing more than R630m annually (Poplak, 2017). There were allegations of political corruption in other areas as well – security tenders, the rollout of smart meters, the free wifi hotspot rollout and the bus rapid transit system, and the Tshwane Metro Police Deputy Chief was alleged to be at the centre of a large tender fraud system (De Waal, 2011).

Similarly in eThekwini in KwaZulu-Natal, a factional contest for political ascendency accelerated in the build-up to the 2016 local government elections. Factions were split between supporters of Durban mayor James Nxumalo and his subsequent replacement Zandile Gumede, respectively aligned with anti- and pro-Zuma factions. The intensity of the factional contest resulted in the murder of three ANC leaders in the eThekwini Region. In evidence given to the Moerane Commission of Inquiry, it was alleged that the political killings were part of a grand plan by the Gumede faction to take over power in the metro. The R40bn budget of the eThekwini Metro was the main target "as the faction that emerges victorious is the one that would be in control of the Metro's resources". This included the lucrative public transport tender and housing projects, competition for which was interlinked with the killings (Moerane, Gounden & Potgieter, 2018, p. 290).

The findings of the Moerane Commission provided a detailed insight into the mechanics of factional contests within the ANC. Contestation over Councillor positions was fierce since the barriers of entry in becoming a Councillor were extremely low, but once elected, Councillors gained substantial political power and access to resources. Election as a councillor was the key to rapid upward mobility and the ability to create a patronage network. Proximity to the decision-making processes within municipalities allowed manipulation of tender processes for personal benefit, corruption and conspicuous consumption. Equally loss of position as a Councillor was devastating, with loss of income and social status and the collapse of patronage networks (Moerane, Gounden & Potgieter, 2018, p. 415). As a result, manipulation of internal party elective conferences in order to obtain Councillor positions was common. Criminal elements were recruited for violent attacks and even the murder of rivals, resulting in a "complex matrix of criminal and political associations" (Moerane, Gounden & Potgieter, 2018, p. 416).

Following the ascendency of Zandile Gumede as Mayor in 2016, it appears that waste tenders were awarded to Gumede's supporters as spoils of the factional battle. A R5m contract was divided up between four companies without waste collection experience, and contract terms manipulated so that unlimited claims for clearing illegal dumping could be submitted. When the City Manager baulked at signing off irregular payments, the Mayor and her supporters incited a protest march against him to force him to sign (Harper, 2019). In May 2019, the Mayor and Speaker were arrested by the Hawks

Clean Audit Task Team for fraud involving the appointment of waste management companies. After months of factional strife, the ANC Provincial Executive forced Gumede to resign, but investigations into other areas were still underway, including a tender for toilets and a security tender for approximately R350m.

In summary, internal factional contests with the ANC and political control over municipal administrations appear to be directly linked – the resources derived from political control of municipal rents fuel the factional battles, the outcomes of which create new configurations of power. The new regimes set out to monopolise the control of rents, but the exclusion of losing factions creates the grounds for a new round of contests for political power.

9.5 THE PERSISTENCE OF POLITICAL CORRUPTION

So far, the case studies cited have dwelt almost exclusively on ANC run municipalities, but coalition politics after the 2016 local government elections suggest that the phenomenon crosses party political boundaries. Dramatic changes in political power took place in Gauteng's two largest metros, Johannesburg and Tshwane, in 2016, with the DA able to pull together multiparty coalitions with EFF support to remove the ANC from power in both Johannesburg and Tshwane (the DA obtained 43.1% in Tshwane and 38.4% in Johannesburg).

The newly appointed DA Mayor for Johannesburg, Herman Mashaba, prominently led an anti-corruption campaign. The City's Group Forensic and Investigation Services announced in 2019 that it had completed over 100 forensic investigations into serious criminal cases which had been reported to the Hawks. Despite Mashaba's allegations and much vaunted clean-up operation, there have been allegations by Metro Officials that the EFF was given control over key appointment processes in the City of Johannesburg, as well as patronage over tenders. This was described as a quid pro quo for the EFF working with Mashaba's DA-led administration (amaBhungane, 2018). An investigation by Micah Reddy and Stefaans Brümmer from Amanbhungane exposed corruption in a 2017 tender for Johannesburg's fleet management services with a value of R1.26bn. The winning bidder, Afrirent, was awarded a five-year contract after it transferred R500 000 to a company allegedly used as a "slush fund" for the EFF and Malema. The parcelling out of domains of control within the coalition was not restricted to the EFF.

The Inkatha Freedom Party, a smaller coalition member, was given the Transport portfolio on the Mayoral Committee, which included oversight of the Johannesburg Roads Agency (JRA), a municipal entity in charge of road maintenance and construction. The newly appointed Members of Mayoral Committee (MMC) appointed

a new Board for the Johannesburg Roads Agency, who immediately set out to take control of procurement on roads contracts (Phillips, 2018). The Board established a Project Management Unit (PMU) to manage all procurement and implementation of capital works, despite these functions already being performed by an internal JRA department. The Company Secretary was suspended after reporting these matters to the City forensics team, and the CEO of the JRA eventually resigned when the Mayor did not take action to stop the interference.

In the capital city of Tshwane, similar developments have emerged. As noted earlier, corruption in Tshwane under ANC rule was widespread, but the new DA regime was not without its problems. Following the elections, the newly appointed City Manager entered into a contract with engineering company GladAfrica[4] to project manage its entire capital budget in a contract valued at R12bn. The lack of a competitive tender[5] and excessive fees paid to GladAfrica contract raised serious concerns. The most substantial capital project was the city's A Re Yeng Bus Rapid Transit (BRT) system, and there were concerns about the extent to which the BRT system was being manipulated. Tshwane's bus acquisition was suspect in terms of over-specified and over-priced. Evidence emerged of the EFF's interests in the Glad Africa contract, which bore a resemblance to the On Point contract in Limpopo a decade earlier (*News24*, 2019). The resultant scandal over the deal threatened the stability of the coalition when the EFF blocked the City Manager's suspension and sided with him against Msimanga, who eventually resigned. The City Manager himself alleged political interference on behalf of his political bosses, and reported that the fractured coalition politics had rendered the administration unworkable (Mosola, 2020). While there is no evidence that the DA itself has benefited from these contracts and initiatives, the investigations to date certainly seem to confirm that rents were being diverted to particular coalition partners in order to hold coalitions together.

9.6 PATRIMONIAL REGIME IN CAPE TOWN

What of well-run municipalities at the other end of the scale? Are these free of rent-seeking and political interference, or do they merely take less damaging forms? My recent research into the City of Cape Town, which is the best performing metro across a number of service delivery, governance and public satisfaction indicators, revealed interesting answers. The City has been governed by the DA since 2006, which has prided itself on a corruption-free administration. The previous mayor, Patricia De

4 Glad Afrika also featured in Mangaung where they were procured to manage the BRT system in 2015.

5 The contract was based on Schedule 32 of the MFMA, allowing the municipality to utilise another state entity's procurement process (in this instance, a contract from the DBSA).

Lille, was widely credited with bringing a more racially inclusive, pro-poor focus to the DA's governance of the metro. Nevertheless, De Lille championed a number of large property deals, clustered together as 'catalytic projects' in Cape Town's integrated development plan,[6] which were given City approval despite technical concerns from officials (Olver, 2019). The Foreshore Freeway project, which was intended to ambitiously reconfigure the foreshore area of the city and complete the long unfinished freeways, came spectacularly unstuck when two whistle-blowers reported undue influence in favour of a particular bidder, allegedly because the Mayor favoured a particular proposal (Kesson, 2017; Van Voore, 2018).

Similar concerns emerged around the Maidens Cove development, which came about after two friends of De Lille, Mark Willcox and property developer Tobie Mynhardt, presented to her an unsolicited proposal for a multi-use exclusive development on publicly-owned land. The city proceeded to privatise the public land despite massive opposition from residents and local stakeholders. An official involved in the development had allegedly been "warned" not to oppose the development because it was "a mayoral project". De Lille was close to the Mynhardt family and frequently visited Willcox at his Camps Bay house. Willcox also made donations to charities suggested by De Lille (McKune, 2015). But probably the most deleterious of the Cape Town property deals related to the Philippi Horticultural Area, whose conservation and protection had been recommended by a number of studies commissioned by the City of Cape Town.

Amongst others, the area was important for food security and the recharge of the Cape Flats aquifer, although there were competing pressures for housing and industrial activities (Philippi Horticultural Area Task Team, 2009; Battersby-Lennard & Haysom, 2012). A number of mixed-use developments were aggressively pushed by De Lille, including Oakland City and a scheme by property developer Uvest. When city officials pointed out the technical flaws in the proposals, they had been bullied into changing their opinions. The linkages between De Lille and some of the developers raised sufficient cause for concern. Mvelaphanda Property Investments are financial backers behind Uvest, and both Tokyo Sexwale and Mark Willcox who set up the Mvelaphanda Group are close allies of De Lille (Van der Merwe & Swart, 2017). More broadly, developers in Cape Town speak favourably of the way that De Lille intervened on their behalf. The Mayor's interventions systematically benefited private property investors, while doing little to advance the racially inclusive city that she championed.

6 The property developments included the foreshore freeway project, Maiden's Cove, the Philippi horticultural area, Paardevlei and the Bellville CBD (City of Cape Town, 2017, p. 113).

The particular nature of the rent distribution regime under De Lille was accompanied by a focused repurposing initiative. The Organisational Development and Transformation Plan, implemented in 2016, was intended to comprehensively modernise the administration and introduce performance focused reforms and technologies. There was a substantial centralisation of power in the Mayor's office, with the creation of a powerful Strategic Policy Unit which took the policy initiative away from line departments. There was also evidence that the Organisational Development and Transformation Plan (ODTP) was used to get rid of officials who had opposed particular property development initiatives, particularly human settlements and planning staff. De Lille appeared to take a hands on approach to staff appointments – for instance in the process of interviewing for a new City Manager, De Lille had allegedly sent a message to one of the interview panel members, instructing her to score the incumbent highest (Van Voore, 2018). In an internal DA enquiry, she was accused of political interference and patronage based appointments in the political and senior management staff (Steenhuisen, Moodey, Kopane & Smith, 2017). In general, it appeared that the repurposing was aimed at market friendly managerial reforms, but it was overlain with efforts to entrench political control over particular allocation processes relating to land and property development.

The other interesting feature of Cape Town is the factional battle that unfolded within the DA between De Lille's supporters and old guard white liberals. An internal report compiled by John Steenhuisen, the DA Chief Whip in Parliament, was surprisingly frank. Steenhuisen referred to the DA caucus as "an arena of massive contestation, acrimony and abuse" and said that "many Councillors do not feel that they should raise their heads above the parapet for fear of being cut down to size by either the Mayor or the Chairperson [of the caucus]". Councillors complained about 'the command culture' established by the Mayor and her leadership team. The factional split seems to have been more about ideology and personality rather than a contest over rents, but the end result was nevertheless as destructive. De Lille resigned as Mayor in October 2018, and in the space of five months set up a new political party that contested elections nationally and in all the provinces. The bruising political battle, the allegations that surfaced, and the racial and ideological rifts that were exposed cost the DA at the polls in 2019. DA support in Cape Town dropped to 55.7%, a fall of 5 percentage points from the previous election.[7]

7 On the national ballot, the DA fell from 22.23% in 2014 to 20.76% in 2019, while on the Western Cape provincial ballot they fell from 59.38% to 52.39%, and in Cape Town metropolitan area from 61.50% to 56.66%.

9.7 CONCLUSION

The Cape Town case is instructive in that an ostensibly corruption-free political regime, deeply embedded with private sector interests, nevertheless pursued a centralising agenda to control the allocation of rents. While outwardly championing a racially inclusive city, the regime was more focused on pursuing urban growth to benefit a particular group of property interests that were intertwined with local and provincial political leaders. This stands in contrast to the more decentralised *clientelist* regimes epitomised by the case study of Nelson Mandela Bay and other ANC-run municipalities. It appears that the appropriation of rents by metropolitan political regimes is a pervasive, indeed systemic, phenomenon occurring in every city to varying degrees. Both growth-oriented and clientelist regimes seek to control rights allocation processes, and they deliberately repurpose local government administrations in order to enable this. Repurposing entails 'staking out' the allocative decision-making process and enabling rent distribution through the governance milieu in which it is located. In other words, repurposing has the effect of entrenching a particular rent distribution regime. Local government politics and the exercise of power are in effect about how rents are appropriated and distributed – they are the politics of rent-seeking.

The essential difference between cities is the extent to which their governing regimes take a short- or long-term view on the future and are able to distribute more value creating rights. The emphasis on higher value land development rights under growth-oriented regimes is good for urban growth, but without active social housing and inclusion policies it has a centrifugal effect on the urban poor, who are forced by rising land prices and gated developments to the urban periphery. Clientelist regimes tend to pursue more socially inclusive policies and distribute rents through decentralised patronage networks. However, the steady extraction of value from a limited pool of municipal rents undermines the value of services that are eventually delivered. The poor are massively disadvantaged as municipalities are repurposed and service delivery collapses.

There are potential remedies for the undesirable effects of rent-seeking, referred to as a *rent management system*, elaborated by Khan in his *political settlements* approach (Khan, 2018, p. 650). Rents in the form of redistributive transfers can play important roles, not just in maintaining political stability and trust in political institutions, but also in boosting demand in the economy. Whether rents in local government get captured depends on the relative power not just of political parties and their adherents, but also organised labour, ratepayer and civic organisations and competing service providers. Where rents have been captured, alternative allocation mechanisms, such as through NGOs or private providers, might be more successful in delivering services.

Specifically in terms of BEE, the issue is how to enable beneficiary organisations to use these rents to become competitive and not remain trapped in inefficient rent-seeking modes. There are policies that can push low productivity organisations towards more productive behaviour but it requires a state with the capacity to set the terms of the relationship with business. There might also be alternative ways of supporting infant black-owned industries that circumvent the worst of rent-seeking behaviour e.g., incentivising technology transfer from productive companies or acceleration innovation and learning. A system of checks and balances can ensure that rents flow to the organisations that are meant to receive them i.e., the most productive organisations.

The challenge is how to insulate municipal administrations from the more deleterious effects of political interference. The current schema for municipal public administration is not conducive to this. Municipal managers and senior executives are on fixed term contracts which expire at the end of a municipal electoral term. This makes the incumbents extremely vulnerable to political whims and disinclines them from standing their ground against political interference and corruption. While not the specific subject of this chapter, there are some easily implemented solutions – put senior managers on permanent contracts; prevent arbitrary abuse and dismissal of managers; ensure transparency around municipal allocation processes; ensure accountability for fraud and corruption, including through civil claims for losses and establish a technocratic and neutral regulator for municipal public administration which can arbitrate and intervene in disputes. In short, there needs to be a rebalancing of power between political and administrative domains, in which dedicated technocrats are able to draw the line in relation to rent-seeking behaviour and arbitrary political decisions.

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Part 3

MAINTAINING LEGITIMACY AND ITS HUMAN COST



10 BOSASA'S MONOPOLY MONEY

Robyn Foley

In January 2019, the country was glued to the daily live stream of the testimony of Angelo Agrizzi, the former Chief Operations Officer for Bosasa, at the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, chaired by Deputy Chief Justice Raymond Zondo (hereinafter referred to as 'the Commission' or 'the Zondo Commission'). On the second day of Agrizzi's testimony, a video was shown of CEO Gavin Watson counting out R1m that was to be distributed as bribes to government employees and political comrades. This was the first time the country heard from someone inside the shadow state and Agrizzi did not appear to hold back, recounting in shocking detail all of what had transpired at the company for more than a decade with Watson at the helm of Bosasa (Agrizzi, 2019a).



FIGURE 10.1 Gavin Watson counting out cash for paying bribes
Source: Video played at Commission of Inquiry into State Capture hearing on 17 January 2019 (State Capture Commission, 2019)

Agrizzi's account and the details that emerged through the testimony are fantastic fodder for sequels of Godfather-type movies. At the time of writing, two books had already been published, namely James-Brent Styan and Paul Vecchiatto's (2019) *Bosasa Billions, How the ANC sold its soul* and Adriaan Basson's (2019) *Blessed by Bosasa: Inside Gavin Watson's State Capture Cult*. It is not possible to traverse all the details that spilt into the public domain during those few weeks in early 2019. This chapter seeks instead to focus on the much broader and less visible aspects of the Bosasa story and how they relate to the conceptualisation of state capture as outlined in the Introduction to this book.

Unlike the Guptas who came from India and were able to establish themselves without any real roots in South Africa's struggle past, the Watsons are emblematic of the type of dependent, clandestine, patrimonial practices that were crucial to the ultimate success of the transition from liberation movement to the democratic dispensation.

10.1 THE CAVEAT: STORIES YET TOLD AND SOME THAT WILL NEVER BE HEARD

Valence and Jared Watson, through various interviews with *BizNews*, have put forward a different version of the Bosasa saga, a narrative of corporate espionage to counter the allegations that have been detailed in the Zondo Commission (Hogg, 2019b, 2019a, 2019d, 2019c, 2019e). The Watsons contend that the entire story of the Bosasa bribes were fabricated by Agrizzi, alleging he wanted to take over Bosasa or would tear it down and then take over the lucrative government contracts.

There is some degree of truth to this narrative, as evidenced in the testimony Agrizzi gave before the Zondo Commission. Following his hospitalisation in December 2016 and his supposed 'come to Jesus moment', Agrizzi spent two years trying to push Gavin Watson and the directors out of Bosasa. He set up his own company, with the same people he conspired with to become 'whistle-blowers' Andries van Tonder (former Bosasa Chief Financial Officer) and Peter Venter (former Bosasa auditor). Together, they indeed went to extraordinary lengths to gather evidence of what was happening at Bosasa, particularly to show Gavin Watson's involvement. Jared and Valence Watson contend that Agrizzi and Andries van Tonder were the ones stealing money from Bosasa (Mavuso, 2019; Shange, 2019). Bosasa liquidators sought to recover approximately R91m directly from Agrizzi (Cowan, 2020a). That may well have been the case, but then why, if Gavin knew about the thievery, did he not remove them from the company?

The testimony from Agrizzi was weakened on at least three occasions thus far (at the time of writing the Commission was ongoing and not all the evidence had been

tested). Most striking was the testimony of Peter Venter, which seems to confirm Jared Watson's claim that Agrizzi was aggressively and coercively try to get more 'whistle-blowers' to join his side. Venter testified that Agrizzi altered his affidavit that was provided to the Commission as part of Agrizzi's submission, without Venter's permission (Venter, 2019). Agrizzi also incorrectly named Lindiwe Sisulu as being one of the founding members of Dyambu Holdings, the company formed in the late 1990s by a group of influential women from the ANC. That company was later taken over by Gavin Watson and renamed Bosasa (Department of International Relations and Cooperation, 2019). In March 2020, Agrizzi returned to the Commission to publicly apologise to Ms Jabu Sishuba for his allegation in 2019 that she had been paid a bribe (Zondo Commission, 2020).

The narrative driven by the Watsons would appear to be in line with what unfolded since Agrizzi's first appearance. The banks closed Bosasa's accounts; the various companies are in the process of being liquidated (though there is currently a legal dispute); government contacts have been cancelled (which are estimated to make up almost 93% of the organisations business); and there have been a tax inquiry and ongoing investigations. It is estimated that R849m in taxes have been fraudulently withheld from the state (Cowan, 2020c).

The challenge to the Watson's reasoning is that it is difficult to see how Agrizzi, with his own culpability in the activities exposed, benefits from the collapse of Bosasa. Agrizzi, Andries van Tonder, Patrick Gillingham and Linda Mti have been arrested and charged, based on a Special Investigations Unit (SIU) investigation dating back to 2009.

Perhaps the most shocking and saddest development was the tragic passing of Gavin Watson in August 2019. In the early hours of a Monday morning, a day before he was due to testify in the tax inquiry, Gavin Watson was involved in a head-on collision with a concrete column along the road entering OR Tambo International Airport. There has been much speculation and several questions raised around Watson's passing, but at the time of writing there were no conclusive findings to any of the investigations that have been undertaken (Hogg, 2019e). His passing means that South Africa will not get to hear his side of the story. There are many questions which will now be left unanswered and the call for justice – be it for Gavin Watson or the people of South Africa – will yet again be denied.

There are, however, still a significant number of other individuals and organisations that have been implicated in the Bosasa story and they should be held to account. Many of those accused of wrongdoing have provided blanket denials, but to date few have actually disputed the allegations of corruption by Agrizzi and the details

contained in supporting physical evidence and corroborating witnesses testimony that has been laid out at the Zondo Commission. At the time of writing this chapter, the Commission is still underway and those implicated may still be compelled to testify before Judge Zondo.

10.2 STRUGGLE HERO TO SYNDICATE KINGPIN: STATE CAPTURE FROM THE BOTTOM UP

Unlike the state capture that took place in state-owned companies, driven by the Guptas, the Bosasa case shows how bribery and "petty" corruption evolves to become state capture. It further shows that state capture extends beyond the mere manipulation of procurement processes, requiring the subversion of multiple government functions and the undermining of accountability for those placed in positions of power.

10.2.1 Airing Dirty Laundry: Contracts, Bribes and Flows of Monopoly Money

In his testimony, Agrizzi outlined in granular detail how money was laundered, the financial books manipulated, the fixing of contracts and the physical paying off of people (with cash money, goods and/or services) were carried out at Bosasa. The Bosasa saga spans almost two decades, is dispersed through several of the group companies and joint ventures and entails several different service offerings. As such, quantifying the number of contracts and associated bribes that are alleged to have been paid is a mammoth task that is yet to fully materialise. In his supplementary affidavit, Agrizzi compiled a breakdown of what seems to be the major Bosasa contracts that were tainted by corruption (see Table 10.1 below).

Table 10.1 Agrizzi's breakdown of estimated Contract Values and Bribes Paid

Contract Name Company	Description	Annual Value or Contract Value	Estimated Annual Bribes paid in Cash
Sibanye Mines Bosasa Operations	Catering	R71 000 000	R3 000 000
Correctional Services Bosasa Operations	Catering	R580 000 000	R15 000 000
Department of Transport Kgwerano	Fleet	R122 000 000	R3 600 000
Department of Justice Sondolo IT	Security Systems	R700 000 000	R16 500 000
Correctional Services Sondolo IT	Access Control	R241 000 000	R4 200 000

Contract Name Company	Description	Annual Value or Contract Value	Estimated Annual Bribes paid in Cash
Correctional Services Sondolo IT	Television Systems	R300 000 000	R5 000 000
Correctional Services Phezulu Fencing	Fencing of Various Facilities	R800 000 000	R10 000 000
North West Youth Bosasa Youth	Youth Services	R32 000 000	R4 500 000
Mogale Youth Centre Bosasa Youth	Youth Services	R14 000 000	R2 300 000
Airports Company South Africa Bosasa Security	Physical Guarding Security	R32 000 000	R2 200 000
North West Youth Development Centres	Pre-Opening Expense Fencing and Software	R4 500 000	R2 200 000
Eskom Sondolo IT	Access Control	Unknown – left when it started	Unknown – left when it started
Department of Home Affairs Lindela	Accommodation of un-documented migrants	R85 000 000	R7 200 000
PRASA Sondolo IT	Access Control	Unknown – left when it started	Unknown – left when it started
TOTAL		R2 981 500 000	R75 700 000

Source: Agrizzi (2019c)

These figures are illuminating in terms of understanding the volume of money that was passing through Bosasa, however, they are by no means comprehensive. For instance, Agrizzi indicates that the amounts estimated for bribes does not include other gifts and services that Bosasa provided to government officials (hereinafter referred to as 'in-kind' contributions). It is also unclear if the amounts indicated are only the bribes assigned to individuals for specific contracts or if they include the long term 'commissions' that were paid to the politically powerful, such as the supposed R300 000 a month paid to the Jacob Zuma Foundation. Agrizzi estimated that by the time he left Bosasa in 2016 the amount of cash bribes distributed per month ranged from R4-R6m (Agrizzi, 2019a).

Investigative reporters from the *Mail & Guardian* (*M&G*) have managed to analyse some 10 000 invoices verified by National Treasury (Saba, 2019). They indicate that between mid 2003 to beginning of 2019, Bosasa and its affiliated companies had received contracts from at least 40 different government departments and entities,

with an estimate value of over R12bn. They note that the data source is not extensive and there are likely more accounts and contracts that are still to be determined.[1]

Services provided by Bosasa range from catering services at prisons and security installation to supplying of stationary. It would appear that Agrizzi's testimony was focused only on the contracts and departments associated with the 'big moneys'. He made no mention of contracts with departments such as "Limpopo's department of social development, Gauteng's education department, the Northern Cape arts and culture department and the national department of agriculture, forestry and fisheries" (*M&G* Data Desk, Smit, Jika & Skiti, 2019) which accounted for 'smaller' amounts. Adriaan Basson (2019), in his book *Blessed by Bosasa*, also provides a similar account indicating that an estimated R12.2bn had been spent by 18 different national and provincial government departments, between 2003 to 2018.

What Agrizzi, Basson and *M&G* all indicate is that the largest contracts in terms of value are from the Department of Correctional Services (R7.2bn), Department of Home Affairs (R1.8bn) and Department of Justice (R650-800m). It should, however, be noted that the combined contracts for the different provincial departments makes Social Development (R2.3bn) the second largest target sector for the Bosasa group. The figure below provides a rough breakdown of the monies Bosasa received from various government departments.

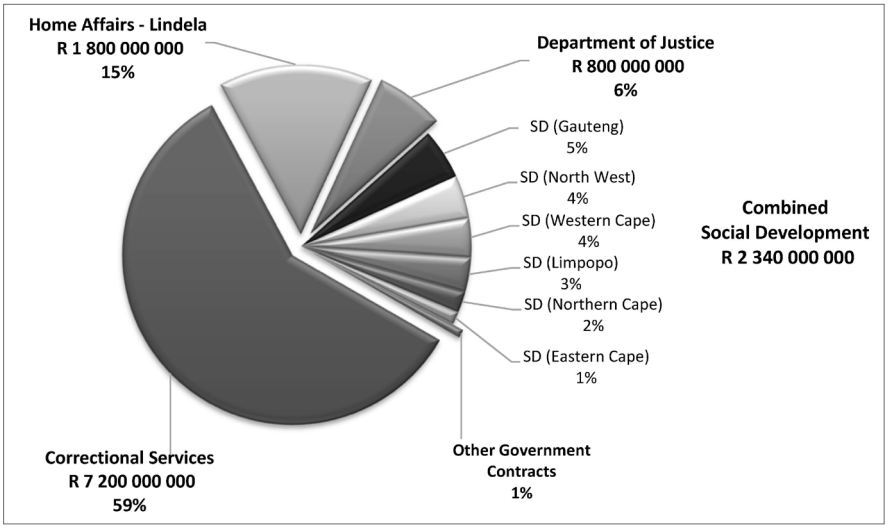


Figure 10.2 Estimated Value of Bosasa Contracts with Government: 2003-2018
Source: *Mail & Guardian* (2019), Adriaan Basson (2019) and Angelo Agrizzi (Agrizzi, 2019c)

1 *City Press'* quoting Advocate Hermione Cronje, the head of the National Prosecuting Authority's Investigative Directorate, indicate that the "company and its subsidiaries and affiliates went on to secure in excess of R34bn in government contracts from a range of government departments at all levels of government" (*News24 Wire*, 2020).

There are several government and private entities Agrizzi discussed in his initial testimony that were not included in Agrizzi's breakdown, such as the contracts with Sasol and South African Postal Office (SAPO). Accruing in the early days of Bosasa, these may have been excluded due to having being paid through 'in-kind' contributions (Agrizzi, 2019a).

These 'in-kind' contributions may be the most visible confirmations of corruption, as they can often be verified physically, but they are also perhaps the hardest to quantify. Richard le Roux was responsible for undertaking security installations at Bosasa and aided the Commission's investigation team in pointing out said installations at the residencies of several high-profile politicians. These include Nomvula Mokonyane, Dudu Myeni, Gwede Mantashe and Vincent Smith amongst others (Le Roux, 2019). Agrizzi testified to arranging for meat and alcohol to be delivered annually to Christmas events for Nomvula Mokonyane and had to arrange for a last-minute birthday cake for then President Zuma. The bribes for the SAPO contract included the purchasing of Mont Blanc pens and Cartier cufflinks (Agrizzi, 2019a). Long-time employee Frans Vorster, Bosasa's former fleet manager, also testified to arranging car rentals for Mokonyane's daughter (Vorster, 2019).

Agrizzi's testimony went beyond just spouting figures and naming names of those that benefited from Bosasa's corrupt dealings. He described in detail how contracts were manipulated, and money was laundered.

Bid specifications would either be drafted by or supplied to Bosasa before going out to tender, giving the company an extreme advantage over any competitors that may be hoping to win the lucrative contracts. A prime example of this was the fence contract for correctional services. Bosasa, with no previous experience, bought a company Phezulu Fencing (Pty) Ltd. Once awarded the contract, it then subcontracted with Beta Fence (Pty) Ltd, SA Fence and Gate (Pty) Ltd,[2] Live Wire (Pty) Ltd and several others. According to Agrizzi, these subcontracts submitted bids for the same tender, but the prices were fixed to ensure Phezulu won the contract. This was over and above the assertion that the bid specifications were drafted by Bosasa (Agrizzi, 2019a).

Gregory Lawrence, connected to a company called Equal Trade was subpoenaed to testify before the Commission. He provided video evidence of how he would deliver millions in cash to Bosasa based on surreptitious invoices generated to cover any auditing tracks (Lawrence, 2019). Petrus Venter testified how Consilium was set up

2 See Chapter 15 on SARS regarding one of the owners of SA Fence and Gate, Mr Patrick Moneyki, and how he is implicated in other cases of state capture.

to be a labour broking firm that was used to pay Gavin, Agrizzi and Andries van Tonder, as well as several members of the Watson family (though this is something they have denied). Shell companies would be set up to internally transfer funds to skew reported profits and evade tax (Venter, 2019). Agrizzi also testified as to how fake companies would be established not only to reflect non-existent purchases, but also to manipulate and improve the BEE scoring of Bosasa (Agrizzi, 2019a).

At least 38 individuals have been implicated in Agrizzi's testimony (served Rule 3.3 notices by the Commission) and many companies and organisations have been named as being part of the Bosasa corruption network. Many of these firms and individuals are linked to other cases of state capture and political corruption. As it is not possible to provide a detailed account of each of these in this chapter, Figure 10.3 (pp. 200 and 201) provides an outline of the various connections within this network.

10.2.2 Paying for Protection from Prosecution and Parliament

Most of the activities detailed in the previous section outline the general modus operandi relating to corruption for government tenders and extraction of rents. Though there were a significant number of these corrupt contracts, I would argue that on their own this does not rise to the level of state capture, as has been described in the Introduction chapter to this book. The turning point, when Bosasa went from being just a corruption beneficiary to a full member of the shadow state, came in 2007, when the SIU began investigating corruption at the Department of Correctional Services (DCS) (President of Republic of South Africa, 2007).

In February 2019, shortly after Agrizzi finished his initial testimony at the Zondo Commission, the Hawks laid formal charges against him and three other co-accused namely: Andries van Tonder, former Bosasa CFO; Patrick Gillingham, former Correctional Services CFO and "Richmond" Linda Mti, the former Commissioner of Correctional Services. The group face multiple counts of corruption, money laundering and contravening the Public Finance Management Act (PFM), relating to four specific tenders that were the focus of the 2007 SIU investigation. The SIU had completed it investigations and submitted a report to the various authorities in late 2009 (Smit, 2019a). How and why it took almost 10 years before they were arrested, was revealed during Agrizzi's testimony.

One of the many startling revelations from Agrizzi was that Bosasa had been tipped off about the intention for the SIU to undertake a search of Bosasa's premises. Pre-emptively Bosasa filed a court interdict against the SIU investigation. The SIU agreed to delay their search and limit the individuals they would engage, for reasons

that not even the lead SIU investigator on the Bosasa case, Clint Oellermann, could surmise (Zondo Commission, 2019h). Agrizzi indicated that at least one of the tip-offs had come from Sesinyi Seopela, one of several alleged fixers and handlers that distributed bribes for Bosasa (Agrizzi, 2019a).

Agrizzi, Andries and Leon van Tonder testified to destroying potential incriminating evidence and Oellermann confirmed the SIU's findings that a specialised software, called "Eraser", was used to delete some 40 000 files from Bosasa's servers before the SIU raid (A. van Tonder, 2019; Agrizzi, 2019a; L. van Tonder, 2019; Oellermann, 2019; Zondo Commission, 2019h). At the time, there was also evidence emerging in the public domain regarding the various travel arrangements, made through Blake Travel agents, for implicated political elites, paid for by Bosasa. Documentation from Blake Travel was also allegedly destroyed and false replacement documents created to mislead the SIU investigators (A. van Tonder, 2019).

The tip-offs about the SIU's investigations was only the start of the processes to manipulate and subvert the criminal justice system from bringing Bosasa to book. Later in 2009, the SIU finished its investigation into four specific contracts Bosasa had with the Department of Correctional Services, namely: for catering, access control, fencing and the installations of televisions. The report provided damning details of how the contracts were awarded and that rewards were received by two high level government officials Gillingham and Mti (Agrizzi, 2019a; Oellermann, 2019). A copy of the report managed to find its way (allegedly via Bosasa's attorney Brian Biebuyck) into the hands of Agrizzi. Oellermann confirmed that the report in Agrizzi's position was the same as the one he had compiled, however, he highlighted that the front page, containing the distribution list for the report, was not included in Agrizzi's copy. Only five names were included in the list, namely: the Minister of Correctional Services (Nosiviwe Mapisa-Nqakula); the Acting National Commissioner of Correctional Services (Ms J Schreiner); the Head of the SIU (Mr Willey Hofmeyr); SIU Programme Manager (Adv. S. Jacobs) and SIU Archive (Oellermann, 2019).

By December 2009, the SIU report had been sent to the NPA, which then turned the case over to the Serious Economic Offences Unit of the South African Police Service (SAPS) for further investigations (NPA, 2009). Since then, based on the documentary evidence supplied by Agrizzi to the Commission, it appears that Bosasa was regularly receiving sensitive confidential documents from the NPA about the case and its developments. These documents were confirmed in the Commission to be identical to those compiled by the primary case office for the NPA, Adv. Marijke de Kock (De Kock, 2019).

NETWORK OF INDIVIDUALS AND BOSASA WEB

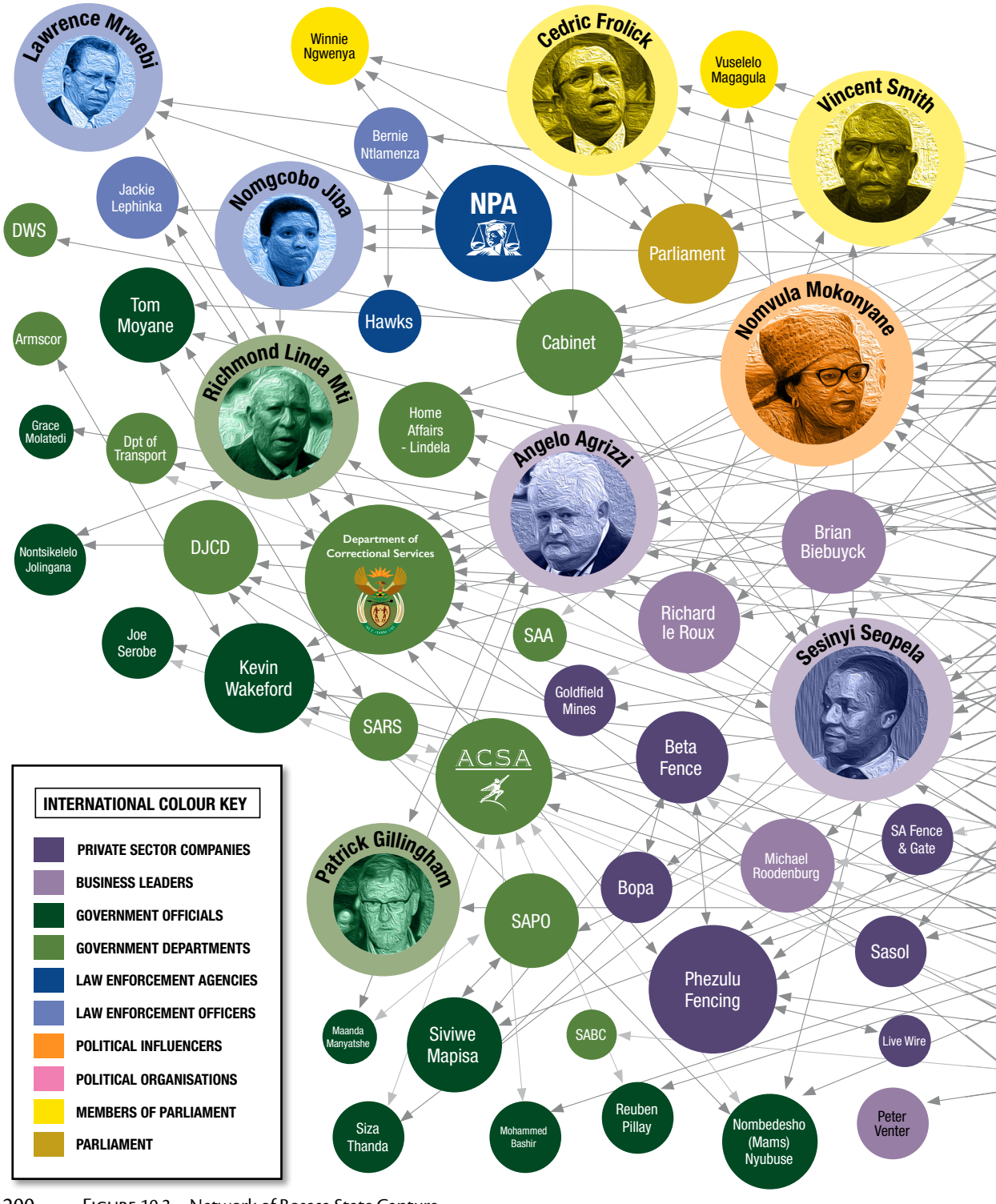
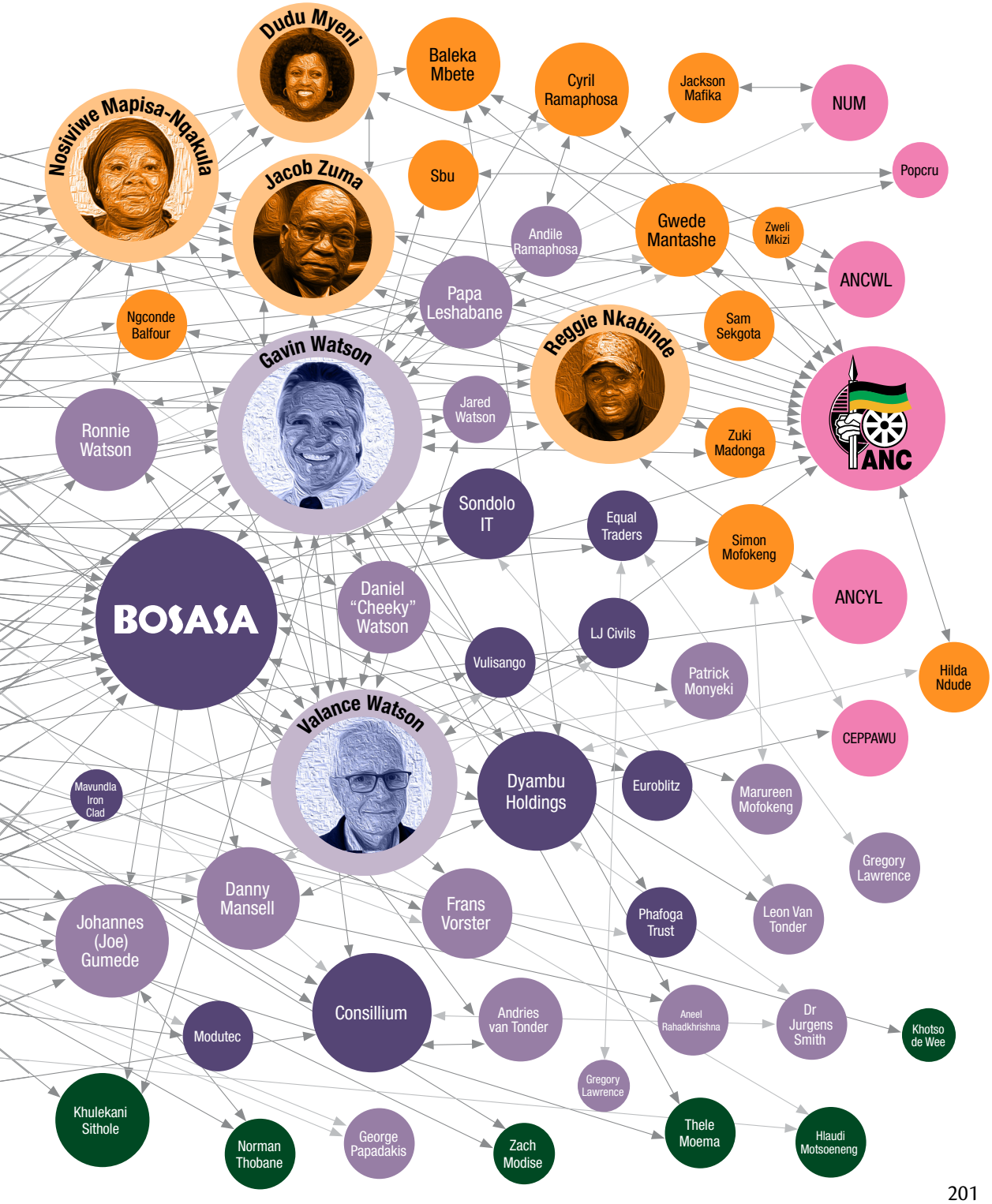


 FIGURE 10.3 Network of Bosasa State Capture

ENTITIES CAUGHT UP IN THE OF CORRUPTION



The case has been ongoing since then and De Kock has committed to provide the Commission with further details surrounding the inexplicable delays in getting the case to the courts. It was, however, revealed by Agrizzi that there appeared to be three individuals from the NPA that were receiving monthly payments from Bosasa to keep the case from seeing the light of day. Agrizzi alleges that each month Mti, at that stage no longer with Correctional Services but still being paid by Bosasa, would distribute bags of cash to Nomgcobo Jiba (R100 000); Lawrence Mrwebi (R10 000) and Jackie Lepinka (R20 000) (Agrizzi, 2019a). Lepinka was previously Mti's assistant when he was at Correctional Services and both Jiba and Mrwebi have been linked to other cases of alleged state capture (see Chapter 13). Both have denied receiving any money from Bosasa while testifying before Justice Yvonne Mokgoro in an inquiry, which found they were unfit to hold office in the NPA (Mokgoro, Moroka & Vilakazi, 2019; Ndaba, 2019; Phakgadi, 2019).

It would seem it was not just those in the NPA that provided information about the case to Bosasa. Agrizzi also implicated Dudu Myeni, the former Chair of South African Airways and Chair of the Jacob Zuma Foundation, as being a source for confidential government documents. She allegedly arranged for Agrizzi and Gavin Watson to view the police case docket, related to the Correctional Services contracts, in a private meeting room at the Sheraton Hotel (Agrizzi, 2019a).

10.2.3 Rolling the Dice and (Re)moving the Players

Like many cases of state capture, there appears to be evidence that individuals who posed as potential obstacles to Bosasa's continued accessing of lucrative contracts from the state were removed. In November 2006, Mti left Correctional Services to serve on the committee tasked with address the security for the FIFA 2010 world cup (Department of Correctional Services, 2006). Vernie Peterson's appointment as National Commissioner of Correctional Services, in May 2007, was meant to serve as a turning point in DCS's fight against corruption (Department of Correctional Services, 2007). Dennis Bloem and several others attest to Peterson's pursuit to rid the department of corruption and, as Agrizzi highlighted in his testimony, this posed a major threat to Bosasa's ambitions (Agrizzi, 2019a; Basson, 2019; Bloem, 2019).

Presumably aware of the allegations of corruption and the investigation by SIU, Peterson suspended Patrick Gillingham in September 2008. This occurred shortly before Gillingham's house was raided by the SIU where they found a business card with Gillingham's name on it, with the title of consultant for Consilium Business Consultants (Pty) Ltd (Agrizzi, 2019a). Agrizzi testified that Bosasa made several failed attempts to meet Peterson, but having exhausted the soft approach, Bosasa allegedly arranged for Khulekani Sithole (former Commissioner of DCS), and senior

member (Agrizzi only recalled his name as Sbu) of Union Police and Prisons Civil Rights Union (Popcru) to put pressure on Peterson (Agrizzi, 2019a; Smit, 2019b).

At the time, still under the Mbeki administration, the Minister of Correctional Services was Ngconde Balfour. The Minister and Commissioner publicly butted heads, with "Peterson reporting Balfour to the then minister of public service and administration … and the parliamentary ethics committee for receiving a discount on his Touareg 4x4 from a company with links to Bosasa [and] Balfour had Petersen investigated for an allegedly drunken outburst at an official departmental function" (Barron, 2011). The deterioration of the relationship between Balfour and Peterson was undoubtedly a favourable turn of events for Bosasa, however, Agrizzi was at pains to highlight that he had no knowledge of Balfour receiving any form of benefit from Bosasa (Agrizzi, 2019a).[3]

In late 2008, Peterson was redeployed to the Department of Sports and Recreation and Xoliswa Sibeko was appointed Commissioner of Correctional Services. According to Agrizzi, Sibeko was also a perceived threat to Bosasa, as she "was adamant that she did not want the Bosasa group involved with the Department of Correctional Services" (Agrizzi, 2019a, pp. 64-65). Sibeko withdrew DCS from a court case that was brought against it by a rival company, challenging the awarding of the catering contracts to Bosasa. With DSC no longer opposing the litigation a major revenue stream of Bosasa's was under threat (Smit, 2019b). Sibeko was later controversially fired by Zuma's Minister Nosiviwe Mapisa-Nqakula (one of the ANC women that originally established Dyambu Holdings) and replaced by Tom Moyane in May 2010.

Agrizzi again testified that he could not state definitively if Moyane was receiving any cash or other financial benefits from Bosasa. He did, however, highlight that during Moyane's tenure as National Commissioner, the payments of bribes to Correctional Service officials increased by R250 000, to an estimated R750 000 per month. Under Moyane, there was an about-turn on the department's involvement in the litigation regarding the awarding of the catering contract (Basson, 2010) and according to reports he "ignored" the request from National Treasury to have Bosasa blacklisted from government's supplier database (Jika, Skiti & Smit, 2019). Moyane would continue to play an active role in the state capture project when he was later appointed Commissioner of SARS (see Chapter 15). Zach Modise, a long time Correctional Services employee and an individual highly implicated by Agrizzi, would become Commissioner after Moyane, with Bosasa continuing to receive the lucrative government contracts (Agrizzi, 2019a).

3 Suggest reading Adriaan Basson's *Blessed by Bosasa* for more details on Peterson's time as National Commissioner of Correctional Services.

BOSASA: FROM GOOD, HOW A CAUSE IS CORRUPTED

INFLUENCE OVER PARLIAMENT

Cedric Frolick - National Assembly House Chair
Vincent Smith - ANC Member of Parliament

INTERNAL GOVERNMENT FIXERS

Patrick Gillingham - Correctional Services Chief Financial Officer
'Richmond' Linda Mti - Commissioner of Correctional Services (2001-2006)
Tom Moyane - Commissioner of Correctional Services (2010-2014)

HEADS OF THE NATIONAL PROSECUTING AUTHORITY (NPA)

Nomgcobo Jiba - Deputy National Director of Public Prosecutions
Lawrence Mrwebi - Special Director of Public Prosecutions

THE POWER ELITE

Nomvula Mokonyane - key figure with links to high profile political contacts
Dudu Myeni - Chairperson of South African Airways
Jacob Zuma - President of South Africa (2009 - 2018)
Cyril Ramaphosa - President of South Africa (2018 - present)

Following media reports that the SIU is investigating BOSASA, Dennis Bloem (Chair of the Portfolio Committee for Correctional Services [PCCS]) **starts asking tough questions of DCS officials.**

Minister of Correctional Services
Ngconde Balfour

Commissioners of Correctional Services

'Richmond' Linda Mti

Mti oversees the manipulation of the procurement processes within the DCS.

Vernie Petersen

May 2007- Petersen embarks on a relentless campaign to rid the DCS of corruption.

1996

Dyambu Holdings formed by prominent ANC women leaders:

- Nosiviwe Mapisa-Nqakula
- Nomvula Mokonyane
- Hilda Ndude
- Baleka Mbele & others

Dyambu Operations

Established by Gavin Watson, first as a subsidiary, later buying all the women's shares.

Lindel Repatriation Centre:

Holding facility for juvenile, undocumented migrants established.

1999

BOSASA

Dyambu Operations renamed BOSASA.

Gavin Watson & Danny Mansell use union contacts to coerce mine contract awarding.



2002

BOSASA provides gifts & favours to politically connected & powerful ANC members.

BOSASA shifts focus from servicing mining operations to procuring more lucrative government contracts.

home affairs
Department: Home Affairs
REPUBLIC OF SOUTH AFRICA

correctional services
Department: Correctional Services
REPUBLIC OF SOUTH AFRICA

social development
Department: Social Development
REPUBLIC OF SOUTH AFRICA

Post Office

sasol

AIRPORTS COMPANY SOUTH AFRICA

2007

Tip-off from **Sesinyi Seopela** *(Fixer and handler)* about SIU's intent to search BOSASA's premises.

BOSASA preemptively files court interdict against SIU search.

Special Investigation Unit (SIU) begins investigating corruption at DCS.



Gavin Watson: His family was known for defying apartheid, famously playing in mixed-race rugby games in the 1970s. Over the years he built relationships with high-profile ANC comrades who would go on to serve the post-apartheid government of South Africa.



Angelo Agrizzi: He is the former Chief Operating Officer of BOSASA. He used the knowledge and experience he acquired in the Malope Group of Companies to transform Dyambu into the BOSASA Group. He is the chief whistle-blower regarding allegations of corruption and state capture of Gavin Watson's BOSASA.

INTERNATIONAL COLOUR KEY

- Parliament
- Department of Correctional Services (DCS)
- Criminal Justice
- BOSASA
- The Power Elite

Nomvula Mokonyane: Every Christmas, the Watsons arranged for meat and alcohol to be delivered to her home.

FIGURE 10.4 Timeline of key developments in the Bosasa Scandal

TO BAD, TO UGLY
TO BECOME STATE CAPTURE

Bloem leaves Parliament after the 2009 Zuma elections and moves to COPE.

To minimise the extent of PCCS probing into contracts, BOSASA pays monthly bribes to National Assembly House Chair, Cedric Frolick (R40k) & 3 MPs on the PCCS: Vincent Smith (R45k), Winnie Ngwenya (R20k) and Vuseselo Magagula (R30k).

OVER R12 BILLION IN CONTRACTS ARE AWARDED TO BOSASA FROM 2003 TO 2018

Minister of Correctional Services
Nosiviwe Mapisa-Nqakula

Following clashes in management, Balfour and Petersen's relationship sours. Ultimately Petersen is redeployed to the Department of Sports and Recreation.

Nosiviwe Mapisa-Nqakula controversially fires Xoliswa Sibeko.

Sep 2008 - Petersen suspends Patrick Gillingham due to allegations of corruption and the ongoing SIU investigation.

Xoliswa Sibeko

Sibeko is considered a threat to BOSASA as she is "adamant that she does not want the BOSASA group involved in the DCS".

Tom Moyane

During Moyane's tenure bribe payments to Correctional Service officials increased monthly to R750k.

Zach Modise

While Modise is in office, BOSASA continues to receive lucrative government contracts.

2008 | 2009 | 2010 | 2011 | 2014 | 2015 | 2017 | 2019

Dec - Angelo Agrizzi and Leon & Andries van Tonder delete 40 000 potentially incriminating files from BOSASA server before SIU raid.

BOSASA regularly receive confidential documents from NPA about developments in the case.

BOSASA provides ANC with election command centre.

Agrizzi leaves BOSASA.

Aug - Gavin Watson dies in car crash near OR Tambo Airport.

Angelo Agrizzi obtains unreleased SIU report via BOSASA's attorney Brian Biebuyck.

Agrizzi alleges 3 individuals from NPA received monthly payments from BOSASA to prevent the case from surfacing. Mti distributes cash to:
- *Nomgcobo Jiba - R100k*
- *Lawrence Mrwebi - R10k*
- *Jackie Lepinka - R20k*

SIU atypically agrees to:
- delay search
- limit engagement with individuals at BOSASA.

SIU completes DCS investigation. The report includes damning details about DCS contracts awarded to BOSASA, and rewards gained by 'Richmond' Linda Mti & Patrick Gillingham.

SIU report sent to NPA, which turns case over to the Serious Economic Offences Unit of the South African Police Services for further investigation.

Feb - HAWKS lay formal charges against:
- Angelo Agrizzi
- Andries van Tonder
- Patrick Gillingham
- 'Richmond' Linda Mti

After Zuma's NDPP, Shaun Abrahams is replaced by Shamila Batohi, Agrizzi testifies and NPA finally takes BOSASA case to court - **a decade later.**

Dudu Myeni: Chairs the Jacob Zuma Foundation, which supposedly receives R300k a month from BOSASA.

Dudu arranges for Agrizzi and Watson to view the police docket in a private room at the Sheraton Hotel.

Jacob Zuma: Watson is secretly recorded boasting that he would lobby president Zuma to appoint a National Director of Public Prosecutions who would 'protect' high-level NPA officials.

Cyril Ramaphosa: Watson uses shell company to contribute R500k to his 'CR17' ANC National Election campaign.

As can be seen from the above, having the 'right people' at the top plays an important role in determining the extent to which a company or group can have sway over government. In the case of Bosasa, this point was made clear when, during Agrizzi's testimony, an audio recording was played of Gavin Watson explaining how he planned to approach then President Zuma and discuss the crucial appointment of the National Director of Public Prosecutions. From the recording of the hearing and the transcripts, Gavin Watson in preparing for his visit with the Zuma, stated the following:

> Now Mr President we need to get this thing closed down. We need the right people in the right place. [Ntlamenza] is the right guy at that place doing what he can. Now we need to get the right person at NPA. Either we get [Chauke] or Jiba or the woman down in Natal … Now Jiba's been buggered up and [Mcwebi] also been buggered up. Ok. In the press. So how are you going to protect them Mr President? By putting the right person in there. I do not know who is advising you Mr President, but you need to make the right decisions now, you have not got much time left. (Agrizzi, 2019b; SABC Digital News, 2019c; Zondo Commission, 2019c)

10.2.4 Parties for the Politically Powerful

Law enforcement is not the only method by which those in power are meant to be held to account. Parliament is the institution that is meant to be the representative voice of the people in government through political party representation. Part of that function is having oversight of the executive branch to ensure that every department fulfils its constitutional mandate in service of the people. Bosasa's sphere of influence within the ANC also managed to infiltrate this branch of government. When it became known through the media that Bosasa was being investigated by the SIU, the Portfolio Committee for Correctional Services (PCCS) began to ask tough questions of the DCS officials (Agrizzi, 2019a; Bloem, 2019). Dennis Bloem was an ANC MP and Chair of the PCCS at the time reports on Bosasa were surfacing. He left the ANC and parliament after the 2009 elections when Zuma became president and joined an opposition party, the Congress of the People (COPE). In his testimony to the Zondo Commission, he noted the responses he received from his ANC comrades for raising tough questions.

> I was reprimanded and said that this what you are doing this is an ANC Government. You cannot do this, because you are putting the ANC in a bad light outside … I was being labelled as an opposition in the ANC, because I was asking these questions and doing my work. (Zondo Commission, 2019f, pp. 30 & 32)

The questions facing DCS officials did not end with Bloem's departure and as such it was necessary to find a way to minimise the extent to which PCCS probed the Bosasa contracts. Agrizzi alleges that there were at least three MPs on PCCS that were

receiving monthly payments to "ensure at the parliamentary committee meetings, that the negative media coverage against Bosasa would not prevent future contracts being awarded to Bosasa" (Agrizzi, 2019a, p. 43). These MPs were Vincent Smith (R45 000), Winnie Ngwenya (R20 000) and Magagula (R30 000) (no first name indicated by Agrizzi) (Agrizzi, 2019a). In his supplementary affidavit to the commission, Agrizzi further implicated Cedrick Frolick (the National Assembly House Chairman at the time) as also being on the payroll, allegedly receiving R40 000 per month along with other Bosasa benefits. Agrizzi indicated that Frolick was instrumental in getting Smith on Bosasa's side (Agrizzi, 2019c). In response to these allegations, Frolick has requested to give evidence at the Commission, however, this had not occurred at the time of writing (Zulu, 2020).

Since its inception, Bosasa has been deeply entwined with the ANC. Initially the company, called Dyambu Holdings, was formed by a group of prominent ANC women leaders, namely: Nosiviwe Mapisa-Nqakula; Nomvula Mokonyane; Hilda Ndude and Baleka Mbete, amongst others. It was Ronnie Watson, Gavin's brother, that recommended Gavin be brought in to run the business on their behalf. Gavin established Dyambu Operations as a subsidiary and later bought the ANC women's shares, assuming control of the company, shortly thereafter it was renamed Bosasa (Basson, 2019). Agrizzi recounted that as far back as 2002 Bosasa was providing all manner of favours to politically connected and powerful members within the ANC. Figure 10.4 (pp. 204 and 205) illustrates a timeline of the Bosasa scandal, highlighting the key political and business players that colluded in this state capture case. It would seem, based on the testimony of most of the Bosasa whistle-blowers, that Nomvula Mokonyane was one of the main political beneficiaries. In his testimony, Frans Vorster stated the following in relation to Mokonyane:

> I often questioned Gavin, Angelo and 20 [of] the other directors why I had to drop everything to attend to the minister and the family and it became apparent over the years that she was the key person and link and had huge political contacts even to the previous president of South Africa and I had to do what I was instructed to do. (Zondo Commission, 2019e, p. 156)

Mokonyane was not alone in receiving benefits from Bosasa, according to Agrizzi R300 000 a month was being paid to the Jacob Zuma Foundation, via its Chair Dudu Myeni. The ANC itself as an organisation also benefited immensely from Bosasa's success. Agrizzi alluded to payments to the top six of the ANC in the millions (one estimate was R10/12m, but could not state definitively) (Zondo Commission, 2019g). Evidence has emerged, however, in the form of a letter sent from ANC treasurer Dr Zweli Mkizi, thanking Bosasa for a R3m donation to the organisation (Basson & Cowan, 2019). During the 2014 national election, Bosasa also set up and maintained

an ANC election 'war room' (a command centre for ANC volunteers), all at Bosasa's expense (Cowan, 2019; Vorster, 2019). According to Agrizzi:

> Gavin Watson became completely infatuated with his relationship with various ANC officials. He openly supported the ANC. At times we had to warn him he was flouting human resources rules, as he would publicly instruct staff to vote only ANC or else they needed to find alternative employment. (Agrizzi, 2019c, p. 16)

This blurring of the lines between business, politics and government was a hallmark practice of state capture, which was on full display when Zuma, addressing international and local guests attending the ANC's Progressive Business Forum gala dinner at Gallagher Estate on 8 October 2015, stated:

> I always say to business people that if you invest in the ANC, you are wise. If you don't invest in the ANC, your business is in danger. The TG [ANC treasurer general] is a nice and a handsome young man. When he knocks, open the doors. If he says we need something he will ask one thing only. If he says support the ANC, just write a blank cheque with the instruction that it should be six digits … This organisation does not make profit, but we create a conducive environment to those who make profit. Once you make profit, you know what to do (Zuma quoted by Letsoala & Hunter, 2015).

President Ramaphosa has also been embroiled in the Bosasa scandal, when it emerged that Gavin Watson had made a R500 000 donation, via one of his front companies, to the CR17 ANC national election campaign. Ramaphosa was confronted by a question, from the opposition, about the donation during a Question and Answer session in Parliament. He incorrectly responded that the donation was a payment to his son, Andile Ramaphosa, for work done with Bosasa. When he was made aware that this was not the case and his campaign had indeed received the donation, he sent a correction to the Speaker. The Public Protector Busisiwe Mkhwebane investigated the matter and issued a report that found the president's actions were found wanting in that he had mislead parliament and should have declared all donations to parliament (Public Protector, 2019). The report was successfully taken on review and overturned by the Gauteng High Court (Cowan, 2020b).

10.3 RACKETS OF RACE, RELIGION AND RIGHTEOUS STRUGGLES

The Introduction chapter to this book introduces us to the concept of rackets, defined as "a pattern of behaviour that enables the racketeer to enrol others into acting out a fundamental untruth that is often masked by a seemingly credible story". Ultimately, rackets are about leveraging 'coercive feelings' to enable abuses of power and to mask illegitimate actions. There are numerous rackets entangled in the case of Bosasa, but

perhaps the most profound are those pertaining to race, religion and the entitlement assumed from a legacy of struggle against apartheid.

Perhaps the most divisive and destructive rackets that have emerged in response to the exposed antics of the state capture project, entails the expropriation and exploitation of South Africa's very real legacy of racial inequality and injustice. Most of those caught in the dubious dealings of the state capture project have argued that state capture is a racist concept, that 'only focuses' on and drives a narrative that black people are corrupt. The Watsons and their cohorts, being predominantly white, undermine this narrative.

The issue of race is intrinsically underpinned in the Bosasa story. The role the Watsons played during apartheid cannot and should not go unrecognised. The family were openly defiant of the apartheid regime's racist laws of segregation and deprivation of human dignity for the non-white majority of the population. At some point in the 1970s, Gavin and his three brothers – Valence, Ronnie, and Daniel (Cheeky) Watson – became actively involved in the fight against apartheid. They attracted significant media attention, even internationally, for their refusal to play rugby according to the regime's racist rules (racially segregated) and the drama that emanated from the arson charges that were brought against them in the 1980s (Sparks, 1986; Parks, 1987; Basson, 2019; James-Brent Styan & Paul Vecchiatto, 2019; Xabanisa, 2019). At Gavin's funeral, Zuma highlighted the important role the Watson brothers also played in the anti-apartheid struggle particularly as an intelligence unit for the underground, at one stage reporting to Zuma. Reflecting on their familial closeness, Zuma declared that "[t]hey are like my brothers" (SABC Digital News, 2019a).

Praise for the Watsons' role in our struggle history is not without merit, however, there is a need to reflect on the race dynamics in post-apartheid South Africa that have buttressed the Bosasa story. In a visibly painful and shameful exchange, that deeply impacted Judge Zondo, Agrizzi can be heard using explicit, derogatory and racist language in regard to Bosasa's black directors (Zondo Commission, 2019d). The recording was made by one of the Watson children present at a late-night discussion at Agrizzi's home. Angelo Agrizzi has pleaded guilty to racism in a case bought forward by the South African Human Rights Commission and has paid a fine of R200 000, donated "to a charitable organisation that promotes social cohesion, non-racialism, social justice and reconciliation in Alexandra, which organisation shall be the Barney Mokgatle Foundation" (Equality Court, 2019, p. 3). Agrizzi tried to highlight his friendship with persons of colour and apologised to the nation at the Zondo Commission for his racial slurs. Jared Watson's 'evidence' provides other instances of Agrizzi undermining and being derogatory towards black people (Hogg, 2019d).

There are also considerable flaws in the narrative portraying Gavin Watson as anti-racist and as an agent of transformation. At no point during the recorded exchange was there any attempt by the Watson children to dress down or disparage Agrizzi from using such vile and despicable language. Watson also saw no issue in the lack of transformation within the other business they chose to partner with (examples are the majority white partners in the fencing contracts collusion), nor did they see the need for transformation within their own organisation. The fact that most of the senior executive positions of the organisation (namely the CFO, COO, CEO, the company accountants and lawyers) were all filled by white men, some known for having racists tendencies, needs to be noted. Then there are reports of the BEE partnerships and joint ventures that had been deliberately undermined and subverted to benefit the Watsons, as well as the allegations of Bosasa manipulating their BEE scoring (Naidu, 2009; Staff Writer, 2013; Agrizzi, 2019a; Zulu, 2019).

To be clear, this is not to insinuate or suggest that the Watsons are in anyway racist. Rather, it seems that racial tensions and inequalities were not viewed as issues of social justice that needed to be addressed, but rather used as a tool to enrol others in their rackets. As Mark Gevisser has observed:

> … according to the testimony before the state capture commission, Watson played race two ways. He offered his black collaborators a quicker route to self-enrichment than might otherwise be available to them, and his white ones a solution from the impoverishment they imagined might befall them, now that black South Africans were in the ascendant. (Gevisser, 2019)

Testifying at the Zondo Commission, Agrizzi, Voster and the other 'whistle-blowers' testified as to how Gavin Watson would often 'remind' them that "[they] were white males and that [they] will not find a job anywhere out there" (Zondo Commission, 2019b, p. 84). It is just one of the rackets that these self-confessed collaborators knowingly and wilfully became enrolled in, to justify their criminal conduct.

A second racket which Agrizzi outlined to the Commission was that the acts of corruption were somehow mitigated through the various acts of charity that Bosasa and he personally performed over the years. This racket is multi-layered in that it alludes to a sense of self-assigned moral authority and legitimacy connected to the group's religious beliefs and values. Agrizzi, Van Tonder and others have testified that one of the main reasons that they either joined and continued to work at Bosasa was because they appreciated the religious views and practices of the organisation (Zondo Commission, 2019a, 2019d).

At Watson's memorial service, Nomvula Mokonyane went into great detail about his charitable acts saying: "… thank you for looking after the comrades (putting children through school and buying houses), thank you for looking after the vulnerable"

(SABC Digital News, 2019b). The question that must be asked, however, is what happens when these acts of charity come at the expense of others or through ill-gotten means? Is it not the role of government to ensure that the most vulnerable in our society are looked after? And what happens when the cost of charity comes at the expense of good governance? This is how the cycle of systemic corruption continues and becomes embedded within society. It is a logic that signifies predatory, systemic neo-patrimonialism, where the informal systems of 'selective charity' (distributed for political support) undermines the formal policies of universal protection, enshrined in the constitution. Ultimately it is the most vulnerable, particularly those that do not form part of selected beneficiaries or fall between the cracks of broken bureaucratic systems, which suffer the most. Those not prepared to pay bribes or support a political power elite are excluded from the benefits of government's preferential procurement, undermining the objective of the policy itself.

These types of contradictions expose the underlying racket. Another example was when Mokonyane insisted that Gavin Watson was "not a capitalist" (SABC Digital News, 2019b). How this statement reconciles with the business model of Bosasa, in particular the operations at the Lindela Repatriation Centre, is incomprehensible. The centre was one of the first major contracts Bosasa entered into with government. It continued to be a major source of income, up until the company went into business rescue. In his statement to the Zondo Commission, Voster detailed how they would go out, aided by police reinforcements, to round up illegal immigrants (mostly from Zimbabwe, Mozambique, and other African countries) and transfer them to the facility. This was done at the instruction of Watson, who wanted to "make sure [Voster] got the numbers up as he needed the money" (Vorster, 2019, p. 4). At that stage, the company was getting paid on a per person basis. As outlined in a report by the organisation Doctors Without Borders, the facility was overcrowded, inmates slept on mattresses on the floor, it was easy for diseases to spread and there have been several reports on the poor conditions and acts of violence that unfolded over the years (Bornman, 2019).[4] Bosasa literally profited from the exploitation of black African bodies.

The last racket which needs to be noted draws from the legacy of apartheid and is still currently deployed by those not wanting to account for their actions. It is the legacy of operating as clandestine networks in an environment of paranoia and fear that was part of the struggle against the apartheid regime. The narrative is that Bosasa (or the Guptas or anyone that has been implicated in state capture) are targeted victims of some grand conspiracy by mysterious "third forces" because of their convictions

4 It was the negative publicity of the operations at Lindela that triggered the ANC women to give up their state in Dyambu Holdings (Basson, 2019).

to enact radical economic transformation. Often accompanying these narratives are veiled threats that "perhaps the time has come for some truths to come out" or that those exposing state capture will regret it as "all of us there have our own *smallanyana skeletons*" (SABC Digital News, 2016). This is nothing short of holding the country hostage, shackled to the atrocities of our past, with the continued threat that there is an enemy that remains ever present.

Who are these enemies? If they are known, why not expose them? Why, when in government, were they not brought to account? What, or rather whose benefit is served by withholding this information from the public? To date there has been no evidence put forward to support these claims, and no actions taken to investigate or address these 'third forces'. Ultimately, this racket provides perpetrators with a sense of immunity from the consequences of their misdeeds, based on their struggle credentials. It is an entitlement to positions of power based on past heroics, without accountability in the present.

These conspiracies are helpful in creating an alternative to the evidence presented. Valence Watson has stated in the press that they do not intend appearing before the Commission (Gevisser, 2019). In so doing, the Watsons and their cohorts have refused the opportunity to repair their reputations.

It could be argued that Bosasa represents a potential case of developmental corruption. The various programmes, charities and initiatives adopted by the company are laudable. The challenge, however, lies in the contradictions that are imbedded in the types of corruption and business practises of the company and the greater impact they have had, not only in terms of draining much need resources from the state, but also the ultimate cost to employees, competitors and the broader objectives of transformation and development. The Watsons, like all anti-apartheid veterans, should be acknowledged for the role they played in the struggle. That acknowledgement should, however, not be equated with a sense of entitlement, particularly when that entitlement comes at the cost of citizens.

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11 CAPTURING THE MESSAGE

Nina Callaghan and Robyn Foley

11.1 CONTROLLING THE MESSAGE: POWER OF THE FOURTH ESTATE

The media has played a significant role in revealing the extent of state capture within South Africa. It is one of the key actors to shape public knowledge of the political project by exposing what can only be described as moral bankruptcy and an impunity that has destroyed the social compact. The Introduction chapter to this book mentions this pivotal role of the media as well as introducing us to the concept of rackets. Rackets has been defined as "a pattern of behaviour that enables the racketeer to enrol others into acting out a fundamental untruth that is often masked by a seemingly credible story" (see Chapter 1).

The ability to construct and amplify stories is the main objective for controlling the media, it allows for the control of the message. Controlling the media is a way of maintaining legitimacy, by insisting on the "good story" and sowing doubt about those who would be discredited. Transparency can be curtailed and even entirely obscured by a media intent on weakening accountability so that acts of impunity are allowed to flourish. Controlling the media gives the incumbent the ability to decide who is heard and who is silenced, quashing opponents, dissenting voices and alternative ideas. Control of the media is the ultimate weapon in a "post truth" world, destroying the precondition for democracy which as Timothy Snyder writes, is to "keep people living in a world where time flows forward" (Timothy Snyder, quoted in Peschel, 2019). If we live in an eternal present – there are no alternatives, and nothing to strive for which give rackets and the people who perpetuate them, the racketeers, free reign.

South Africa has found itself in the grip of such malaise before. The apartheid government actively utilised and manipulated the media to maintain its 'legitimacy'. The regime's untruth was the racist premise of segregation and the exploitation of black people, blatantly broadcast through its state-controlled media agency. There are numerous examples of media manipulation to maintain political projects, but it is the Cold War that offers us a useful framework to understand just how media can serve its master. Active Measures (Rid, 2020), as the strategy was called, is a form of warfare

that aims to influence political life, media being just one of the tools to accomplish this. Disinformation, misinformation, propaganda, intelligence operations and a threatening culture are some of the ways the capture of media can be played out. This chapter will use the active measures framework to illustrate how the Zuma-era state capture actors attempted to take control of the state broadcaster and hijacked the message across multiple media platforms to maintain their legitimacy, obscure the looting and mislead the public on a grand scale. It is common knowledge that the initial target in a political coupe is the media and the project of state capture was no different.

11.1.1 Active Measures Framework

The figure below presents a broad outline of the different types of active measures, also known in Soviet times as "ideological subversion" as detailed by the Committee for State Security, which is the English translation of the KGB. Active measures were developed in the early 1920s, but was most extensively deployed during and post the Cold War (Rid, 2020). Former KGB informant, Yuri Bezmenov says plainly that active measures are intended "to change the perception of reality … to such an extent that no one is able to come to sensible conclusions in the interest of defending themselves, their families, their communities and their country" (Ellick, Westbrook & Kesse, 2018). Since then, active measures have become a template for political actors – both malign and benign – across the globe, providing a strategy to execute their political plots.

Active measures were used in South Africa to counter apartheid and to promote a Soviet agenda. Since the late 1950s onwards, the Soviet Union supported anti-colonial movements in newly independent African states. For almost 40 years, the Soviet Union supported the ANC and SACP in their anti-apartheid struggle. Anti-West propaganda played an essential role in the cooperation between the ANC and the Soviet Union.

Different methods of active measures were used in the work with South African partners. An example of white active measures would be Russia-supported media agencies directed at South Africa: the News Press Agency, Progress publishing house, and Radio Moscow (broadcasted in Zulu) (Filatova & Davidson, 2013).

An example of black active measures, aimed at the United States but which had a devastating impact in South Africa, was the false story that AIDS was created by the Central Intelligence Agency (CIA). It was part of a disinformation campaign developed by the KGB in the 1980s (Selvage, 2019). It is suggested that former President Mbeki believed this disinformation (Barrell, 2000) which resulted in the postponement of antiretroviral treatment and countless AIDS deaths in South Africa.

Disinformation works best in polarised societies with high levels of populism (Humprecht, Esser & Van Aelst, 2020), making the topics of race, inequality and transformation the perfect arena for promoting untruth in South Africa. Those that manipulate public opinion are not interested in addressing inequality as it would reduce the susceptivity of the population to disinformation.

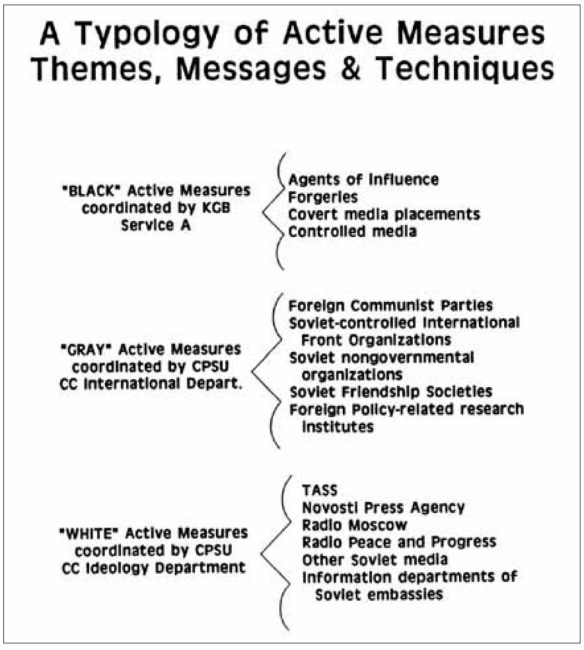


FIGURE 11.1 Breakdown of different types of Active Measures
Source: Soviet Active Measures in the Post Cold War Era 1988-1991 (USIA, 2002; Abrams, 2016)

In our analysis of the kinds of active measures pursued by state capture actors in South Africa, we can identify all three colour-coded strategies which we will explain throughout the chapter. Referring to Figure 11.1 above, "White" active measures are so described as they are characterised by the overt involvement of state officials and employees in influencing outcomes (USIA, 2002; Abrams, 2016). These 'White" measures have been pervasive and evidenced in the attempted capture of the SABC and the establishment of the Gupta media platforms, ANN7 and *The New Age*. Former President Jacob Zuma has admitted involvement in the formation of the Gupta media platforms and even gave testimony to this effect at the Zondo Commission (Zondo Commission, 2019b). Several other ministers and state employees have also been accused of directly meddling in the state broadcaster's editorial policy and in the appointment of key positions at the SABC, which will be unpacked later in the chapter.

"Grey" active measures are characterised by the underhanded, semi-covert nature of the interference that could take the form of rumours, disinformation campaigns and altered facts (USIA, 2002; Abrams, 2016; Cull, Gatov, Pomerantsev, Applebaum & Shawcross, 2017). These measures are undertaken in the shadows where messaging or reports may emanate from anonymous sources, steadily making their way into mainstream media channels for amplified effect. We draw correlation with the damaging work of Bell Pottinger, the UK-based public relations company which stands accused of years of interference in political life in South Africa, even as far back as the 1994 democratic elections and again in the state capture era (Kemp, 2020).

"Black" active measures are even more clandestine and aim to deliberately deceive and to obscure the source of influence. These measures involve the use of intelligence, covert placements in state and corporate offices and are designed to insert a stubborn influence and spread distrust in state institutions (USIA, 2002; Abrams, 2016; Cull et al., 2017). The Rogue Unit story at SARS fits this arena of influence well.

11.2 MAINTAINING LEGITIMACY: PURSUIT OF POSITIVE PUBLICITY

11.2.1 Guptas, ANN7 and *The New Age*: White Active Measures

Zuma's testimony at the Zondo Commission may have been short, but it was certainly revealing about his relationship to the Gupta media empire. He openly admitted he and the Gupta brothers had had extensive conversations about establishing what he called an alternative media voice, accusing the South African media of being biased. "There had been a problem that worried us – all of us that in this country the media is very biased [against us]. At all material times it is just critical. It criticises the country etcetera. There is no alternative voice…" (Jacob Zuma testimony at the Zondo Commission, 2019b, p. 37). Without being prompted, Zuma offered that the idea for the Guptas to establish *The New Age* newspaper and later the 24-hour satellite TV channel ANN7, was his own. This was most likely done in response to testimony of former ANN7 editor, Rajesh Sundaram, who testified that "President Zuma was very much involved in the running of the station", directing its content and message (Zondo Commission, 2019a, p. 54).

The first publication of *The New Age* was on 6 December 2010, while ANN7 (African News Network 7), a 24-hour satellite TV news channel started three years later. The idea was for the newspaper and channel to report the good news of South Africa, government's initiatives and successes and cover stories from the provinces and not just the big metros. Zuma made clear he was fully behind it.

> It was me who put them into trouble because I said your paper is so successful. I am sure your TV thing can be successful and they agreed. They

> said it is a good idea and they moved on it. I know that people who had problems had a lot to say about this. (Jacob Zuma testimony at the Zondo Commission, 2019b, p. 40)

Damning testimony at Zondo from the Director General of Government Communications (GCIS), Temba Maseko, paints a picture of the Guptas' media enterprise being funded by government, with Zuma's blessing. Maseko describes how he was summoned to the Gupta compound and instructed to invest R600m, the entire advertising budget for GCIS, into establishing *The New Age* newspaper. Maseko relates how Ajay Gupta knew the exact available budget, a fact that is not publicly disclosed. Maseko had refused to do business with the Guptas, believing it to be unlawful. In his testimony, he mentions that the newspaper had not even been formed, yet the Guptas were pressurising government into a contract monopoly, which excluded any other service providers (Maseko, 2017).

The Guptas' veiled threats made it clear that they were connected to the highest office. Maseko says "… he then volunteered information that he as Ajay Gupta, has regular meetings with the President and that if there is a Minister who is not co-operating, the Minister is then summoned" (Zondo Commission, 2018). Maseko also testified how Zuma himself gave him a call and requested he "help out" the Guptas. Maseko believes his refusal on all accounts cost him his job at GCIS. Zuma was evasive in how he responded to Maseko's accusations in his own testimony at the Commission. He did not outright deny making the request, saying that if he had made such a call there would be nothing wrong with it.

Then Finance Minister, Pravin Gordhan, was publicly critical of the Gupta media enterprise, questioning their independence, calling out their bias and likening their messaging to a public relations stunt, funded by government (Lekabe, 2017). Gordhan and the Treasury had been subject to repeated attacks through reporting by ANN7 and *The New Age* which focused on Gordhan's response to SAA Board Chair Dudu Myeni, his target of Eskom and state links to the Guptas. Gordhan became the focus of controversy in their reporting, which, according to the Minister, was backed up by smear campaigns crafted by Bell Pottinger. Gordhan is on record at a press conference accusing the Gupta media house of discrediting public institutions and generating fake news, saying,

> Why must we constantly deal with people (the Guptas) who are never seen in the public domain – never – but they mastermind all these attacks, make false accusations, pay somebody called Bell Pottinger – you know them? PR firms are hired, millions of rands are spent – to do what? To malign democratic institutions of South Africa. Why don't they come out, face to face? Let's have a debate, face to face. (Gordhan quoted by *BusinessTech*, 2017)

Government contracts with the fledgling media organisation were one of the main focus areas of the Public Protector's *State of Capture* report (2016). *The New Age* breakfasts were a central part of the "government's good story to tell" campaign. These lavish events were hosted at the SABC and broadcast live, featuring interviews with Ministers and business. A ticket cost guests over R700 a seat. SOEs coughed up hefty sums to sponsor an event, Telkom paying R12m for 12 events, Eskom R7.2m for six events and Transnet over R17m for 18 events – all of it public money and televised on the state broadcaster for free (*Mail & Guardian*, 2013). After a Board change at the SABC that saw Zuma stalwart – Ben Ngubane replaced with an interim chair – the communications portfolio committee heard that the breakfast events ended up costing the SABC a hefty R20m (PMG, 2017). Added to the government advertising budgets that were eventually approved for *The New Age* and ANN7, the Gupta media enterprise managed to syphon an exorbitant sum from government. Without this parasitic lifeline it was not financially viable. This was made evident when, shortly after the Guptas bank accounts were shut down and they fled to Dubai, it was bought over by Mzwanele Manyi through a dodgy vender financiering agreement but in a matter of months the media operations crumbled. *The New Age* was re-branded as *Afro Voice* in April 2018. Its last edition was published on 29 June 2018. ANN7 was rebranded Afro Worldview but ceased operating in August 2018.

11.2.2 Repurposing the SABC

Hlaudi Motsoeneng was central to the state broadcaster's demise, as suggested by the Public Prosecutor's 2014 report, titled *When governance and ethics fail*. Thuli Madonsela called for the Board of the SABC to take disciplinary action against Motsoeneng for dishonesty, abuse of power and improper conduct amongst a litany of disturbing findings.

Motsoeneng was removed as COO of the SABC in 2013 when it was discovered that he was unqualified for the job he had served in for three years. He had lied about obtaining a matric certificate, which meant the job advertisement was crafted especially him, making his appointment irregular (Public Protector, 2014). This directly implicated then Board Chair, Ben Ngubane, for facilitating his appointment, which the Public Protector constituted as maladministration. In December 2016, the Western Cape High Court ruled that Motsoeneng's appointment as Group Executive was illegal and that he was not to hold any position within the SABC at all (Western Cape High Court, 2016). Motsoeneng did however remain as Group Executive Editor of Provinces and Corporate Affairs. Madonsela's report found that his several salary hikes across portfolios was in violation of the SABC personnel regulations, which saw his annual salary of over R1m per annum double over a year (Public Protector, 2014).

Motsoeneng cost the SABC dearly on multiple fronts. *The New Age* business breakfasts, and a contract that saw the public broadcaster purchase 1 800 copies of *The New Age* daily, was all done under his watch. As COO, he instituted a 90% local content policy which haemorrhaged viewers and listeners who had a range of entertainment options to choose from. Advertising money followed the crowd.

Motsoeneng was also found to have driven a bad deal with MultiChoice, a paid-for TV network in South Africa, which gave the company almost complete control of the SABC's invaluable archives in exchange for financial support to host and develop channels on its platform (in contravention with SABC's principle mandate of being a public broadcaster). The agreement involved the SABC altering its stance on the issue of digital migration and the requirement for encryption capability of set-top boxes. SABC and E-TV (both free to air service) were in favour of encryption, as the set-top boxes (required for the digital migration) would then enable them to also offer paid-for content without customers having to purchase a secondary decoder (as is currently the case with MultiChoice). This transition would ensure MultiChoice's dominance in the paid-for-TV service (Abdool Karim, 2017; Umraw, 2019; Phakathi, 2020). At the Zondo Commission, the former SABC CEO, Lulama Mokhobo, testified how Motsoeneng, with support of the Board, signed the agreement unlawfully, flouting supply chain management processes and in contravention of SABC's Delegation of Authority Framework (Blignaut & Gedye, 2016; Zondo Commission, 2020). For his efforts, Motsoeneng earned himself a R33m bonus to be paid over three years. In 2016, he received R11.4m of his windfall (Blignaut & Tau, 2016).

Motsoeneng's controversy and dodgy dealing landed him in court for 15 different cases over the 2013-2014 period, with the SABC footing his legal bill for R22m. This amount in a long calculation of others that includes contracts with *The New Age*, security tenders, 13th cheques to senior Managers and irregular staff bonuses is being scrutinised by the Special Investigations Unit (SIU) that is working to recoup the money.[1] In a briefing to the Standing Committee on Public accounts in Parliament in September 2019, the SIU was confident that they have gathered enough evidence for the SABC to approach the courts in a range of legal matters with a total value of R560m (PMG, 2019).

Like many other state capture actors, it is clear how Motsoeneng used a state institution for personal gain, bending and breaking the rules as he went, and growing a corrupt network both inside and outside of the public broadcaster. While these offences are staggering in themselves and contribute to the erosion of good governance and

1 It is worth noting that Motsoeneng confirmed that Bosasa, discussed in Chapter 10, inexplicably contributed at least R1m towards covering his legal costs (Maduna, 2019).

democratic principles, it is perhaps Motsoeneng's direct political interference that remains a deep trauma for journalists and those who uphold media freedom. Maligned journalists in the newsroom tell of a revised editorial policy that had been approved in secret just months before local government elections in 2016. The new policy gave the COO, Motsoeneng, control over all content and news. It was a privilege he attempted to use to shape a glowing narrative of government, gutting all media independence at the SABC along with the ability to report accurately and fairly for the benefit of the public (Krige, 2019).

A year-long investigation at the SABC culminated in the *Report of Commission of Inquiry into Interference in Decision-making in the Newsroom of the South African Broadcasting Corporation* released in 2019 (Thloloe & Tawana, 2019). The commission found that "the SABC suffered from the capricious use of authority and power to terrorise staff and to deflect the Corporation from its mandate and Editorial Policies" (Thloloe & Tawana, 2019, p. 4). The report found the Minister for Communications, Faith Muthambi, gave direct instructions to the newsroom and that Board members, operational Executives like Motsoeneng and news editors failed in their duties. Eight journalists were fired for disagreeing with the decision to not cover a service delivery protest in the runup to the 2016 elections. They came to be known as the SABC Eight, the most visible casualties of the culture of fear and toxicity inside the organisation. Interviews with opposition parties were scrapped, public opinion pieces struck off the news diary and journalists were sent to cover dubious stories because the President or Ministers would be at the scene.

The Zondo Commission heard how, during Motsoeneng's reign of terror, radio shows were cancelled because the analysts and guests were too critical of the ANC (Zondo Commission, 2019c). Editor of SAfm's current affairs radio show, Krivani Pillay, quotes Motsoeneng in her testimony at Zondo, saying,

> We are cleaning up the organisation. People are doing their own stuff. There are many journalists outside who want to work for the SABC. The environment outside is bad; no person within the SABC is independent. You must adapt or find a job somewhere else. (Zondo Commission, 2019c, p. 13)

Motsoeneng was on suspension when he delivered a press briefing on 19 April 2017 that was the nail in the coffin of his career at the public broadcaster. He proceeded to criticise the SABC, lambast its current Board Members, as well as lay into the parliamentary ad hoc committee that investigated the SABC. It was an outburst that led the SABC to declare him in breach of his suspension, as well as tarnishing its reputation. A disciplinary hearing was instituted and in June 2017, he was fired from the SABC.

11.3 THE MALICE BEHIND THE MESSAGE: BELL POTTINGER AND THE GUPTA BOTS

The New Age, ANN7 and the capture of the SABC can undoubtedly be considered forms of "white active measures", for the direct involvement of government Ministers and the President himself. But this was only one arm of the Zuma/Gupta messaging machine. The Guptas deployed other kinds of active measures, arguably into the grey typology, funding various organisations, fronts and individuals to push their narrative into the public domain to be entrenched in the South African psyche. It sounds rather dramatic, but eerily plausible when one considers just how some of the most enduring political narratives to come out of the state capture era became immensely popular. Ever wonder where the term "White Monopoly Capital" came from, or "Radical Economic Transformation?" Plucked from left-wing academic speak, these terms were dusted with foment and popularised in a public relations (PR) campaign designed by UK public relations giant, Bell Pottinger (Findlay, 2016; ANCIR, 2017). The target was poor and black South Africa, the majority of whom suffer continued economic and social injustice. The truth of this condition ensured that the campaign was immensely successful. The result was a toxic eruption of racial tension fuelled by the narrative of white monopoly capital. The consequence was the public's diversion away from the project of state capture and onto the spectre of racial injustice and the newly vilified cast of characters, like Pravin Gordhan and others who seemed obstructionist to black wealth.

In 2015, following growing public distrust of a Zuma-led government, reports of large-scale corruption and state capture with the Gupta family as key players, the task of damage control was given to one of the most powerful PR companies in the world. Bell Pottinger has admitted they met with the Guptas and secured a £100 000 a month contract that focused on a PR campaign to popularise economic emancipation, while also casting President Zuma and the Guptas in a favourable light (Segal, 2018). Bell Pottinger crafted press statements and set up a "blog", a site called *Voetsekblog*, to disseminate cartoons, articles and blogposts while blasting Twitter with inflammatory tweets about the concentration of wealth in the hands of a few white people, while Zuma opponents were framed as upholding a racist order (*News24* reporter, 2018).

White monopoly capital (WMC) and radical economic transformation (RET) were the perfect cover for corrupt dealings of the shadow state, who used it to explain doing business with the Indian family, awarding massive state contracts to suspect companies and using state-owned enterprises (SOE) as the cash cow and the vehicle for transformation ((Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017). There was no economic transformation, just the formation of a black elite with access to political power.

Though not directly employed through Bell Pottinger, there is significant evidence that an active social media campaign was undertaken by the Guptas to discredit journalists, target government officials that did not toe the Zuma line and proliferate the WMC and RET narratives (Findlay, 2016; #GuptaLeaks, 2017). A disinformation website based in South Africa but with content engineered by an India-based PR company, called WMCLeaks, has been linked to the Guptas (ANCIR, 2017; Cronjé, 2017; Le Roux, 2018). The site was used to push WMC propaganda and discredit South African media houses. The #GuptaLeaks emails also suggest that the Black First Land First group, a radical black movement in South Africa were paid by the Guptas to drive anti-white narratives (Anderson, 2017).

11.4 THE DOUBLE-EDGED SWORD OF LEAKS AND SOURCES: ADVOCACY OR ACTIVE MEASURES?

> It is absolutely important that we accept the fact that there is something we need to deal with as a country. The very fact that intelligence organisations which today are key instruments to run countries the war today is fought at intelligence level. No longer at the hard guns etcetera. (Jacob Zuma at the Zondo Commission, 2019b, p. 45)

"Black" active measures are those activities that are discernibly clandestine in nature, ranging from deploying undercover agents to interfering with communication infrastructure. During the Soviet era, these operations were carried out by official state intelligence agencies, primarily in service of national interests and against foreign adversaries. Today, however, these techniques have been adopted, adapted, and advanced throughout the world, within and between governments, the private sector and numerous other spheres of the broader body politic.

The manipulation of intelligence is not new to democratic South Africa and over the years there have been several examples where 'intelligence' dossiers have been seemingly deployed to achieve political ends (*Mail & Guardian*, 2016). There was first Project Avani and the "hoax emails" of the early 2000s (discussed in Chapter 3) (Dawes, 2011). In 2005, there emerged the *Special Browse Mole Report*, which detailed a plot against Mbeki and alleged that Zuma was receiving support from foreign governments to ensure his ascension to power (Sole, 2009).[2] In 2011, *Ground Coverage* (written by Richard Mduli) outlined a plot against then President Zuma (Sexwale, 2011). During his testimony, Nene detailed how the *Project Spider-Web* report released in 2015 implied that there was a cabal that had captured National Treasury, and were trying to undermine Zuma's pursuit for RET (Zibi, 2015; Nene, 2018). The most recent, being

2 The "spy tapes", used by Zuma's lawyers to have the Arms Deal corruption case shut down, were recorded as part of the investigation into the preparing and leaking of the *Special Browse Mole report* (Sole, 2009).

the "rubbish intelligence report" on supposed Operation Check Mate, was allegedly to be used as a basis for firing Pravin Gordhan and Mcebisi Jonas in March 2017 (but this time the political players were having none of it) (Nicolson, 2017; Opperman, 2017). All of these "intelligence reports" appear to align with Zuma's argument that there has been some 'grand' conspiracy against him since before the negotiations that led to the end of apartheid (Zondo Commission, 2019b). But none of these intelligence reports have been substantiated with any form of substantive evidence, motive, or execution. More than anything, they have served to shore up support for Zuma, providing 'plausibility' for his actions.

When black active measures enter the public domain, it usually entails the covert placement of information that strategically supports clandestine objectives. In some instances, this entails the leaking of legitimate but highly sensitive information to reporters (or increasingly, directly into the public domain). The most recent example of this is the CR17 leak, revealing the financial records of South African President Cyril Ramaphosa's Presidential campaign. Black active measures often come in the form of carefully curated and crafted pieces of intelligence, designed as dis/misinformation to poison the information ecosystem.

The type of disinformation deployed is based on the intended outcome. In some cases, the disinformation only serves to shift public opinion, often in conjunction with white or grey active measures. For example, Paul Erasmus, a Stratcom agent under the Apartheid regime, has openly confessed to creating and spreading fallacious stories about Winnie Mandela in the media with the specific aim of tarnishing her reputation and isolating her from the ANC (Erasmus, 2020; Lakaje, 2020). Other disinformation operations are more insidious, where the placement of information is aimed at triggering or 'justifying' an official action being implemented – it is the manufacturing of motivations for malfeasance. In aid of the overall state capture operandi (outlined in the Introduction), there are many instances where "leaked" information has been used to justify the suspension or removal of potentially obstructive officials. This type of activity did not start under the Zuma administration, but during his tenure these became a more regularly deployed tool, in particular focusing on the criminal justice sector.

The Cato Manor hit squad and Zimbabwean rendition articles published in the *Sunday Times* were seemingly based on multiple secret sources from within the state. The news articles were used to trigger internal investigations, often accompanied by suspensions, which would then be leaked. This in turn justified further investigations, until some form of potential "dirt" was found to charge individuals. Often the law has cleared many of those implicated in the salacious reporting, but by then the damage had already been done – reputations and careers destroyed, and institutions repurposed or hollowed out (see Chapters 13, 14 and 15).

Perhaps the best example of this cycle of dubious investigations triggered by questionable reporting is the SARS Rogue Unit saga. The capture of SARS was critical for the state capture project (see Chapter 15). Like many of the other cases, the modus operandi entailed "identify[ing] individuals to neutralise" and removing them from office, hollowing out critical institutional capacity (Bain & Company, 2014, p. 7). The narrative around the supposed 'rogue unit' was used by then Commissioner of the South African Revenue Service (SARS), Tom Moyane, as one of the main motivations for undertaking "the process of re-launching the SARS brand by embarking on a comprehensive overhaul of the organisation in all aspects" (Nugent Commission, 2018b, p. 42). The rogue unit was the supposed stain at SARS that Bain, an international management consulting firm, was hired to erase. These 'independents' drove the "massive 'transformation and turnaround of SARS'" (Nugent Commission, 2018a, p. 42), which resulted in the institution's investigative capabilities being stripped bare, leaving tax evaders smiling. As noted in the Nugent Commission final report:

> To suggest that a major evaluation of SARS was required because of allegations that had been made concerning Mr Magashula, who had in any event long since resigned, and because of newspaper articles, is perfectly bizarre. (Nugent Commission, 2018a, p. 42)

There are several investigative units within SARS that correspond to different aspects of tax enforcement. The rogue unit narrative, however, was focused on a particular unit that was mandated to investigate individuals and companies suspected of committing criminal offences such as large-scale tax evasion, trading in illicit goods, smuggling, etc. The unit itself had over the years undergone several different transformations, consecutively being named the Special Projects Unit (SPU), National Research Group (NRG) and the High Risk Investigative Unit (HRIU from late 2009-2014). Prior to its complete dismantling by Moyane, the unit (in various incarnations, together with other investigative units in SARS and in collaboration with other criminal justice entities) had been central to pursuing several high profile tax evaders – big names such as Brett Kebble, David King, Glen Agliotti, Ivan Khoza, Lolly Jackson, Radovan Krejcir (particularly in relation to cigarette trade) and Tigon and Gary Porritt (case still ongoing) to name but a few (Haysom, 2016; Haffajee, 2017).

The main allegation from various news articles and investigations, the latest being that of the Public Protector (2019), contends that the investigative unit within SARS was established illegally under the leadership of then SARS Commissioner, Pravin Gordhan, and several senior officials. The unit is accused of conducting covert operations and illegally intercepting communications of certain politically connected individuals. Former senior SARS officials fingered in this alleged illegality were Ivan Pillay (former Deputy and Acting Commissioner of SARS), Oupa Magashula (Deputy

and then Commissioner of SARS) and Johann van Loggerenberg (Head of the Unit), amongst others.

As can been seen in the timeline of the rogue unit narrative in Figure 11.2 (pp. 230 and 231), the story of the rogue unit and the events and actions that fuel the narrative, dates back at least 13 years to 2007. There appear to be three distinct periods in which the rogue unit narrative (re)emerged, all of which appear, coincidently, to benefit some political actors in discrediting opponents or garnering sympathy from the public. SARS had several ongoing investigations into high profile individuals connected to Zuma for alleged cases of corruption, tax evasion and smuggling thanks to the functioning unit (amaBhungane, 2014; De Wet, Hunter & Mataboge, 2014; Haysom, 2016; Van Loggerenberg & Lackay, 2016; Pauw, 2017).

Project Snowman was an 'intelligence dossier' written by a former SARS SPU (rogue unit) employee who had been fired following charges linked to rhino poaching. The dossier was leaked in October 2009 to various political parties. SARS only received a copy of the intelligence dossier in November 2009. In early 2010 it was handed to the press by Julius Malema (SARS, 2013). The narrative at the time was that the unit was going after Zuma supporters and that the investigations into Malema's unpaid taxes (which he later settled with SARS) was politically motivated (Laurence, 2010; Sole, 2010).

The second round of rogue unit allegations emerged in 2014, shortly after Zuma's re-election, with the apparent narrative being that SARS is broken and in need of a "strategic refresh". It appeared to have been initiated following a complaint to SARS by Ms Belinda Walter, after falling out of a romantic relationship with Johann van Loggerenberg (head of the HRIU at the time). Walter laid an official complaint with SARS, which was sufficient reason for then acting Commissioner Ivan Pillay to appoint the Kanyane Panel to investigate. It would later emerge that she was an informant for the State Security Agency (SSA) and worked as a legal advisor to various cigarette organisations, such as Carnilinx and British American Tobacco (BAT) (Rees, 2014; KPMG, 2015). This revelation appeared to support other allegations made in different media reports that SSA agents were colluding with organisations in the tobacco industry, hampering SARS investigations and raising questions about SSA interference (*City Press*, 2014; Sole, 2014). This prompted the Office of the Inspector General of Intelligence (OIGI) to investigate. However, rather than investigating the allegations levied against the SSA agents, the OIGI focused on the operations of the investigative unit in SARS – an organisation not within OIGI oversight mandate. This was the first time that the actual legality of the unit itself was raised (OIGI, 2014).

RUNNING WITH THE ROGUE

- The power elite
- Manipulated state organs used to build narrative
- The rogue reporters
- The rogue informants
- The rogue legitimisers
- Driving the narrative
- Where information comes from & how it evolves
- Investigative & functional integrity lost
- Investigative & functional integrity held

UNIVERSAL GRAPHICS KEY



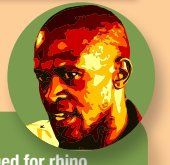
Jacob Zuma
2010 - New President of ANC. Goes on to become president of SA & works on 'Project Phoenix' with Bain to restructure country's SOEs.

Siyabonga Cwele
Minister of State Security. Oversees NIA change to State Security Agency (SSA) that opens investigation into Peega's self-approved dossier.

Oupa Magashula
Commissioner of SARS. Continuously asks for SSA reports on 'Project Snowman', but no findings ever reported to SARS. Keeps probing until he's caught in a 'jobs for pals' scandal & leaves SARS - replaced by acting commissioner Ivan Pillay.

Julius Malema
Still ANCYL president at the time. Informed of his tax evasion investigations via Peega's dossier, which he uses to claim conspiracy against him & other Zuma supporters.

News reports claiming SARS investigations unfairly targeting Zuma supporters.



Mike Peega
After being charged for rhino poaching & attempted extortion, he is fired from the Special Projects Unit. Then leaks his 'Project Snowman' 'intelligence dossier' to political parties before it even reaches SARS.

Vittorio Massone
2012 - Bain consultant meets Zuma, presents 'Project Phoenix' and consults him on this. Is later introduced to Tom Moyane in 2013 & starts coaching him on 'SARS 2.0' restructuring plan.





David Mahlobo
Replaces Cwele at SSA in 2014 & uses news articles to get Office of Inspector General of Intelligence (OIGI) to investigate SSA operatives Belinda Walter & Mandisa Mokwena's claims.



Nhlanhla Nene
Zuma's new Finance Minister. Instructs Pillay to establish Sikhakhane Panel to further probe Kanyane JvL findings.

STORY IS USED TO HAMPER INVESTIGATIONS INTO STATE CAPTURE OPERATIVES.

Belinda Walter
A triple agent for tobacco industry & SSA, Walter leaks information about HRIU & JvL to the media after her relationship with JvL ends - lodges a complaint with SARS & SAPS.



Pillay sets up Kanyane Panel to look into Walter's complaint.

Sunday Times publishes Walter's story - 'Love affair rocks SARS'. City Press reports on SSA agents interfering with SARS investigations, also publishes article - 'Spies & lies: As a love affair ends'.

2006 to 2009

SARS INTELLIGENCE UNIT ESTABLISHED
SARS with National Intelligence Agency (NIA) agree to establish covert enforcement unit to investigate individuals & companies suspected of committing criminal offences like large-scale tax evasion, illicit goods trading, smuggling, etc.

NIA pulls out after SARS hires members of the unit. SARS gets approval from three legal opinions to establish it's own investigative unit & the Special Projects Unit (SPU) is born.

2010

NPA, Gerrie Nel of DSO/Scorpions asks head of SPU Janse van Rensburg to initiate surveillance at NPA, 'Project Sunday Evenings' - which coincidentally comes to a halt at the same time Zuma becomes ANC president. SPU becomes National Research Group (NRG).

Van Rensburg leaves NRG, Johann van Loggerenberg (JvL) takes over & NRG drops from 26 to 8 members when it becomes High Risk Investigation Unit (HRIU).

Investigations by SSA make no findings on 'Project Snowman'.

2011

THE UNIT INVESTIGATES & BUILDS CASES
Among them are high profile cases: Julius Malema, Hennie Delport, Lifman, Carnilinx & British American Tobacco barons, the Guptas & other Zuma family friends like Thoshan Panday, ANC donor Robert Huang & the Nkandla matter.
They also perform multiple audits & investigations relating to state tender fraud at state-owned enterprises & national government departments, as well as unlawful & illegal spying on SARS, its audits, investigations, inspections, its officials & operations. The investigations are all brought to a halt in 2014.

2012

Kanyane Panel investigates Walter's complaint - concerns of conflict of interest regarding JvL's relationship with her, but makes no definitive findings in claims & finds Walter an unreliable witness.

Sikhakhane Panel starts investigating & JvL is placed on special leave.

OIGI Report completed - finds HRIU established irregularly & undertook "covert activities"- clears SSA operatives.

Sikhakhane Panel concludes & submits report to Moyane - report finds unit illegally established & 'prima facie' evidence of illegal activities.

2013

2014

230 FIGURE 11.2 Timeline of the Rogue Unit Narrative

THE EFFECT THE STORY

NARRATIVE

THE EVOLUTION OF A STORY AIMED AT DESTROYING SARS' INVESTIGATIVE & FUNCTIONAL INTEGRITY



Tom Moyane

Zuma replaces Pillay with Bain prepped Moyane as SARS commissioner, who starts dismantling the entity's integrity through investigations and external enablers.

Sunday Times publishes its first expose on the 'covert unit' titled 'SARS bugged Zuma'.

Sikhakane expands scope of investigations based on news articles.

'Rogue Unit' enters narrative in Sunday Times article, "Taxman's 'Rogue Unit' ran brothel".

Moyane suspends all SARS executive meetings based on news articles. Gets approval from Nene to bring in Bain 'for strategic refresh'.

Sunday Times uses leaked Sikhakhane report in article to confirm its own reporting.



Jonas Makwakwa

In on Moyane & Bain's master plan. Oversees KPMG who are brought in to probe deeper into investigations.

Nene appoints Kroon Advisory Board - Kroon releases press statement rubber stamping Sikhakhane finding that HRIU, the so-called 'Rogue Unit', was 'unlawfully established'.

STORY THEN SHIFTS TO FIND DIRT ON THOSE IN THE WAY.

Moyane opens criminal case - alleged "crime has been committed" - Hawks investigate.

Draft KPMG report leaked to Sunday Times in 'Confirms our story editorial'.

KPMG Concluded - submits final report to Moyane.

Sunday Times admit poor reporting.



Shaun Abrahams

Head of the NPA which files criminal charges against Pillay, Gordhan & Magashula with fraud relating to the early retirement, pension payout, & reappointment of Pillay - not related to 'Rogue Unit' but based on KPMG findings.



Busisiwe Mkhwebane

Appointed Public Protector (PP) by Zuma shortly before he resigns as SA president. She continues charge to take down all Zuma's nemeses.

NPA withdraw charges on 'Pillay pension payout', then charge Pillay, JvL & Andries Janse van Rensburg in relation to the 2007 planting of covert bugs in NPA offices, known as 'Project Sunday Evenings'.

THE STORY IS RESURRECTED.

PP probes 'Rogue Unit' & Gordhan - based on complaint from anonymous whistle-blower & second complaint from EFF 09 Nov 2018.

PP Pillay report: Mkhwebane finds against Gordhan in Pillay's early retirement - recommends president take 'appropriate action' against Gordhan. Report taken on review by several parties (no initial interdict against implementing PP findings is sought).

Mkhwebane releases a YouTube video indicating she has given Gordhan notice of another adverse finding against him & the so-called 'Rogue Unit'.

Mkhwebane's PP SARS (Rogue Unit) report released - finds against Gordhan & others in 'Rogue Unit'. Report is taken on review with interdict against implementing PP findings.

We still wait to see where Mkhwebane's (Rogue Unit) report narative will go?

TO BE CONTINUED...

2015

- Moyane suspends JvL.
- Moyane suspends Pillay & Peter Richer.
- Moyani dissolves HRIU.
- JvL leaves SARS after months on suspension.
- Pillay & Richer resign after winning a Labour Court dispute against SARS.

2016

- Pillay, Gordhan & JvL complain to Ombudsman about Sunday Times Report.
- Pillay, Gordhan & JvL win Ombudsman complaint & Sunday Times ordered to retract.
- Zuma forced to make Gordhan Finance Minister - Gordhan orders a halt on SARS restructuring, which Moyane ingores.
- Hawks send Gordhan '27 questions' relating to 'Rogue Unit' & SARS shortly before he is due to present budget speech in parliament.

2017

- With new supporting emails of Pillay's valid early retirement NPA withdraw charges on Pillay, Gordhan & Magashula.
- KPMG International announces withdrawal of its findings & conclusions in its 'Rogue Unit' report.
- Zuma fires Gordhan.
- Zuma forced to resign. Ramaphosa takes over & sets up Nugent Commission - suspends Moyane pending outcome.
- Judge Kroon backtracks on ruling that 'Rogue Unit' was unlawful.

2018

2019

- Moyane is fired after Nugent Commission's damning findings. Edward Kieswetter appointed new commissioner of SARS.
- PP's enforced remedial action on 'Rogue Unit' report is interdicted by High Court.
- NPA withdraws 'Project Sunday Evening' charges.
- ConCourt rules interdict on PP 'Rogue Unit' report stands.
- Internal SARS report recommends that KPMG & Sikhakhane 'Rogue Unit' reports should be "fully withdrawn".

2020

HAS ON SARS INTEGRITY

In October 2014, the *Sunday Times* ran with the stories, reporting some serious allegations that went far beyond the substance of Walter's initial complaints. The more than 30 *Sunday Times* articles reference internal SARS sources and leaked documents obtained from within SARS (Lackay, 2015). Several of the accusations were eerily similar to those presented in the Project Snowman dossier (Rampedi, Wa Afrika, Hofstatter & Rees, 2014a, 2014b; Rampedi, Wa Afrika & Hofstatter, 2014; Rampedi, Hofstatter & Wa Afrika, 2015). The slew of media articles were enough to motivate and influence a cascade of formal investigations that followed.

Most of the SARS investigations did not focus on any one particular allegation or specific area of enforcement operations. Both the Sikhakhane and KPMG investigations scope were expanded to include perceived 'new areas' of inquiry or allegations, based on the emerging media reports (Sikhakhane, 2014; KPMG, 2015). The reports emanating from those investigations were then in turn leaked to the journalists, which selectively used findings to validate their reporting and generate new allegations to keep the story going (Wa Afrika, Hofstatter, Rampedi & Rees, 2014; Quintal, 2015).

With Moyane firmly at the helm and a "broken" SARS being "fixed", the focus of the rogue unit narrative then shifted. In May 2015, Moyane opened a criminal case which was investigated by the Hawks and resulted in the NPA bringing criminal charges against the previously mentioned SARS officials. In his testimony at the Zondo Commission, Gordhan outlined how he believed the criminal charges were used to apply political pressure for his removal as Minister of National Treasury (Gordhan, 2018). Curiously, none of the criminal cases were directly related to the official mandate or operation of the 'rogue' High Risk Investigation Unit (HRIU) at SARS. All of the charges have subsequently been dropped as the cases are presumably unwinnable.[3]

After being taken to the Press Ombudsman in 2015, the *Sunday Times* was instructed to retract several of the rogue unit articles and apologise for misleading reporting

3 The first relates to the early pension payout that Pravin Gordhan authorised for Ivan Pillay. At the height of contestation between various shadow state actors and National Treasury, charges were laid against the then Minster Gordhan. They were later withdrawn after a supposed hostage drama unfolded, when it emerged that Gordhan had received a lawyers opinion clearing the payout and reinstatement. This legal opinion was for some unknown reason not included in the docket (*News24 Wire*, 2016; Van Wyk, 2017; *Fin24*, 2018). Second relates to Project Sunday Evenings. In 2007, Van Rensburg, who was head of the newly established SPU at the time, was approached by a top prosecutor, Gerrie Nel, at the Directorate of Special Operations (DSO or Scorpions) and asked to install surveillance and interception devices in the offices of the NPA. It also is understood that all the operational costs were covered by the NPA (KPMG, 2015), meaning this was not an official SARS operation. Many of the details of the case remain unclear due to the full docket not being made public (Cowan, 2018). The NPA has since dropped the charges against Van Loggerenberg, Pillay and Van Rensburg (Hotz, 2020; NDPP, 2020).

(Etheridge, 2015). Though some wanted the paper to appeal the ruling, in April 2016 they reached a settlement and published a detailed apology outlining the numerous errors in their reporting and where their journalistic practices went wrong (Siqoko, 2016). In 2017, KPMG retracted the findings and recommendations from their report, which turned out to be cut and pastes from a memo sent to them by SARS lawyers. In 2018, Judge Kroon admitted that the advisory Board, which was meant to oversee and guide Moyane's reshaping of SARS, had in effect merely rubber stamped the Sikhakhane report (Nugent Commission, 2018a). The report by the OIGI has been officially set aside and it has been reported that SARS, under new management, has been advised to formally set aside both the Sikakhane and KPMG reports in their entirety (Cowan, 2020; Du Toit & Cowan, 2020).

The latest reincarnation of the rogue unit saga is the result of an investigation by the Public Protector, which was triggered by complaints laid by an anonymous source and an EFF MP, launched in October and November 2018. This was around the time the Nugent Commission released its interim report, recommending Tom Moyane be fired (Smit & Ritchie, 2018; Public Protector, 2019). The Public Protector's findings appear to be primarily based on selective interpretations of the discredited OIGI, Sikhakhane and KPMG investigations, as well as the initial Project Snowman dossier. The report's recommendations, however, have far reaching political consequences, as one in particular calls on President Ramaphosa "to take appropriate disciplinary action against" Pravin Gordhan (Public Protector, 2019, p. 119). The narrative thus appears to be a continuation of the political targeting of Gordhan now aimed at undermining the credibility of the current administration's efforts to clean up government. The reports have been taken on legal review, but if history is anything to go by, it is unlikely that the rogue unit narrative will end there.

The primary task of investigative reporting is to make public what others seek to hide. This is dependent on accessing information that is not within the public domain, where sources, whistle-blowers, informants and leaks are essentials. This type of journalism, however, comes with risks. Sometimes the desire for the seductive 'scoop' undermines the crucial task of journalism itself. This is where the noble task of truth telling itself becomes a useful tool for deception and manipulation.

In the broad apology from the *Sunday Times* in 2018, in relation to the fallout from the paper's stories, the following offers a reflection on the manipulation of the press during the Zuma years:

> Were we aware of this parallel political project? The answer is no. But we should have joined the dots. We should have paused and asked more questions. This is our duty as journalists. Were we manipulated by our sources and some of those who were part of this parallel political project?

> Perhaps. Were we complicit in ensuring the achievement of their goal? No. But as a consequence, our stories might have given them grounds, reason and motive to achieve their objectives. (Siqoko, 2018)

11.5 CONCLUSION

The importance of an open, free and critical press to any democracy cannot be understated. While the above demonstrates the negative impacts that manipulation and repurposing of the 4th estate can have on a nation's constitutional aspirations, it is important to recognise the contribution made by the media in curtailing the state capture project. Throughout this book, a significant amount of evidence emerged from journalists who had the courage to raise the difficult questions, dig through the paperwork and shine a light on what was happening in the shadows. The collaboration of various media houses in digging through the thousands of emails contained in the #GuptaLeaks, provided many of the links needed to "join the dots" and demonstrated the power of South Africa's journalist prowess.

As part of the political machinery of a country, the media can be a divisive and paralysing tool in a post-truth world, saturating us with conflicting stories and disinformation that come at us on multiple platforms. This paralysis keep us living in an eternal present as Snyder (2019) suggests, a cyclical politics of "us and them" as the era of state capture has mired us in. For Snyder, democracy works when we are able to reference our past, make decisions in the present for our future, in a world where time moves forward. Sound media policies and following a code of ethics are ways the media can help keep us out of the doldrums of cyclical politics to which there appears no end.

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12 STEALING FROM THE POOR: STATE CAPTURE AT SASSA

Robyn Foley

> If you've got to choose between paying the grants and irregular. And if the country's going to burn on the 1st of April and the irregular, I choose the country not to burn. (SABC Digital News, 2017)

The statement above, made by the then South African Social Security Agency (SASSA) CEO Thokozani Magwaza during a presentation to the Parliamentary Portfolio Committee on Social Development (PCSD), highlights the two crises which were unfolding before South Africa's eyes in early 2017. The first, which has become known as the SASSA-Gate crisis, was the potential risk that some 17 million grant recipients would not receive the grants which they depend on come 1 April 2017 when the invalid contract with Cash Paymaster Services (CPS) was set to end – an eventuality which by that point was unthinkable. So unthinkable was this idea that admittedly almost everyone at the time was in agreement that this would not come to pass and that one way or another there was no option but to ensure the continued payments of grants. Yet, until there was clarity on how grants would be paid, all the assurances given by the President and the Minister provided little comfort to the millions of children who were at risk of going hungry, nor would that alleviate the anxiety of the elderly who could be left homeless due to not being able to pay their rent. Had it materialised, this would have been a socio-political crisis of mammoth proportions.

In response to this eminent threat, a collective of civil society organisations, led by the Black Sash Trust, approached the Constitutional Court to intervene. The urgency of the court application, given the limited time available for addressing the imminent crisis, was not disputed, nor was the required outcome in terms of CPS needing to continue to pay grants. In the court application, the Minister and SASSA declared that "CPS is the only entity capable of paying grants for the foreseeable future after 31 March 2017", a situation which the court did not take kindly to (Constitutional Court of South Africa, 2017b). Ultimately, the court ruled that the initial 2012 invalid contract between SASSA and CPS would continue for a year and thus the crisis was averted.

The underlying cause of this crisis, however, is the second crisis – the governance crisis. It is the story of this governance crisis that this chapter seeks to unpack. As the Constitutional Court concluded:

> The constitutional right to social assistance that for many, especially children, the elderly and the indigent, provide the bare bones of a life of dignity, equality and freedom is directly involved, across the land. The conduct of the Minister and SASSA has created a situation that no one could have contemplated: the very negation of the purpose of this Court's earlier remedial and supervisory order. The matter can be decided on facts that are not disputed. Due to the time constraints of the emergency created by the Minister and SASSA, the forum for effective final relief is this Court. (Constitutional Court of South Africa, 2017b)

In July 2018, the State Capacity Research Project released one of the follow-on case studies to the *Betrayal of the Promise*, titled *How One Word Can Change the Game: Case Study of State Capture and the South African Social Security Agency* (Foley & Swilling, 2018). The report provides, in intricate detail, an account of how SASSA was captured and the implications thereof. This chapter seeks to expand on analysis of that case study by briefly describing the key events round which the SASSA case study is centred; outlining the critical aspects that make it case of state capture (as defined in Introduction); unpacking the costs that have resulted from the capture of SASSA and lastly highlight how the SASSA case study also serves potentially as an example of how state capture to some extent was curtailed.

12.1 EVOLUTION OF THE GRANTS PAYMENT SYSTEM AND THE SASSA-GATE CRISIS

12.1.1 Background on SASSA and the Social Grant Payment System

In 2004, the legislation that formalised South Africa's social security systems and established the national agency which would be responsible for administering grants, was signed and promulgated. The Social Assistance Act 13 of 2004 (Republic of South Africa, 2004a) and the South African Social Security Agency Act 9 of 2004 (Republic of South Africa, 2004b) are the two main pieces of legislation that outlines the requirements and parameters for social grants and the institutional structure by which they are distributed. The primary objective of the South African Social Security Agency (SASSA, also referred to as the Agency) was to centralise and standardise the payment and administration of grants. Over and above this legislation, SASSA is also required to be governed by all legislation related to the operation and governance of any state run entity, including to the Public Finance Management Act, 1999 (Act No. 1 of 1999) (Republic of South Africa, 1999).

Prior to the establishment of SASSA, the payments of grants was fragmented as the responsibility for grants resided with each of the nine provinces, and payment methods were inconsistent and inefficient. The majority of grants were paid in cash through contracted service providers, each conforming to separate and varying service level agreements and providing different models for payment (Constitutional Court of South Africa, 2013).

In 2006, SASSA inherited the fragmented and non-standardised social grants service provider contracts for the various provinces. The method and manner in which grants were distributed to recipients varied greatly between the various service providers, as did the costs and the terms and conditions of service contracts. In line with the recommendations laid out by the Taylor Committee, SASSA undertook to centralise the payment of grants. On 23 February 2007, the Agency issued its first Request for Proposal (RFP) for the "Provision of a Payment Service". Nine bids were received for the tender, however, in its final report submitted to the CEO of SASSA on 25 September 2008 (almost a year and a half after being issued), the Bid Adjudication Committee (BAC) concluded that the tender should be cancelled (Adjudication Committee, 2008). It later emerged that there was allegedly an attempt to bribe the chair of the BAC, Adv. Arendse, by someone claiming to represent CPS. The allegation has been profusely denied (Arendse, 2009; Bainbridge, 2009; McKune, 2012; Bejoy, 2016).

In 2009, just prior to Zuma appointing Bathabile Dlamini as Minister of the Department of Social Development (DSD), SASSA and South African Post Office (SAPO) had entered into a Memorandum of Understanding (MOU) which would see the two SOEs partnering to develop government's capacity for the payments of social grants. Being aggrieved by the agreement between SASSA and SAPO, as well as other agreements between SASSA and certain banks to subsidise grant recipients' banking fees, CPS instituted several legal cases against SASSA. In 2011, after having the High Court find in favour of CPS, the Supreme Court of Appeal ruled that the agreement between SAPO and SASSA was valid (Supreme Court of Appeal of South Africa, 2011). This outcome would, however, be of no consequence as in the month that followed SASSA would initiate a fresh tender process for identifying a service provider for the payment of grants. When CPS won the 2012 contract, it ceased to pursuing the litigation, however, when it became evident that CPS would no longer be paying social grants following the SASSA-Gate crisis, Net1 lodged an unsuccessful claim against SASSA for almost R1.3bn, seemingly based on the litigation that it had dropped after having been awarded the 2012 tender (Quintal, 2019).

12.1.2 The Invalid 2012 Contract: The Original Sin

In 2010, arguably the first visible strategic move to repurpose state institutions took place in the form of the first cabinet reshuffle, in which then President Zuma appointed

Bathabile Dlamini (President of the ANC Women's League and strong Zuma ally) as Minister of the Department of Social Development (DSD). In 2011, a new tender process was initiated and in January 2012 the contract for the provisioning of social grant payments was awarded to Cash Paymaster Services (Pty) Ltd.

Minister Dlamini appointed Ms Virginia Petersen as CEO of SASSA on 21 April 2011 (Cabinet, 2011), four days after the new RFP was released on 17 April. The importance of specifying these dates is to highlight that in terms of exposure to the complexities of the services that SASSA was seeking to acquire and the technical complexities around how the RFP was constructed, it would be reasonable to assume that Ms Petersen was most likely not in a position to make executive interventions in the bidding process. It was Petersen who, on 10 June, issued Bidders Notice 2, which was purportedly intended to clarify the requirements for biometric verification for payment transactions. The significant change comes down to the change of just one word, where the authentication of life for the monthly payment of a grant to a recipient (read biometrics) had gone from being a "preferred" requirement to a "must". Both the competing bidders (AllPay and CPS) provided for the use of fingerprint biometrics in the process of beneficiary enrolment and reconciliation (proposed by both AllPay and CPS). However, as mainstream payment methods were not yet enabled for biometric verification, AllPay was not able to meet this change in requirement. It was only CPS's proposal that offered an alternative method of biometric verification in the form of voice biometric technology, which was never properly implemented (*Cape Times*, 2014). Ultimately, it was this changing of just one word in the technical requirements that resulted in CPS being awarded the tender on 17 January 2012 (Constitutional Court of South Africa, 2013).

A number of the losing bidders, particularly the other provincial service providers (hereinafter referred to as 'AllPay'), were aggrieved by the bid evaluation process and the awarding of the contract to CPS, and collectively resolved to institute litigation against the DSD, SASSA, and CPS. The litigation process ultimately resulted in the case being heard by the Constitutional Court. In November 2013, the court ruled that the award of the tender to provide services for payment of social grants to CPS was constitutionally invalid and in April 2014 a remedial order was handed down, where the court suspended the declaration of invalidity. The declaration was based on the premise that a new tender would be awarded after a proper procurement process. To ensure the payment of grants was not interrupted, CPS would continue to provide payment services and the invalidity of the contract was suspended. SASSA was ordered to report to the court on progress in respect of the new tender process and its outcome (Constitutional Court of South Africa, 2013, 2014).

Following the two attempts to find a solid solution for distributing grants, the first being abandoned in 2008 and the second being found by the Constitutional Court to be invalid, the DSD set about the task of attempting to once again carve out a way forward. A third tender process was initiated but was then later abandoned due to non-responsive bids. It was suggested at the time that the tender was engineered to fail, citing two specifications that made the tender commercially unviable. The first was the price, where SASSA had stipulated a maximum fee of R14.50 per recipient per month, which is an 11.8% decrease on the fee that CPS was charging, and the second being the biometric (proof of life) requirement, which CPS initially approached the courts to have SASSA revise (Sole & McKune, 2017).

In 2015, SASSA then decided that it would endeavour to take over the payment of grants itself. In order to achieve this SASSA, on instruction by minister Dlamini based on recommendation from her Ministerial Advisory Committee (MAC), appointed external advisors to oversee the planning and development of SASSA's capabilities to fulfil this function (referred to as the work streams) (Constitutional Court of South Africa, 2017a). However, in early 2017, it emerged that there was no feasible plan for how grants would continue to be paid come 1 April 2017 (which was the original end date for the invalid CPS contract).

12.1.3 The SASSA-Gate Crisis

Ultimately, the court ruled that the invalid contract between SASSA and CPS would continue for a year (with changes to pricing being determined by National Treasury) and that the court would resume its oversight role by appointing a Panel of Experts to monitor the progress in finding a solution to take over the payments from CPS by 1 April 2018 (Constitutional Court of South Africa, 2017b). The fact that the court had to appoint such a panel as a governance mechanism reveals how deeply dysfunctional the Executive, as well as the oversight bodies of parliament, had become in the eyes of the court.

The sequence of events which led to the Black Sash approaching the Constitutional Court, traces back to its involvement in the Ministerial Task Team (MTT), which was focusing on the issues of irregular deductions from social grants. Through its engagements with Minister Dlamini in September of 2016, just seven months before SASSA was due to take over the payment of grants, it became apparent to some in the MTT that there did not appear to be any resolve as to how this transition was to take place. The Black Sash (as co-Chair of the MTT) sent a letter to the Minister requesting that an update be given on SASSA's progress regard the taking over of grant payments – a request that was declined (Dangor, 2017a). When the Black Sash

launched its litigation against SASSA and DSD, the MTT was disbanded and all amicable engagement with both the agency and the department came to end.

A Section 38 Inquiry set up by the Constitutional Court to get to the bottom of how the crisis had materialised and was held in early 2018. It resulted from the request by Black Sash for the Constitutional Court to consider assigning a personal cost order to Dlamini as a form of accountability for dereliction of duty as the executive authority – under whose watch SASSA and in turn the state, was unable to fulfil its legal constitutional mandate. As noted in the Constitutional Court ruling:

> … there are reasonable grounds for investigating whether this Court's remedial order was disregarded and, if so, whether this was done wilfully … The Minister bears the primary responsibility to ensure that SASSA fulfils its functions. She appoints its CEO. There is little the CEO can do without her direction. Attempts to obtain evidence of what steps she took after AllPay 2 to ensure that beneficiaries would continue to be well catered for drew a blank. (Constitutional Court of South Africa, 2017b, p. 38)

Although not putting forward any definitive recommendations, the comments by Judge Ngoepe in a report submitted to the Constitutional Court following the Section 38 Inquiry, were scathing in regard to the conduct of the former Minister. As reported in a *Mail & Guardian* article (Herman, 2018), Ngoepe's report indicates that "Dlamini was evasive", her explanation on why she did not disclose the appointment of the individuals to work streams was "unconvincing" and the "appointment of work streams and their role was central to the whole exercise of meeting the deadline. Therefore, in dealing with any aspect relating to the crisis, it is difficult to understand how the minister could have justifiably left out the issue of the appointment of work stream". Ultimately the Constitutional Court would rule, in a ground-breaking judgment, that Dlamini be held personally liable for 20% of the Black Sash case litigation costs and that the NPA should consider if there is a possible case of perjury in relation to the ministers testimony at the Section 38 Inquiry (Constitutional Court of South Africa, 2018b).

Through the court proceeding, the subsequent Section 38 Inquiry and the numerous investigative reports in the media, it is clear that within government there was no agreement on what the future payment system should entail or how this crisis was going to be averted. There were essentially two different approaches, and these make visible the stark contrast between the constitutional and shadow state. The first approach (promoted by DSD officials Zane Dangor and Sipho Shezi, together with the newly appointed CEO of SASSA Thokozani Magwaza) was to approach the Constitutional Court and try limiting the reliance of SASSA on CPS as much as possible, with the main objective being to remove CPS from the grant payment system within a year. The second approach (preferred by Dlamini, enabled by the parallel work

streams/external consultants) was to enter into a new, undoubtedly illegal, contract with CPS, with new negotiated higher rates for an extended period of at least two years. An important aspect of this second approach was that SASSA would not seek to approach the Constitutional Court prior to entering a new, undoubtedly unlawful, contract with CPS. It would instead only inform the court after the fact. This approach was in direct opposition to the recommendations presented to the agency and DSD, in three separate written legal opinions (Foley & Swilling, 2018).

During the institutional turmoil in the lead up to and following the March 2017 Constitutional Court ruling, those that apposed Minister's approach were removed from the offices of DSD and SASSA. Zane Dangor had resigned from the post of Director General of DSD in March of 2017 and by 10 April 2017, Minister Dlamini's long-time special adviser, Sipho Shezi, was fired (Thamm, 2017a). Just prior to leaving SASSA on 17 July 2017, Thokozani Magwaza (then CEO of SASSA) terminated the contracts of the work streams after National Treasury had declared their appointment as irregular. At the same time, Magwaza also received approval from National Treasury, allowing for a deviation from the standard procurement process, which would allow for the provisioning of services between and within different government entities. Having received this approval, Magwaza signed a cooperation agreement between SASSA and SAPO (Dzonzi, 2017).

On 19 July, Dlamini replaced Magwaza with "one of her close supporters and a fellow member of the ANC Women's League", Pearl Bhengu (Ensor, 2017). With all three opponents (Dangor, Shezi, and Magwaza) out of the way and an ally now appointed as acting CEO of SASSA, the doors were reopened for the Minister to ensure that she got what she wanted – at least until parliament intervened.

Towards the end of October 2017, the Panel of Experts presented a damning report to the Constitutional Court regarding the conduct of SASSA officials responsible for ensuring a grant payment system is in place by April 2018. The panel did not receive a copy of the SAPO RFP despite requesting it on numerous occasions from the department. They indicated that "the absence of a comprehensive implementation plan for SASSA's stated objectives providing adequately for risk management, risk mitigation and proposed alternatives should the 'course of action fail or an exit plan in respect of CPS' presents a 'serious risk'" (Thamm, 2017b).

Alarmed by the report by the Panel of Experts and the fact that SASSA had missed four self-imposed deadlines for signing a contract with SAPO, Standing Committee on Public Accounts (SCOPA) and the Social Development Portfolio Committee called the DSD, SASSA, and SAPO to provide parliament with an update as to what had happened and what was intended for the way forward. As meeting after meeting unfolded, it became clear that the disconnect between SASSA and SAPO

would require an intervention. What was revealed through these meetings was that, following Magwaza's exit from SASSA, there appears to have been a marked turn for the worse in the relationship between the two SOEs. After the two state entities could not reach an agreement, the portfolio committees combined their efforts and called in National Treasury to establish what had transpired. On 8 November 2017, those representing the Inter-Ministerial Committee (IMC) on Comprehensive Social Security and Minister Jeff Radebe (who by then was the chair of the committee, even though it had been announced in March that President Zuma would undertake this role) reported back to parliament that it had set up a task team to intervene and that an agreement would be concluded by 17 November (Foley & Swilling, 2018).

When the joint standing committee's in parliament intervened in November 2017, there was little time (less than 5 months) remaining for SAPO to mobilise the necessary resources to meet the looming deadline of 1 April 2018 for taking over the payment of social grants. With pressure from IMC on DSD and SASSA, a contract was signed with SAPO on 10 December 2017 and the difficult task of transitioning the grant payment system commenced (Herman, 2017).

Out of the four principle functions outlined in the original RFP from SASSA, SAPO was awarded three, namely: the development of an integrated payment system, providing banking services and management of card production, all of which were required to handle beneficiaries' biometric data (Foley & Swilling, 2018, p. 60). The remaining function, which under Dlamini it was indicated would be put out on a standalone tender process, was the servicing of cash pay points. With only a few months to finalise the procurement process and contract negotiations, yet alone enact an operational transition, many were aware that it was highly unlikely that a replacement for CPS would be in a position to take over the cash payments function come April 2018. SASSA, however, would only approach the Constitutional Court with this information on the eve of the deadline. On 23 March 2018, the invalid contract between SASSA and CPS was yet again extended for an additional six months, to ensure that CPS continued to provide cash payment services to beneficiaries during the transition to the new SASSA/SAPO payment system (Constitutional Court of South Africa, 2018a).

In the ruling made by the Constitutional Court on 23 March 2018, required for the extension, significant criticism was again levied against Dlamini, together with Pearl Bhengu (the acting CEO of SASSA at the time). The criticism, similar to the previous judgment, was due to the Agency's inability to meet the initial March 2017 deadline (Constitutional Court of South Africa, 2018c). Both Dlamini and Bhengu were instructed to explain why they should not be held liable for the costs related to this second extension. Ultimately, both were found to be responsible for the extension,

however, only Dlamini had a personal cost order placed against her following the outcomes of the Section 38 Inquiry (Saba, 2018).

12.2 SASSA AS CASE OF STATE CAPTURE

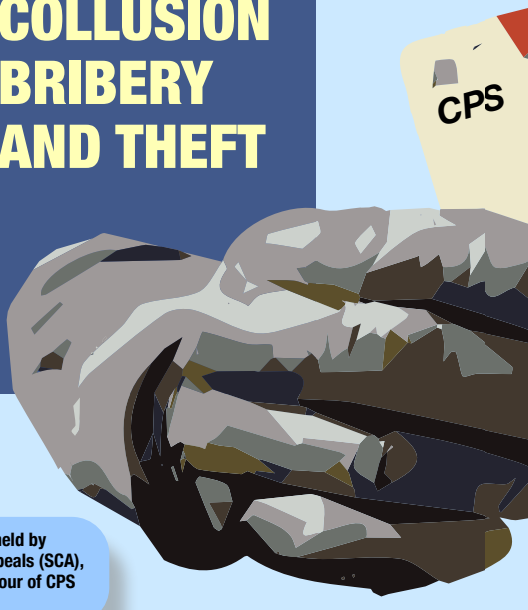
Since the 2012 tender award to CPS, there has been a plethora of investigative reporting on allegations of corruption, some emanating out of the court filings in the litigations. Most of the allegations relate to Minister Dlamini's indirect connections to the Black Economic Empowerment partners of CPS and its US listed holding company Net 1 UEPS Technologies Inc. (Net1). There have also been significant questions raised around the role which the external advisors (the work streams) played in the decisions and actions which culminated in the SASSA-Gate crisis.

It is important to note that following the initial Constitutional Court ruling in 2013, due to Net1 being a US-listed company, both the Federal Bureau of Investigation (FBI), under instruction from the US DOJ and the US markets regulator, the Securities and Exchange Commission (US SEC), as well as the Hawks on two cases, undertook investigations into the allegations of corruption levelled against Net1/CPS. The SEC closed its investigation in May 2015 with the disclaimer that this "must in no way be construed that the party has been exonerated" (US SEC, 2015). In July 2017, US DOJ also closed its investigation with a similar caveat: "If the Department learns additional information, it may reopen its inquiry" (US DOJ, 2017). At the end of 2015 it was announced that the Hawks had investigated allegations of corruption levelled against Net1/CPS and brought their findings before two separate prosecutors, who decided not to prosecute (Chopra, 2015). There are no details surrounding the cases or the reasons for deciding not to prosecute, but given the wealth of information that has emerged since then (in terms of both the SASSA case and the seemingly compromised actions of the Hawks and NPA under the Zuma administration), there is still potentially a case that could be pursued.

Most if not all of the allegations have been denied by those implicated, sometimes accompanied with obscure or shallow justification. It is, however, worth noting that Dlamini herself seems to indicate that there is more to the SASSA-CPS contract than has been made public. In her rambling resignation letter as a representative for the ANC in the National Assembly, after not being appointed to the new cabinet following the May 2019 elections, Dlamini indicated that in her defence there are "[t]hose that made profit through CPS through by their wives are known, but because they are well respected by the organization. Nothing has been said to them. I have been made a scape goat and an easy target" (Dlamini, 2019, p. 4).

THE DECADE OF DODGY DEALINGS

COLLUSION BRIBERY AND THEFT



PRE-2008

THE BUILD-UP

1999 - Aplitec (later NET1) purchased CPS from FNB. At the time, CPS was paying grants to 1.2m people in South Africa & Namibia.

2003 - Limpopo Tender Board irregularly awards contract to CPS.

2006 -When SASSA is established, NET1 start to implement a strategy of setting up infrastructure to further access the grant beneficiary target market to push its financial service offerings.
To do this, NET1 purchases Moneyline (Pty) Ltd (which later establishes EasyPay Everywhere banking service).

2008

- Zuma appoints Bathabile Dlamini Minister of DSD.

2009

- Zuma becomes President. Appoints Edna Molewa as Minister of Social Development (DSD) & Bathabile Dlamini as Deputy.
- Makiwane is suspended based on suspect 'report'.
- Makiwane dismissed. He later sues for defamation & gets R6m+ payout.
- Coceko Pakade appointed acting CEO of SASSA.
- SASSA CEO, Fezile Makiwane concludes Letter of Agreement with SAPO.

2010

- Grant Tender #2 bids received.
- Peterson issues Grant Tender #2 bidders notice – changes biometric verification from "PREFERRED" to "MUST" ensuring CPS is the only valid contender.
- Virginia Peterson appointed CEO of SASSA.
- Grant Tender #2 is released just 1 month after SCA ruling.
- Appeal by SASSA upheld by Supreme Court of Appeals (SCA), previous ruling in favour of CPS overturned.

2011

- Dlamini appoints Ministerial Advisory Committee (MAC).
- Coceko Pakade becomes acting DG of DSD - followed by Wiseman Magasela.
- SASSA concludes contract with CPS.
- Grant Tender #2 awarded to CPS - Hulley, Monyeki & Moyane involved in bid evaluation & adjudication process.

2012

- AllPay appeal to SCA for remedial action against SASSA & CPS - High Court ruling is overturned.
- NET1 companies start to push financial products (airtime, electricity loans, insurance etc.)
- Hands Off Our Grants (previously called Stop SASSA-CPS Debits Campaign) launched.
- ConCourt rules CPS invalid. April 2014 ConCourt - Invalidity is set aside while SASSA undertakes new procurement process (CPS is performing a function of state).
- CPS is paid R316m for re-registration of beneficiaries. Coincides with NET1 BVI BEE deal payout of same amount soon after.

2013

- AllPay & other bidders take CPS to court.
- NET1 enters new (separate) BEE deals with Business Venture Investments (BVI) & others – links to power elite & shadow state.
- High court declares CPS/SASSA tender agreement process unlawful.

2014

- CPS enters into MoA with Born Free Investments (BFI) & other dodgy BEE companies for SASSA bid.
- Black Sash Community Monitoring & Advocacy Project (CMAP) begins to uncover violations of norms & standards at pay points & irregular/ unauthorised 3rd-party deductions from beneficiaries.

Attempted bribe
Grant Tender #1 cancelled - alleged attempted bribe of Bid Adjudication Committee (BAC) chair by CPS.

- CPS wins high court case against SASSA & SAPO agreement, & SASSA decision to enter into agreement is set aside - SASSA cannot contract SAPO.

PHASE #1: SECURE MONOPOLY ON GRANT BENEFICIARY TARGET MARKET

FIGURE 12.1 Timeline of State Capture of SASSA

SASSA-GATE



- In the public's interest
- The Power Elite
- The Power Hungry
- The Brokers & Fixers
- The colluding corporate
- The middlemen/-women

UNIVERSAL GRAPHICS KEY

2015

- Grant Tender #3 - SASSA initiates bidding process for grant payment services in line with ConCourt ruling.
- MAC recommends SASSA builds its own payment system.
- Thokozani Magwaza made acting DG of DSD.
- Grant Tender #3 released – 'engineered to fail'. CPS does not bid.
- Dlamini instructs Petersen to appoint work streams.
- Grant Tender #3 adjudicated, not awarded due to "non-responsive bids".

2016

- SASSA/DSD report to ConCourt that no contract is awarded & promises to take over payments on 1 April 2017.
- SASSA unable to take over grant payments in April 2017 (at this stage, unclear what they have done to take over payments) - Legal Opinion #1.
- Virginia Petersen leaves office & Raphaahle Ramokgopa appointed Acting CEO.
- Work streams are irregularly appointed.
- Thokozani Magwaza appointed CEO, Zane Dangor appointed DG of DSD.
- Work streams issue first draft report - confirms SASSA unable to take over grants on time. Work streams want new SASSA contract with CPS - Legal Opinion #2.
- Technical Task Team (TTT) develops 6 options for SASSA to pay grants - Legal Opinion #3.
- Dlamini is critical of TTT options, particularly against using banks.

2017

- After much contestation, agreement to extend CPS contract – all 3 Legal Opinions indicate SASSA must approach ConCourt first.
- Dlamini meets Zuma over weekend, decides not to approach ConCourt.
- Magwaza goes on sick leave, Dangor resigns from DG of DSD - Magasela is the acting CEO when SASSA negotiates (irregular) new contract with CPS.
- Black Sash approaches ConCourt to intervene - ConCourt rule 1 year extension of invalid 2012 contract.
- Zuma reshuffles cabinet, leaving Dlamini in place & fires Finance Minister Pravin Gordhan & deputy Mcebisi Jonas.
- Magwaza cancels work stream contracts with R45m already spent. Signs agreement with SAPO on taking over payment of grants.
- Magwaza resigns & Pearl Bhengu appointed acting CEO.
- Magwaza with Dangor files affidavit with ConCourt - responding to claims by Dlamini that she should not be held personally liable.
- National Treasury reports irregular SASSA/SAPO negotiations. Inter-Ministerial Committee intervenes & SASSA & SAPO sign agreement.
- Bhengu signs off alleged irregular payments - coinciding with ANC national conference.

2018

- Enquiry into Dlamini's liability begins on 22 Jan.
- Cyril Ramaphosa becomes President of SA, replaces Dlamini with Susan Shabangu as Minister of DSD.
- Tender process initiated by Dlamini to replace CPS is cancelled & cash payments added to SAPO contract.
- ConCourt allows partial extension of CPS contract for 6 months & Corruption Watch wins case against CPS (R316m for irregular payment of re-registrations).
- SASSA takes over direct payment to beneficiaries' individual bank accounts but battles to transfer EPE accounts to SAPO system.
- Abraham Mahlangu appointed acting CEO of SASSA.
- Constitutional Court rules Dlamini to pay 20% of legal costs.

PHASE #2: EXPLOIT BENEFICIARY DATABASE

BEE PAYOUT
NET1 repurchases shares to repay BEE loan agreement.

- Black Sash join AllPay court case - ConCourt rules new Request For Proposal (RFP) must have timeframes for new tender process.
- NET1 launches EasyPay Everywhere (EPE) bank accounts.
- EPE bank accounts reach 600K.
- National Consumer Tribunal (NCT) rules there were good reasons to investigate Moneyline - Moneyline appeals this ruling.
- DSD amends regulations to limit deductions. Grindrod & others approach High Court for clarity on illegal deductions.
- EPE grows to over 1.1 million bank accounts.
- Black Sash organise mass action held in CT, JHB & DBN.
- EPE has more than 2 million active bank accounts.
- Black Sash organise mass action held in CT, JHB & DBN.
- Moneyline (EPE) oppose application by National Credit Regulator (NCR) to cancel its registration for alleged reckless lending to beneficiaries.
- Over 2.4 million grant recipients who were transferred onto EPE are charged R10 account fees by Grindrod (to cover R9.50 NET1 service fee).
- Report alleging CPS sabotaged SASSA/SAPO efforts to transfer onto new system - filed with ConCourt.
- SCA rules NET1 case against Social Assistance regulations moot – highlights the ring-fenced SDA of the SAPO system.
- SASSA institutes legal proceedings against Grindrod.
- SASSA contract with CPS ends.

12.2.1 The Shape of State Capture

The case study on the capture of SASSA illustrates several aspects of the state capture modus operandi which were identified in the Introduction. First is the securing of control over the public service, in particular through the appointment of Cabinet Ministers. Initially Zuma appointed Edna Molewa as the Minister of DSD in 2009, however, she was later relocated to the Department of Environmental Affairs and was replaced by her Deputy Minister Bathabile Dlamini in 2010.

The second component entails the intentional weakening of key technical institutions and formal executive processes. This is often achieved by 'removing' key top officials (such as Fezile Makiwane and Zane Dangor) and replacing them with people that would not be obstructionist; having officials only in acting positions (limiting ability to take long-term strategic decisions) as was the case in early 2016 where both the CEO and DG of DSD were acting appointments; and having persons who appear to be part of the shadow state, such as Michael Hulley and Patrick Monyeki, involved in the procurement process (both in 2012 and again in 2017). Also worth noting is the appointment of the work streams in 2016 and the instruction from Dlamini not to interfere, limiting the ability of the agency officials to carry out their mandate.

The third element of the state capture modus operandi entails securing access to opportunities for repurposing state institutions by manipulating or changing the directives or objectives of government. In this case in particular, it involved the manipulation of tender processes that resulted in the contract between SASSA and CPS for the nationwide payment of social grants. This was achieved by changing just one word in the tender specifications, where 'preferred' changing to 'must' changed the rules of the game.

In cases where the shadow state objectives are for accruing wealth, this type of manipulation of the procurement processes often centres around large-scale projects/contracts. The original 2012 tender for the payments of social grants was worth an estimated R10bn and was the largest contract of its kind at the time. There is also often an element of 'scope creep' in the contracts, where the value is increased or the contract is extended, potentially indefinitely. CPS's windfall, which serendipitously coincided with their BEE partnership paying out, was as a result of an irregular extension for the 're-registration of grant beneficiaries', at an additional cost of R316m. Additionally, there were the seemingly deliberate delays which led to the Constitutional Court having to extend the invalid contract in March 2017 and again in 2018.

The last aspect of state capture that takes place both within and outside of government, is the creation of parallel political, governmental, and decision-making structures

that undermine the functional operation of government institutions. In the SASSA case, it was the establishment of a parallel governance structure, where the recommendations of an external advisory team (the work streams which reported directly to the minister) were elevated above those of SASSA officials. There are also several accounts of unofficial meetings taking place, in various informal locations such as at the Minister's home and Nkandla, meetings with Michael Hulley (advisor and lawyer to Zuma) also play a key role in this aspect.

There are several other aspects of the state capture project that are worth reflecting upon, such as the organisational 'structure' of the shadow state and the roles which are filled by various members of the power elite. Bathabile Dlamini would be considered the "elite" due to her position as Minister of DSD and as President of ANCWL. Michael Hulley (Zuma's former lawyer), who played an active role in providing 'legal opinion' both in the awarding of the 2012 CPS contract and the 2017 SASSA-Gate crisis, could then be considered a "fixer". The fixer creates an accountability buffer between the elite and any illicit activities which are taking place within government. For example, Dlamini did not directly interfere in the Bid Evaluation, however, Michael Hulley and Patrick Monyeki (whose company would later be appointed as lead for the technical work stream) are alleged to have played a critical role ensuring that the Bidders Notice 2 change in biometric verification yielded the desired outcome – the appointment of CPS. Lunga Ncwana could be considered the "broker", due to his personal and business relationship links to Dlamini and Hulley (in government), and with multiple individuals that were involved with the BEE partnerships/deals with Net1. Without having any direct involvement in any of the formal contracting, the broker is free to interact with and between both parties.

12.2.2 The Underlying Politics

To highlight the importance of the role that political power dynamics play in terms of how the state is governed, one need look no further than the trading of political favours (patronage) between Bathabile Dlamini and Zuma-centred elites. Dlamini was a crucial political supporter of Zuma in the lead up to the ANC Polokwane Conference, where in her position as Secretary-General she was able to mobilise significant support resulting in Zuma being nominated for President by the ANCWL. For this support, Dlamini was rewarded with the position of Deputy Minister (and later Minister) of the Department of Social Development. Then in 2015, her political status was elevated, allegedly through the support of the 'Premier League', to become President of the ANCWL.

STEALING FROM THE POOR

SASSA-GATE When power & greed cross paths

THE ONE WORD THAT CHANGED THE GAME

2011 Jun - The grant payment Request For Proposal (RFP) is altered with Bidders Notice #2. Bid specification for biometric verification is changed from "preferred" to "must", ensuring CPS is the only contender.

Power & influence

THE POWER

POWER HUNGRY





Bathabile Dlamini
2010 Nov - Appointed Minister of DSD and oversees new SASSA tender process, ensuring CPS gets contract in 2012.
2015 - She instructs the formation of shadow state "work streams" leading to SASSA-Gate in 2017.



Virginia Petersen
2011 Apr - Dlamini appoints Petersen to CEO of SASSA. By June, Petersen issues the "one word" change in Bidders Notice #2, ensuring CPS won the bid.



Wiseman Magasela
2012 - As Deputy Director General of SASSA he was part of the Bid Evaluation Committee that changed the scoring to ensure CPS won. He was key in pushing the SASSA-Gate work streams agenda in 2017.

BROKERS

Michael Hulley
Zuma's Lawyer provides 'legal opinions' in both the awarding of the invalid 2012 contract & the 2017 SASSA-Gate CPS contract crisis.





Raphaahle Ramokgopa
2011 - Ms Ramokgopa is part of the Bid Evaluation Committee (BEC) that chose CPS.
2016 - She becomes acting CEO of SASSA & appoints Dlamini's work streams for her.



Tim Sukazi
Dlamini's legal advisor, Tim is appointed to Ministerial Advisory Committee (MAC) & then contracted as legislative & policy advisor of work streams for over R7.6m in 2016. He was also the manager of Ncwana's football club's coach.



Zodwa Mvulane
2016 - Ms Mvulane was the project manager at SASSA for Dlamini's parallel work streams.



Pearl Bhengu
2017 - Dlamini's family friend, Pearl is appointed CEO of SASSA. Post SASSA-Gate introduces irregularities into the new SAPO contracting process.

FAMILY & FRIENDS OF ELITES



Gateway of

As stated by Dlamini, there are "Those that made profit through CPS through their wives are known, but because they are well respected by the organization, nothing has been said to them." This well-paid patronage system ensures the power elite maintain support to stay in power.

FIGURE 12.2 SASSA Shadow State Network

Money flow

Power & influence flow

The exploited grant beneficiaries

The Power Elite

The Power Hungry

The Brokers & Fixers

The colluding corporate

The middlemen/-women

UNIVERSAL GRAPHICS KEY

Greed & undermined economic transformation

NET1

ELITE

COLLUDING CORPORATE

Jacob Zuma

2009 May - Zuma becomes president thanks to support from ANC WL leader Bathabile Dlamini. He returns the favour making her Minister of Social Development (DSD) in the 2010 cabinet reshuffle.



Serge Belamant

Founder of Alpitec (NET1 SA). The company bought CPS, Moneyline, Prism Holdings & other companies that supported NET1's "first wave/second wave" strategy - secure monopoly of grant beneficiary market & then push NET1 financial services.



Tom Moyane

2011 Nov - Appointed Bid Adjudication Committee Chairperson. Deliberately ignores red flags by National Treasury, allowing CPS to win the invalid 2012 contract.

OVER R800 MILLION IRREGULAR/ UNAUTHORISED DEDUCTIONS FROM GRANTS*

*31 May 2016, Thokozani Magwaza report

It is still unclear just how many more unreported millions were stolen as CPS/Grindrod system had no tracking mechanism at the time.

& FIXERS

MIDDLEMEN/-WOMEN



Lunga Ncwana

With close personal & business ties to Dlamini, Hully & many of the NET1 BEE partners, Ncwana is one of the main brokers - bringing them together.



Mazwi Yako

ANC stalwart & former CPS national chairperson, sole owner of NET1's BEE partner Born Free Investments, Yako is a key BEE link to ANC power elite.

Patrick Monyeki

A good friend of Tom Moyane, Monyeki is technical adviser on 2012 contract. Appointed to MAC where his company Rangewave Consulting is awarded bulk of work stream contracts for R35.8m.



Kgomotso Mosehla

2014 Nov - NET1 signs a BEE partner deal with Mosehla's Business Venture Investments & he pockets a quick R83 million.





Mpolokeng Parkies

Is appointed to MAC & is awarded R4.4m contract for local economic development work stream. No clear evidence of work produced to justify the expense?

Global Retriever & Other BEE partners

Among CPS' new BEE partners is Global Retriever, which ends up with 75% of the payment from CPS. Ncwana & Mosehla become directors of the company on the same day in April 2015.



corruption



THE EXPLOITED GRANT BENEFICIARIES



Using the personal information collected through the CPS social grant payment system, NET1 targeted over 10 million of South Africa's most vulnerable - selling them "financial services" & extracting rents directly from the grants on which they depend for survival.

The political power Bathabile Dlamini wields in the governing party has undoubtedly protected her from having to account for her potentially corrupt (alternatively extreme incompetence) actions which lead to the SASSA-Gate debacle. This is evident by the fact that despite the scathing Constitutional Court judgment against Dlamini in mid March 2017, Zuma did not remove her from the position of Minister of DSD in the last cabinet reshuffle of his Presidency in late March 2017. Instead, Zuma removed a comparatively competent and effective minister of finance (Pravin Gordhan), without any rational motivation given to the public. This act showed to the country that the decisions Zuma was making as President were not in the interest of the country and were motivated by selective interests.

The political dynamics of the country, such as they are, means that Dlamini is still seemingly protected by the political position/power she retains as President of the ANCWL. This is evident from the fact that President Ramaphosa (with marginal National ANC Conference victory), though removing her from position of Minister of DSD, did not remove her from cabinet (transferring her to Minister of Woman under the Presidency).

By providing a brief summary of the finding of the Public Protector's investigation into the use of state resources for party political benefits, the case study also highlights just one of the many other ways in which the state can be repurposed under the project of state capture. In this case it is to reinforce voter support, by maintaining and reaffirming the association of delivery of public services with the governing political party.

12.2.3 How Net1 Repurposed a Function of State

> No party has any claim to profit from the threatened invasion of people's rights. (Constitutional Court of South Africa, 2017b, p. 28)

This was potentially one of the most damning statements levelled against CPS in the March 2017 Constitutional Court judgment.

Over and above the irregular contracts, it would appear that the actual benefit that Net1 derived was as an indirect result of its appointment to pay grants, primarily from the sale of secondary financial services to grant beneficiaries. The problem here is not the pursuit of profit, but rather how the interests of this private company became the interest of certain state institutions. A lucrative state contract was used by the company to gain preferential access to a market consisting of poor and vulnerable people.

The history of CPS and Net1 goes back to the 1990s. Net1 UEPS Technologies Inc. was incorporated in Florida in May 1997 and later listed on the Nasdaq Stock Market

in 2005. Over the years it expanded its interests across the world and is now the parent company of a range of subsidiaries that provide a variety of payment technology solutions and financial services, including CPS. In 2004, the company acquired a South African company, Net1 Applied Technology Holdings Ltd (or Aplitec), which was a public company listed on the Johannesburg Stock Exchange (JSE). It was in fact Aplitec (a smart card company, whose founder and CEO was Serge Belamant) that had initially bought CPS from First National Bank (FNB). At the time (1999), CPS had contracts to distribute grants to some 1.2 million people in South Africa and Namibia worth R54m (ITWeb, 1999). In the years that followed, Aplitec would go on to acquire Moneyline (Pty) Ltd and New World Finance (Pty) Ltd (both micro-lending businesses) (Net1, 2006) and later in 2006 Prism Holdings Ltd, which focused on "secure transaction technology, solutions and services", which later became the owner of EasyPay Ltd (Net1, 2008). These businesses would be central to Net1's overall business strategy, conceived back in 2006.

The supply of secondary financial services has always been part of the business strategy and Net 1 publicly outlined how it would repurpose the state function, from as far back as 2006 (Net1, 2006) and 2008 (Net1, 2008, p. 6) Annual Reports. After being awarded the 2012 contract for the payment of grants by SASSA, and having undertaken the 're-registration' of all grant beneficiaries and recipients, in 2013, Net1 synthesised its strategy to a "first wave/second wave" approach, which is described in its annual reports as follows:

> We use what we refer to as a "first wave/second wave" approach to market expansion. In the "first wave," we seek to identify an application for which there is a demonstrated and immediate need in a particular territory and then sell and implement our technology to fulfill this initial need. As a result, we should achieve the deployment of the required technological infrastructure as well as the registration of a critical mass of cardholders or customers. During this phase, we should generate revenues from the sale of our software and hardware devices, as well as ongoing revenues from transaction fees, maintenance services and the use of our biometric verification engine. Once the infrastructure has been deployed and we achieve a critical mass of customers, we intend to focus on the "second wave," which should allow us to use this infrastructure to provide users, at a low incremental cost to us, with a wide array of financial products and services for which we can charge fees based on the value of the transactions performed. (Net1, 2013)

What is important to highlight is that this business strategy has long been known to veteran DSD officials, such as Zane Dangor, who led the negotiations with the various service providers in 2008/2009 (Dangor, 2017b). It is a practice that has been frowned upon by those who understood the potential negative ramifications that could result

from allowing a company that pays grants to also sell secondary financial services to beneficiaries. The 2012 contract between SASSA and CPS stated that the "Contractor [CPS] shall not use data belonging to SASSA for any purpose other than for the performance of the services" (McKune, 2017). Even though over the years SASSA had threatened to cancel its contract with CPS, it would seem the restriction on the use of beneficiary data was never properly enforced. As a result, Net1 was able to move directly from establishing access to the market to pushing its proprietary financial services that had nothing to do with the service provided to the state. As highlighted in *How One Word can Change the Game* (Foley & Swilling, 2018, p. 45):

> … the 'genius' of Net1 business model: it was paid [by the government and in turn taxpayers] to establish a massive client base and ensure the payment technology is adopted by the major commercial businesses involved; it then leveraged beneficiary data and information to which only it had access to sell financial products, knowing that there is minimal risk of non-payment.

The main allegation levied against Net1 concerns the use of grant recipients' personal information and data, held by CPS in terms of the payment services contract with SASSA. It is alleged that this information is exchanged between and within the Net1 group of companies. Particular focus has been placed on Moneyline, which provides microloans. By virtue of the fact that it has access to and knowledge of a beneficiary's income significantly reduces risk for the business, which means it has an unfair advantage over other competitors in the market. The second advantage derived is that the enrolment process of beneficiaries for these services is made both easier and cheaper for Net1 companies. The third allegation involves the use of beneficiaries' personal details, such as contact numbers, for marketing products and services ("ambush" marketing practices) (De Lange, 2017; ITWeb, 2017; Van Zyl, 2016; Mawson, 2015).

In order to counter the various allegations of Net1's inappropriate (possibly fraudulent) business practices, the company appointed auditing firm KPMG to conduct an investigation into its operations. The scope of the investigation was determined by Net1 and as such the investigation was limited in its finding and applicability, in terms of the actual accounts provided by beneficiaries and even Net1 employees (Black Sash, 2018; Foley & Swilling, 2018; Torkelson, 2020). It became apparent that, through the ruling by the Constitutional Court and the ground swell of negative sentiment, it was unlikely CPS would continue payment of social grants beyond April 2018 (though this would only be final in September 2018). The Panel of Experts that were appointed by the Constitutional Court to oversee the transition reported allegations against Net1 (in partnership with Grindrod Bank) of intentionally attempting to sabotage the migration from CPS to SAPO. This sabotage entailed implementing a misinformation

campaign to get grant recipients to open EasyPay Everywhere (EPE) bank accounts and not allowing SASSA and SAPO employees access to sites where grant recipients receive their cash payments (Auditor General, 2018).

12.3 THE COST OF SASSA STATE CAPTURE

> For many people in this country the payment of social grants by the state provides the only hope of ever living in the material conditions that the Constitution's values of dignity, freedom and equality promise. About 15 million people depend on the payment of these social grants. They are vulnerable people, living at the margins of affluence in our society. (Constitutional Court of South Africa, 2013, p. 3)

In 1994, when the democratically elected ANC government was instituted, the social security system that was inherited was skewed towards favouring white pensioners, with little protections in place for addressing the plight of African women and children. The system was to be reformed to cater for all South African citizens equitably and fairly. Access to social security is one of several socio-economic rights guaranteed in the South African Constitution of 1996, where Section 27(1)(c) of the constitution states that "Everyone has the right to have access to … social security, including, if they are unable to support themselves and their dependents, appropriate social assistance" (Republic of South Africa, 1996).

However, unlike other socio-economic rights, such as the right to freedom of expression or property rights, the Constitution also recognises and accommodates for the practical limitations on the government's ability to comprehensively fulfil this mandate, in that the government is subject to an internal limitation of the resources which are available. Section 27(2) in the constitution states that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights" (Republic of South Africa, 1996). This caveat is a necessity, in that it allows for flexibility in terms of establishing policy and the management of the state's budget and the country's fiscal sustainability. It is in this regard that the expansion and application of the social grants policy can arguably be viewed as one of the greatest post-1994 redistributive achievements.

Under the Mbeki Presidency, social grants were identified as a key component of the Growth, Employment and Redistribution (GEAR) framework, which was adopted. The increased scope of social grants was implemented as the main form of wealth redistribution and was the principle programme which sought to account for the flaws/shortcomings of implementing neo-liberal economic policies (Khan, 2013). As a result, there was a significant growth in the number of grant recipients, in particular the introduction of Child Support Grants in the early and mid 2000s which resulted

in the number of South African citizens receiving social grants ballooning from approximately 3 million beneficiaries in 2000 (primarily old age grants) to over 12 million beneficiaries by 2008. As of December 2017, there were over 17 million grant beneficiaries.

Social grants are targeted at providing financial relief to the most vulnerable in South Africa's society, namely the elderly, children, persons with disabilities and temporary assistance for those experiencing financial hardship outside of their control. As Khan (2013, p. 575) highlights, social grants are no longer just a "stop-gap measure" for counter-balancing the deficiencies in the government's policies to achieve meaningful structural transformation of the economy, social grants "are now a structural necessity and 'politically irreversible pillars of social policy'".

It is not possible to provide a comprehensive, all-encompassing estimation of the cost which can be attributed to the state capture of SASSA. There are in fact several costs which need to be considered and some are not definitely quantifiable, however, the following have been identified:

- Cost of the 2012 irregular contract (estimated R10bn over 5 years, as well as then the cost incurred to the state as a result of the contract extensions). Added to this should be the legal costs relating to the litigation of the contract.
- Opportunity cost to the state in that seven years after the SASSA/CPS contract was signed. We are back at a point where SASSA is contracting with SAPO for the payment of grants. The weakening of SASSA as an institution should also be taken into account. This is not something that cannot be readily quantified, however, with the recent appointment of SAPO it is evident that the appointment of CPS was arguably an unnecessary delay in grant payment being undertaken by government itself.
- There is the highly questionable escalation of irregular expenditure at the department from only R8.8m in 2007 to R1.4bn in 2017. Included in this amount are the irregular payments of R316m to CPS (for the 're-registration of beneficiaries') and R43m paid to the work streams.
- Of course, there is the slow repressiveness of the value of grants themselves (where annual grants are increased at CPI, which is lower than real food inflation), the 1% increase to VAT, numerous fuel increases, etc. Even though this cannot be attributed directly to the capture of SASSA, this is the result of the fiscal and economic impacts/decisions of the Zuma administration.
- The most important is the costs to beneficiaries. There are not definitive figures for this as yet, but it is known that beneficiaries did incur potentially unnecessary costs relating to transactions fees by CPS/Grindrod. Then there are the monies

lost which correspond with the 'illegal'/immoral deductions from grants (May 2016, Magwaza reported that at that stage "the total monetary loss due to the unlawful deductions was close to R800 million").

12.4 CONCLUSION: THE CONSTITUTIONAL STATE AT WORK

The capture of SASSA was not just a form of "grand corruption" resulting in a financial loss to the state and taxpayer, but was a political project that has had a direct negative impact on the poorest and most vulnerable in our society; the consequences of which will undoubtedly be felt for years to come. Though the case study does not present a smoking gun, in terms of corruption or state looting, there are several questions raised in this regard and it is possible that grand-scale looting was actually prevented due to the interventions by AllPay, the Judiciary, civil society, and the media.

The significant role civil society groups played, by approaching the Constitutional Court, needs to be acknowledged. Together with officials who spoke out, this configuration has made it possible to keep the grant payment system more or less on track to the benefit of millions. Had there been no intervention, a likely possible scenario would have been that CPS was awarded a new contract, thus making possible massive profits for a company and its associated networks off the backs of South Africa's poorest. Thankfully, this did not happen. This case study highlighted the various actors/institutions which play a crucial role in preventing the rules from being abandoned, defending the Constitution and throwing light on the shadows where the 'skeletons' hide. These are the unsung heroes who speak truth to power and give voice to South Africa's most vulnerable, in particular:

- The Judiciary, who time and again has been forced to walk the line of the separation of powers without crossing it, to ensure that recourse is found to address the failures of the Executive and ensure that those in power are at least held to account in terms of their legal obligations, even though they seem impervious to political rebuke. The order they made was seminal – without it 17 million South African citizens may not have received the grants on which they so desperately depend;
- The various NGOs and civil society advocacy groups, such as the Black Sash Trust, Centre for Applied Legal Studies and Corruption Watch, which have initiated litigation on behalf of the most vulnerable and actively partnered and supported the government in the development of progressive social policy;
- The committed civil servants and whistle-blowers who refused to pander to political pressure, dedicated themselves to serving in the interest of public good, and spoke out when they witnessed improper acts (or statements) by those in power; and

- The investigative reporting by brave men and women in the news media, such as *GroundUp, Business Day* (Ann Crotty), *Daily Maverick* (Marianne Thamm) and amaBhungane (Craig McKune and Sam Sole), who ask the tough questions and expose the lies.

This case study serves to highlight that state capture extends beyond the narrow objective of extracting monetary wealth. The capture of SASSA demonstrates that state capture can actually result in the repurposing of a fundamental function of government itself. Here the constitutional obligation of the state – the administration of social grants – was handed to a private company, knowing that this function would be repurposed to enable said company to profit from the poor.

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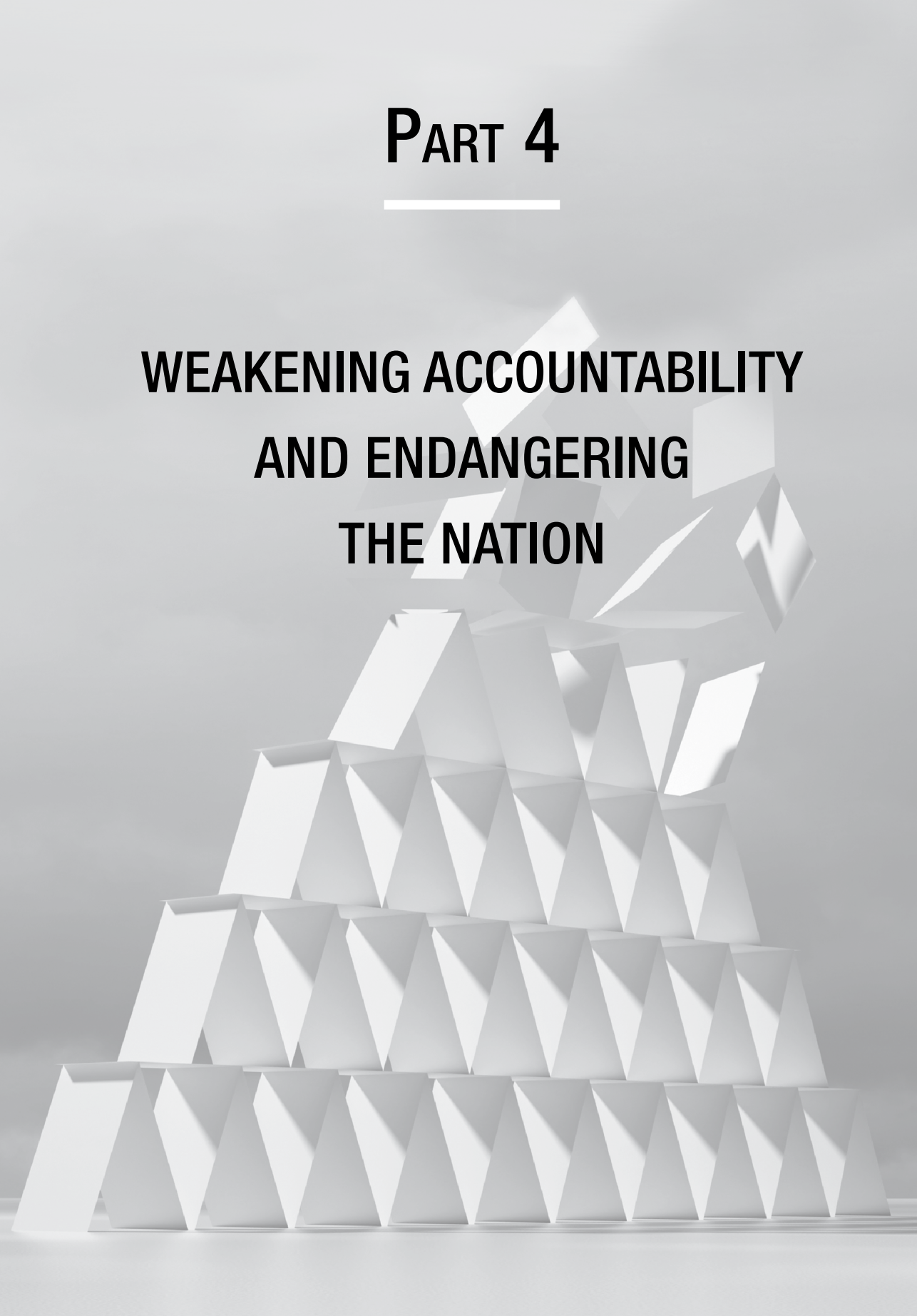
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PART 4

WEAKENING ACCOUNTABILITY AND ENDANGERING THE NATION



13 STATE CAPTURE AND ZUMA'S CRIMINAL JUSTICE AGENDA

David Bruce, David Lewis and Gareth Newham [1]

13.1 INTRODUCTION: THE LEGAL TRAVAILS OF JACOB ZUMA

When he became President on 9 May 2009, and assumed overall command of SA's state machinery, Jacob Zuma had already been involved in a prolonged battle with key agencies of the criminal justice system. In November 2002, press reports indicated that Zuma, who was Deputy President of South Africa at the time, was one of those being investigated on corruption charges linked to the arms deal (Holden, 2008). Initially, for reasons probably related to his position in government and the ANC, the NPA decided not to include him in the list of those charged in respect of the matter, notwithstanding the fact that he was also strongly implicated in the indictment against his alleged accomplice, Schabir Shaik (High Court of South Africa: Natal Provincial Division, 2005; SCA, 2006). Zuma was first charged with corruption in June 2005 after Shaik had been convicted of corruption and fraud (Holden, 2008).

In the period since, Zuma's lawyers have been unrelenting in trying to ensure that Zuma does not have to stand trial. Following a series of motions by Zuma's lawyers, the charges lodged in 2005 were struck from the roll by the Pietermaritzburg High Court in September 2006 (High Court of South Africa: Natal Provincial Division, 2008). However the High Court judgment was overturned on appeal (SCA, 2009) and new charges were brought by the NPA in late December 2007, ten days after Zuma had been elected as ANC President. Acting National Director of Public Prosecutions (NDPP) Mokotedi Mpshe withdrew these charges on 6 April 2009, shortly before the 2009 general election. This followed submissions by Zuma's lawyers including the provisions of tapes ('the spy tapes') showing political interference in the NPA decision regarding the timing of the charges against Zuma. During this period, Zuma had also been charged (in December 2005) and acquitted (in May 2006) for the rape of a 31-year-old woman (High Court of South Africa: Witwatersrand Local Division, 2006).

1 This chapter is a condensed version of report submitted by Corruption Watch and the Institute for Security to the Zondo Commission in April 2019. See Corruption Watch and the Institute for Security Studies, *State capture and the political manipulation of criminal justice agencies – Submission to the judicial commission of inquiry into allegations of state capture,* April 2019 (Corruption Watch and Institute for Security Studies, 2019).

During his period in office as President, whether or not he would stand trial for corruption continued to be the subject of ongoing contestation through the courts (SCA, 2012, 2014b, 2017). Allegations have been made that he was abetted by senior officials in the NPA, notably Nomgcobo Jiba in her role as acting NDPP, in obstructing some of the litigation against him, though different courts have reached different conclusions on her culpability in this regard (SCA, 2012, 2014b; High Court of South Africa: North Gauteng, 2016; SCA, 2018). Zuma is no longer President, but his legal travails continue. After the High Court in 2016 set aside Mpshe's 2009 decision to withdraw the corruption charges against Zuma, and Zuma's appeal against the decision failed in October 2017 (SCA, 2017), the NPA reinstated charges against Zuma in March 2018 (Pather, 2018). After a further series of unsuccessful legal manoeuvres, at the end of April 2020 Zuma's legal team finally announced that they had abandoned their intended appeal to the Constitutional Court for a permanent stay of prosecution (Khumalo, 2020). As of May 2020, the case against Zuma is due to proceed in the KwaZulu-Natal High Court in June.

Mobilising support around him and enabling himself to become the preferred candidate for those who were frustrated with then President Thabo Mbeki appears to have served as Zuma's best instrument for protecting himself from being held accountable for his alleged corruption. Whatever the motives of those who mobilised for Zuma to become ANC President in 2007, and thus President of South Africa in 2009, for Zuma himself this appears to have firstly served as a way of ensuring that he stayed out of jail. Notwithstanding that his oath of office committed him to 'obey, observe, uphold and maintain the Constitution and all other law of the Republic' (Republic of South Africa, 1996), given the facts available to us it is reasonable to believe that Zuma did not view the principles of equality before the law embodied in the Constitution, in favourable terms. Instead, he appears to have deemed it necessary to ensure that the criminal justice system was subordinated to his personal interests.

13.2 MANIPULATION OF CRIMINAL JUSTICE AGENCIES BY THE EXECUTIVE UNDER ZUMA

Following his election as President, it appears that Zuma's interest in protecting himself against prosecution came to be aligned with the broader project that has come to be known as state capture. The manipulation of criminal justice agencies contributed to this through:

- Ensuring impunity – protecting Zuma, his family, and other allies and associates from prosecution. This extended to generalised impunity for the political class and those associated with state capture.

- Promoting Zuma's control of the ANC – Zuma's control of the ANC was the pivotal enabler of state capture. State intelligence capacity, including the SAPS crime intelligence division, were used to promote control of the ANC for Zuma and his allies.
- Neutralising criminal justice officials who posed a threat to impunity, and administrators and politicians, including members of his own Cabinet, who did not cooperate with the state capture agenda.

The evidence indicates that Zuma and members of his Executive played a central role in this manipulation, most notably through their ability to influence the appointment and removal of key officials of the criminal justice agencies including the SAPS, the Directorate for Priority Crime Investigation ('the Hawks') and NPA and Independent Police Investigative Directorate (IPID).

13.3 RICHARD MDLULI AND THE MANIPULATION OF THE SAPS CRIME INTELLIGENCE DIVISION

Zuma showed his hand shortly after his appointment as President. On 1 July 2009, less than two months after he had assumed office, Richard Mdluli was appointed as Head of the SAPS Crime Intelligence Division. In terms of SAPS regulations, the head of crime intelligence should have been appointed by the National Commissioner.[2] Instead Mdluli was appointed irregularly by a panel of politicians headed by the Minister of Police, Nathi Mthethwa and consisting of three other Zuma aligned Ministers, Siyabongwa Cwele (State Security), Malusi Gigaba (Home Affairs) and Susan Shabangu (Energy Resources and previously Deputy Minister of Police) (*City Press*, 2011a).

Mdluli's appointment was prioritised over that of a new SAPS National Commissioner. At that time, the SAPS had been under an acting National Commissioner, Tim Williams, for just short of 18 months. When Zuma appointed Bheki Cele as National Commissioner on 29 July 2009, Cele was faced with Mdluli's promotion to head SAPS crime intelligence as a fait accompli.

Despite also being a KwaZulu-Natal based politician, Cele was not one of Zuma's close political allies. However, at that time he was aligned with Zuma's populist agenda for

2 See Chapter 4, and in particular sections 43, 44 and 45 of the Regulations for the South African Police Service, No R. 973, 12 September 2008 (Department of Safety and Security, 2008). It may be noted that Section 2(1) of the 2008 regulations provided that: "The Minister may, if circumstances justify it, approve a deviation from any provision of these Regulations, and may authorise such deviation with retrospective effect for purposes of equality." It appears unlikely that the appointment of Mdluli may be seen as one which is justified in terms of this provision. Even if so, it fell clearly outside the established procedures.

getting tough on crime. During Zuma's tenure in office the capacity of criminal justice agencies to deal with corruption was consistently weakened, creating a permissive environment for corruption. Most notably during his early period in office, Zuma and his allies projected themselves as 'tough on crime' through promoting more forceful 'militarised' policing. During his tenure as a member of KwaZulu-Natal Provincial Executive (2004-2009), Cele had encouraged more liberal use of lethal force by police (Kathree-Setiloane, 2013). But Cele's role in Zuma's strategy appears to be secondary to that of Mdluli.

In addition to the priority given to appointing Mdluli and the irregular process followed, enormous effort would be expended on ensuring Mdluli's impunity. Evidence showed that it was likely that Mdluli had instigated the February 1999 murder of Tefo Ramogibe, the husband of a woman that Mdluli had been married to in customary law (North Gauteng High Court, 2013; Breytenbach & Brodie, 2017). There were also cases involving intimidation, kidnapping, assault, assault with intent to do grievous bodily harm and attempted murder, that were linked to the Ramogibe matter ('the related charges'). At the time of the alleged crimes Mdluli was the head of detectives at the Vosloorus police station. This was probably the reason why the investigation was abandoned. The investigation was re-opened after he became Head of Crime Intelligence. Mdluli was arrested in March 2011 and placed on suspension due to the murder charges. He was arrested a second time, in September 2011, on charges of corruption and fraud linked to alleged abuse of crime intelligence funds. The latter allegations against Mdluli would be the subject of detailed evidence to the Zondo Commission in 2019.[3]

The corruption charges against Mdluli were withdrawn, allegedly irregularly, in early December 2011 by Lawrence Mrwebi, a Special Director of Public Prosecutions and head of the Specialised Commercial Crime Unit. Mwerbi had been appointed by Zuma on 1 November 2011. It is alleged that Nomgcobo Jiba, who was appointed by Zuma as acting National Director of Public Prosecutions on 28 December 2011, further shielded Mdluli by failing to review Mrwebi's decision despite the controversy that it caused (SCA, 2014a, paras. 32-42). In March 2012, Police Minister Nathi Mthethwa also allegedly pressurised the then SAPS acting National Commissioner to withdraw Mdluli's suspension (amaBhungane, 2012; *City Press*, 2012; SCA, 2014a). In relation to the withdrawal of the murder charges there were also peculiarities. During the same period, both the Gauteng Director of Public Prosecutions and the inquest magistrate of Boksburg also acted in an unusual manner in relation to the evidence of

3 See the evidence of: Kobus Demeyer Roelofse (2019) and Colonel Dhanajaya Gangulu Naidoo at the Judicial Commission of Inquiry into allegations of State Capture (Zondo Commission, 2019b).

murder against Mdluli (North Gauteng High Court, 2013; SCA, 2014a; Breytenbach & Brodie, 2017).

After being reinstated at the end of March 2012, Mdluli was suspended again in early June following a successful court application by a civil society organisation. No further action was taken against Mdluli in respect of the murder or any of the related charges for several years afterwards. In January 2018, weeks before Zuma's resignation as President, Mdluli agreed to take early retirement (*News24*, 2018a). By this point Mdluli had been on suspension with full pay and benefits for six and a half years altogether without disciplinary action being taken against him in relation to any of the evidence of wrongdoing.

However, partly as a result of litigation, the charges against Mdluli had not fallen away entirely (SCA, 2014a, paras. 2, 32-42). In October 2016 Mdluli and a co-accused appeared in court again on various charges including intimidation, kidnapping, and assault with intent to do grievous bodily harm (Masilela, 2016). The two accused were convicted on most charges in July 2019 (Chabalala, 2019), though an appeal against the Constitutionality of the intimidation act resulted in the intimidation convictions being overturned and as of May 2020 final sentence has not as yet been given. As a result of the findings of the inquest court, the murder charges however have not been pursued further. There has also been no progress in prosecuting the corruption charges against him.

Why did Zuma and members of his Executive attach so much importance to appointing Mdluli and retaining him as Head of Crime Intelligence? It is possible that the association between Mdluli and Zuma goes back to 2006 when Mdluli, as a Gauteng Deputy Provincial Commissioner, would have had overall authority over the detectives who investigated the failed rape case against Zuma (amaBhungane, 2012). It also appears that an alliance between Nomgcobo Jiba and Mdluli began in the 2007/8 period when both were associated with efforts to undermine the Scorpions corruption investigation against then SAPS National Commissioner Jackie Selebi (*Mail & Guardian*, 2009; *City Press*, 2011b). Jiba's favourable relationship with Mdluli may have contributed to Jiba becoming Zuma's favoured senior NPA official. Not only did he appoint her as acting NDPP for a full 21 months, but there is information suggesting that even after this point she was the NPA official who was most favoured and trusted by him (Zondo Commission, 2019a).

After being suspended in December 2007, Jiba faced disciplinary charges in the NPA regarding her involvement in the Selebi case. Mdluli, who as Gauteng Deputy Provincial Commissioner had oversight over SAPS Crime Intelligence, filed an affidavit in her support. This revealed that the SAPS had been monitoring the

telephone conversations of Scorpions Head Leonard McCarthy. It is likely that it was Mdluli who later unlawfully provided Zuma's lawyers with copies of the 'spy tapes' these being recordings of some of McCarthy's telephone conversations. These proved useful to Zuma's lawyers in persuading Acting NDPP Mokotedi Mpshe to withdraw the corruption charges against Zuma in April 2009.

The power of spy masters is often related to what they know about the people that they work for. Whether this was part of Mdluli's hold on Zuma is unknown. It appears likely however that it was not that Zuma felt that he owed Mdluli a debt of gratitude in relation to the spy tapes, or that Zuma feared what Mdluli might do with information that he had about him. Instead, Mdluli's key role was likely to have involved using crime intelligence personnel and resources to assist Zuma in retaining control of the ANC and assisting Zuma in helping to neutralise threats to the impunity against prosecution that he and his allies appear to have enjoyed (Pauw, 2017, p. 234).

Notwithstanding his past as a policeman appointed in the apartheid era, given the facts available to us, it is reasonable to conclude that Richard Mdluli was seen by Zuma as a key ally and instrument. Zuma's career in the ANC in exile was largely in the intelligence sector. The fact that Zuma chose to rely on Mdluli may be seen to reflect Zuma's appreciation of the 'uses' of intelligence. This is consistent with Zuma's misuse of other intelligence agencies as documented by the high-level review panel on the State Security Agency (SSA) that was appointed by President Ramaphosa in June 2018 (The Presidency, 2018). The panel found that the SSA's Special Operations component had 'become a parallel intelligence structure serving a faction of the ruling party and, in particular, the personal political interests of the sitting President of the party and country' (High-Level Review Panel on the SSA, 2018, p. 66).

13.3.1 Neutralising the Hawks

At the time when Mdluli was appointed, Zuma's Minister of Police, Nathi Mthethwa, was also required to appoint the first head for the Hawks. Mthethwa had been instrumental in appointing Mdluli. But the Hawks appointment was a more high profile one. The creation of the Hawks had been shrouded in controversy and the launch of the unit in early July 2009 would involve a high level of media attention. Zuma and his allies had been instrumental in the demise of the Directorate for Special Operations (the Scorpions), the predecessors to the Hawks. One justification for disbanding the Scorpions was that they had allegedly been used to neutralise Zuma and other political opponents of former President Thabo Mbeki. For purposes of their own credibility, Zuma and Mthethwa therefore needed to appoint someone who might credibly be seen as independent. Zuma would have been likely to have preferred to appoint someone who would ensure that he, at the very least, was protected against

investigation. It may be that he believed that Anwa Dramat, who had also served time on Robben Island, would conform to this requirement.

More than two years later, on 23 October 2011 a front-page story appeared in the *Sunday Times* alleging that Dramat and Hawks Gauteng Head, Shadrack Sibiya, had been involved in the illegal renditions of six Zimbabweans who were handed over to the Zimbabwean police in November 2010. Allegedly two of the Zimbabweans were killed by members of the Zimbabwe police after they had been handed over (*Sunday Times* Investigation Staff, 2011). Six weeks later another set of allegations appeared. On 11 December 2011 a front-page story in the *Sunday Times* alleged that the Cato Manor Organised Crime Unit, a unit of the Hawks in KwaZulu-Natal, had been linked to the extra-judicial execution of numerous crime suspects. A key aspect of the allegations was that Johan Booysen, the Head of the Hawks in KwaZulu-Natal, was complicit in these activities.[4]

Both of these stories emanated, at least in part, from information that was 'leaked' to the *Sunday Times* from within the SAPS. There is good evidence that the renditions 'leak' against Dramat and Sibiya emanated from SAPS crime intelligence (Sole, 2015). One contention is that the motivation behind the initial leak in October 2011 was the fact that Sibiya, with the support of Dramat, were investigating the murder allegations against Richard Mdluli (Thamm, 2018). There is also evidence that Mdluli worked with Berning Ntlemeza in trying to ensure that Dramat was removed from office so that Ntlemeza could replace Dramat (Bateman, 2016; Evans, 2016; Thamm, 2017). It may be that the attempt to incriminate Dramat was initiated by Mdluli and Ntlemeza or that it was initiated at the behest of the Executive. Based on his experience of being investigated by the Scorpions, Zuma is likely to have been concerned about the type of threat that the Hawks might pose to him, particularly if they operated independently. Once Dramat started showing such signs, this would have motivated Zuma and his second Minister of Police (in May 2014 Zuma replaced Nathi Mthethwa with Nathi Nhleko) to take action against him.

Dramat would only face disciplinary action in late 2014, and Sibiya in January 2015, three years after the allegations against them first appeared. Dramat has stated that Nhleko suspended him in late 2014 after Dramat called for action on certain case dockets 'involving very influential persons' (Sole, Brümmer & Evans, 2015). After Dramat's suspension, Ntlemeza was appointed as Head of the Hawks, initially in an

4 The article was removed from the *Sunday Times* and an apology to Booysen was published by the editor of the *Sunday Times* (Siqoko, 2018) though the *Sunday Times* editor from the time when the original article was published has defended its publication (*News24,* 2018a). An image of the article is available (*Sunday Times,* 2018) and the text of the article is also available (Hofstatter, wa Afrika & Rose, 2011).

acting capacity in late December 2014 (Lindeque, 2014; Evans, 2016). In September 2015, he became the permanent head of the Hawks. As with Mdluli's appointment, the process was irregular (Thamm, 2016; Mashego, 2017c). And as with Mdluli, Ntlemeza's appointment appears overtly to have been intended to ensure that Zuma, and those associated with state capture, were shielded from justice. One feature of Ntlemeza's term of office was numerous questionable senior promotions and appointments resulting in the overall weakening of the Hawks capacity to investigate corruption.

In contrast to Dramat and Sibiya, the publication of the allegations against Booysen and the Cato Manor unit led to action far more quickly. Prosecutions were instituted against them, and Booysen and the Cato Manor unit members were suspended from the SAPS, within six to nine months of the publication of the *Sunday Times* story. It is alleged that the allegations in the *Sunday Times* emanated from information provided by crime intelligence, though the *Sunday Times* has also disputed these allegations (Pitchford, 2016, pp. 101-103). Whichever account is true, it is apparent that the Hawks investigators who were appointed to investigate the Cato Manor allegations after they had been published, had links to Richard Mdluli (Pitchford, 2016, p. 106).

There may have been some substance to the allegations against the members of the Cato Manor unit, but it is doubtful whether the pattern of questionable killings linked to the Cato Manor unit was the real reason why the matter was treated as an investigative and prosecutorial priority. Instead, it appears that the motivation was to provide a pretext for taking action against Booysen in order to neutralise certain corruption investigations of which he was in charge. These included an investigation against an associate of Zuma's family, Thoshan Panday, in a case that also implicated the KwaZulu-Natal SAPS Provincial Commissioner (Underhill, 2015; Wicks, 2015).

13.3.2 Securing Control of the ANC

Given that Crime Intelligence works under a veil of secrecy, the manner in which Crime Intelligence worked to favour the Zuma faction in the ANC may never be fully known. However, this may have included surveillance of ANC members enabling Zuma to obtain advance warning of disloyalty and gather information on rivals (amaBhungane, 2012; *Eyewitness News*, 2012; Sole & Evans, 2012; SCA, 2014a; Pauw, 2017). It is also alleged that Crime Intelligence members linked to Mdluli played a major role in trying to ensure that the outcome of ANC elective conferences was favourable to Zuma and his allies both in 2012 at Mangaung (Pauw, 2017, pp. 306-307) and again five years later (though unsuccessfully) in the build-up to the December 2017 Nasrec conference in Johannesburg (Mashego, 2017b, 2017a; Pauw, 2017). Although Mdluli was on suspension at the time of these conferences, it is understood that he retained considerable authority in SAPS crime intelligence (Pauw, 2017, pp. 306-307).

13.4 ENSURING INFLUENCE OVER THE NPA

In addition to being able to exert influence over the Hawks, Zuma exerted his influence over the highest level of the NPA, apparently to ensure that he and his allies were not prosecuted. Considerations about the credibility of appointees were completely disregarded when Zuma appointed a new NDPP, Menzi Simelane, on 25 November 2009. A few days before this, former NDPP Vusi Pikoli had agreed to withdraw legal action contesting his removal from office and reached a financial settlement with government (*SA News*, 2009). Simelane had been appointed as Director General (DG) of the Department of Justice in June 2005, five months after Pikoli had been appointed as NDPP (SCA, 2011, para. 15). At the time when he was appointed as DG, Simelane was 38 years old and had practised as an advocate for only two years (SCA, 2011, para. 8). He was appointed as a Deputy NDPP by Zuma six weeks before he was appointed as NDPP.

In 2007, conflict had arisen between Mbeki and his Minister of Justice Bridget Mabandla and Pikoli over Pikoli's intentions to have Jackie Selebi arrested on the basis of corruption charges. Mbeki suspended Pikoli and appointed an official inquiry, headed by Frene Ginwala, into Pikoli's fitness for office. Ginwala's November 2008 report made some critical comments about Pikoli but confirmed that he was 'fit and proper' to serve as NDPP and recommended his reinstatement (SCA, 2011, para. 22). Notwithstanding the report, Kgalema Motlanthe, who replaced Mbeki as President in September 2008, decided to remove Pikoli from office.

The great irony of Zuma's appointment of Simelane in Pikoli's place in November 2009, was that the Ginwala Inquiry report was far more critical of Simelane than it had been of Pikoli. As DG of the Department of Justice, Simelane played a major role in drafting government's submissions to the inquiry (SCA, 2011, para. 18). The report stated that Simelane's "conduct left much to be desired" that his "testimony was contradictory and without basis in fact or in law" and that several of the allegations that were levelled against Pikoli in the submissions that Simelane had prepared were "baseless" (SCA, 2011, para. 23). It was widely believed that, due to the possibility of prosecution that he faced, "Zuma could simply not risk having an independently-minded NDPP" (Democratic Alliance, 2009) and that this is why Simelane was selected for appointment as NDPP.

Within a month of his appointment as NDPP, the DA would bring a court action for Zuma's appointment of Simelane to be declared constitutionally invalid. Two years later, in December 2011, the Supreme Court of Appeal (SCA) confirmed that Simelane's appointment was irrational and therefore invalid. Zuma was then obliged to place Simelane on special leave pending consideration of the SCA's finding by the

Constitutional Court. In December 2010, probably anticipating Simelane's departure, Zuma made another significant move, appointing Nomgcobo Jiba as a Deputy NDPP. This was somewhat unusual as it involved promoting her by two levels, bypassing the Director level. When she was promoted, she was already indebted to Zuma. Three months earlier, in September 2010, Zuma expunged the criminal record of her husband Booker Nhantsi for stealing R193 000 worth of trust funds from a client while practising as an attorney. Available information indicates that what may have recommended Jiba to Zuma was that she already had an association with Mdluli. Both were linked with efforts to neutralise the Scorpions' investigation against Jackie Selebi (*Mail & Guardian*, 2009; *City Press*, 2011b).

Jiba's appointment as acting NDPP meant that, in the space of little more than a year, she had been promoted by three levels. Her tenure as acting NDPP would last a full 21 months. It was only in the face of litigation compelling him to make a permanent appointment that Zuma replaced her with Advocate Mxolisi Nxasana at the end of August 2013 (*Mail & Guardian*, 2009). During her tenure as acting NDPP, Jiba was accused of having not only favoured Zuma directly (SCA, 2012), but also protecting Mdluli from criminal prosecution (SCA, 2014a, para. 27), and of authorising poorly motivated charges against Booysen (High Court of South Africa: Kwazulu-Natal, 2014). Jiba has remained adamant that she did nothing wrong, but nothing done by her during her term of office and subsequent tenure in the NDPP ever threatened the Zuma impunity agenda (Chauke, 2019). It has been alleged that, even after she was no longer acting NDPP, she remained Zuma's most favoured and trusted NPA official (Zondo Commission, 2019a). During her time of influence, the NPA's general approach appears to have been to avoid prosecuting any significant corruption cases linked to Zuma, his family and their associates.

13.5 CRIMINAL JUSTICE LEADERSHIP INSTABILITY DURING ZUMA'S TERM AS PRESIDENT

During the remainder of his term of office, Zuma and his associates appear to have faced difficulty with finding leaders for criminal justice agencies who both seemed credible and would cooperate in ensuring his impunity. The appointment of those apparently most likely to fulfil his agenda proved indefensible in the courts in various instances. On the other hand, a number of those appointed appear to have resisted pressure to compromise themselves in order to serve his interests. Zuma and his collaborators ultimately had to rely on bullying tactics and the offer of financial settlements to remove Dramat and Mxolisi Nxasana from office. Attempts to remove Robert McBride as Head of IPID, apparently after he refused to cooperate in implicating Dramat and Sibiya in the illegal renditions case, were defeated in the courts.

In other cases, Zuma's predilection for appointing senior criminal justice officials who lacked meaningful experience, proved to be a liability for other reasons. The killing of 34 men by police at the Lonmin Marikana mine on the afternoon of 16 August 2012 can be seen as partly a result of Zuma's decision to appoint Riah Phiyega, who had no policing background, as SAPS National Commissioner. There are also questions about whether Phiyega also facilitated Zuma's impunity agenda. After being appointed in June 2012, Phiyega was suspended in October 2015 to face a board of inquiry on the basis of the recommendations of the Marikana Commission of Inquiry (eNCA, 2015b). Richard Mdluli's suspension overlaps with the 40-month period during which Riah Phiyega was SAPS National Commissioner. Despite a court order that disciplinary action be taken against Mdluli, Phiyega failed to act, thereby enabling Mdluli to remain on suspension with his full pay and benefits intact (eNCA, 2015a; Mahlangu, 2018).

For various reasons, Zuma's impunity agenda therefore resulted in considerable instability in the leadership of criminal justice agencies. One prominent feature of the eight years and eight months in which Zuma served as President was the suspension or removal of senior criminal justice officials prior to the completion of their full terms of office. As reflected in Table 13.1 below, at least nine senior criminal justice officials appointed or promoted during Zuma's term of office served periods of suspension or special leave while eight were removed from office.

The instability had multiple causes. These included action by the Executive intended to advance impunity, including taking disciplinary action against officials following 'leaks'. Another cause of instability was the disposition of the Executive to appoint individuals who were unsuitable for office or to use irregular appointment processes. Both Simelane and Ntlemeza were removed from office as a result of litigation contesting their appointment. The removal of NDPP Shaun Abrahams (appointed June 2015) in August 2018 also originated in litigation. In this case the court found that the removal of his predecessor, Mxolisi Nxasana, was an abuse of Presidential power. As a result, Abraham's appointment was also invalid (Constitutional Court of South Africa, 2018).

One by-product of this instability and manipulation was wasteful expenditure of various kinds including poorly motivated state expenditure on litigation, the salaries of those serving periods of suspension, and the liberal use of resources for the purpose of securing the removal from office of officials – including Pikoli, Dramat and Nxasana – through financial settlements. The scale of the leadership instability is not fully reflected in the above table. During the period of Mdluli's suspension, SAPS Crime Intelligence went through a series of acting Heads. Likewise, during

Table 13.1 Key criminal justice agencies leaders who were suspended or removed from office prematurely during Zuma Presidency

Name	Position	Duration of suspension or special leave	Removed from office prior to completing term	Reasons for suspension and/or removal	Month removed or end term of office
Menzi Simelane	NDPP	Nine months	Yes.	Found to have been appointed irregularly after litigation.	December 2011
Anwa Dramat	Head of the Hawks	Re-instated temporarily after less than one month.	Yes. Accepted financial settlement and resigned.	Alleged involvement in illegal renditions.	April 2015
Mxolisi Nxasana	NDPP	Not suspended prior to removal.	Yes. Accepted financial settlement and resigned.	Unclear.	May 2015
Shadrack Sibiya	Head of the Hawks, Gauteng	6 weeks	Dismissed following SAPS disciplinary process (Evans, 2015).	Alleged involvement in illegal renditions.	September 2015
Berning Ntlemeza	Head of the Hawks	Five months	Yes.	Appointment set aside by court after litigation.	June 2017
Riah Phiyega	SAPS National Commissioner	20 months (October 2015 to completion of term in June 2017).	No. Her appeal against the findings against her was still in process when she reached the end of her five-year term.	Suspended and faced board of inquiry in respect of her allegedly dishonest testimony to the Marikana Commission.	June 2017 (suspended for final 20 months of term)
Richard Mdluli	Head of SAPS Crime intelligence division	Six and a half years	No. Accepted early retirement in January 2018.	Various alleged crimes including murder and corruption.	January 2018
Sean Abrahams	NDPP	Not suspended prior to removal.	Yes.	Court finding that his predecessor, Nxasana, had been removed irregularly rendering his appointment invalid.	August 2018
Robert McBride	Executive Director, IPID	March 2015 to September 2016	No. Completed single term as IPID ED.	Alleged that he interfered with the illegal renditions investigation.	February 2019
Nomgcobo Jiba	Deputy Director of Public Prosecutions (acting NDPP for 21 months)	Over 30 months (placed on special leave in September 2016, suspended September 2018, dismissed from office April 2019). Jiba also spent close to two years on suspension from December 2007 onwards.	Yes.	Removed from office after inquiry finding against her.	April 2019
Lawrence Mrwebi	Special Director of Public Prosecutions	30 months (as for Jiba)		Removed from office after inquiry finding against him.	April 2019

Phiyega's suspension, Khomotso Phahlane, who took over from her as acting National Commissioner, was also suspended on full pay on the basis of corruption allegations against him, and was replaced by another acting National Commissioner who served for five months until Zuma appointed a new SAPS National Commissioner during the last months of his Presidency in November 2017 (Gous, 2017; *Mail & Guardian*, 2017).

13.6 NEUTRALISATION OF OPPONENTS IN POLITICAL OFFICE AND THE ADMINISTRATION

The extent of the Zuma Executive's manipulation of criminal justice system can also be seen in steps that were taken to neutralise opponents in political office and the public service. These resemble the 'leak' targeted at both Dramat and Sibiya and the steps taken against Booysen. As indicated, there are allegations and evidence that SAPS Crime Intelligence, under Mdluli's influence, played a critical role in both of these cases. As discussed in another chapter, the 'leaks' strategy was also used against senior officials at SARS, as well as Pravin Gordhan, a Cabinet member who served inter alia as Minister of Finance but was seen as an obstacle to aspects of the state capture project. In respect of the SARS leaks, however, it appears that the State Security Agency (SSA), rather than crime intelligence, was the primary role player.

Whilst disregarding serious corruption cases, the Hawks and NPA appeared to prioritise cases in which Gordhan might be implicated, even if the evidence was insubstantial. In October 2016, Gordhan, as well as Ivan Pillay and Oupa Magashula, were summonsed to appear in court on charges of fraud related to allegedly irregularities in the rehiring of Pillay after his retirement. On the day before their scheduled court appearance the charges were withdrawn (*News24*, 2016; PMG, 2016; Tandwa, 2016; Van Wyk, 2016). Earlier in 2016, while Gordhan was preparing to deliver his budget speech, the Hawks submitted a set of poorly considered questions on the alleged SARS 'rogue unit' to him in what was understood to be a form of harassment and intimidation (Munusamy, 2016; Du Toit, 2018; Hunter, 2018).

In March 2016, at the same time that the Hawks were pursuing Gordhan in relation to the 'rogue unit', the NPA announced that Robert McBride and two others from IPID were to be charged with fraud and defeating the ends of justice relating to the IPID reports exonerating Dramat and Sibiya on the illegal rendition allegations. In November 2016 the NPA announced that it would be withdrawing the charges (Raborife, 2016). Another government official who was targeted was Glynnis Breytenbach, a senior NPA prosecutor. Breytenbach was one of those who objected to the withdrawal of the corruption charges against Mdluli.

TIPPING THE SCALES OF CRIMINAL



FIGURE 13.1 Timeline of State Capture of Criminal Justice

JUSTICE IN FAVOUR OF CORRUPTION

ONLY 16 OF THE 86 PRIORITISED CORRUPT CASES IDENTIFIED WERE ENROLLED OVER 2 DECADES

Booysen charged with alleged racketeering & other crimes relating to the now disbanded Cato Manor serious & violent crime unit 'death squad' - racketeering charges signed off by Jiba.

Facing possible litigation, Zuma is compelled to replace Jiba with Adv. Mxolisi Nxasana at the end of Aug 2013 - Jiba goes back to Deputy NDPP.

Zuma's second term & notably Nathi Mthethwa is replaced with Nkosinathi Nhleko as Minister of Police.

Nxasana accuses Jiba of being obstructive when asked to hand over major case files which included cases against Mdluli; the so-called "Amigos" case against prominent KZN politicians; the Cato Manor 'death squad' & the spy tapes case used to withdraw corruption charges against Zuma.

Zuma meets with Nxasana & threatens him with inquiries into his fitness to hold office. Nxasana later sends a letter to Zuma recommending Jiba & Mrwebi's suspension.

Dramat suspended for Zimbabwean rendition saga. Berning Ntlemeza irregularly appointed acting Head of the Hawks - made permanent in Sept 2015.

Head of the Gauteng Hawks, Shadrack Sibiya suspended by Nhleko.

Zuma announces an inquiry into Nxasana's fitness to hold office.

Head of IPID, McBride unlawfully suspended by Nhleko for exonerating Sibiya & Dramat.

Dramat offered R3m severance payment, plus R60k pm until he turns 60, for his resignation.

Nxasana signs settlement agreement with president - agrees to resign as NDPP for a R17m golden handshake. He is irregularly replaced by Shaun Abrahams.

Booysen irregularly suspended once again by Ntlemeza on same resurrected Cato Manor charges. He takes legal action & his suspension is set aside 4 months later.

Abrahams declines to prosecute Jiba & withdraws charges of perjury & fraud.

Phiyega suspended, facing a board of inquiry on the basis of the recommendations of the Marikana Commission of Inquiry. Khomotso Phahlane enters as acting national commissioner.

Hawks give Gordhan a set of poorly considered questions on the alleged SARS 'Rogue Unit' just before (4 days) his budget speech. On the same day NPA prosecute former Hawks Head Dramat, Major-General Shadrack Sibiya & Capt. Lesley Maluleke on Zimbabwean rendition saga. Later McBride & 2 others from IPID charged with fraud & defeating the ends of justice based on their exoneration of charges against Dramat & Sibiya.

High Court sets aside Mpshe's 2009 decision to withdraw Zuma's corruption charges.

ConCourt rules that Police Minister's decision to suspend McBride invalid & unconstitutional. He returns to work in Oct & by Nov NPA withdraws charges.

Jiba struck off the roll of advocates by the North Gauteng High Court.

Mdluli & a co-accused appear in court again on various charges including intimidation, kidnapping, & assault with intent to do grievous bodily harm.

Pravin Gordhan, Ivan Pillay & Oupa Magashula summonsed to appear in court over fraud charges related to alleged irregularities in rehiring Pillay after his retirement.

Under public scrutiny NPA withdraws charges against Gordhan, Pillay & Magashula as well as charges against McBride & co.

Fikile Mbalula replaces Nhleko as Minister of National Police.

Ntlemeza told to vacate office immediately after losing bid to remain Hawks boss.

Phahlane suspended on full pay based on corruption allegations by IPID. He is replaced by Khehla Sitole as National Police Commissioner.

Supreme Court of Appeals denies Zuma's appeal against Arms Deal charges being reinstated.

High Court in Pretoria sets aside Abrahams' decision to withdraw charges against Jiba. This effectively meant the NPA was obliged to reinstate them.

Mdluli agrees to take early retirement after being suspended with full pay & benefits for 6 & a half years without any disciplinary action being taken against him regarding his suspension.

Zuma forced to resign & Ramaphosa takes over as President.

NPA reinstates corruption charges against Zuma.

ConCourt finds removal of Abrahams' predecessor, Nxasana was an abuse of presidential power. Resulting Abraham's appointment invalid & that Nxasana must repay the R17m golden handshake.

Ramaphosa appoints Shamila Batohi to NDPP.

Deputy NDPP Jiba & Mrwebi fired by President Ramaphosa.

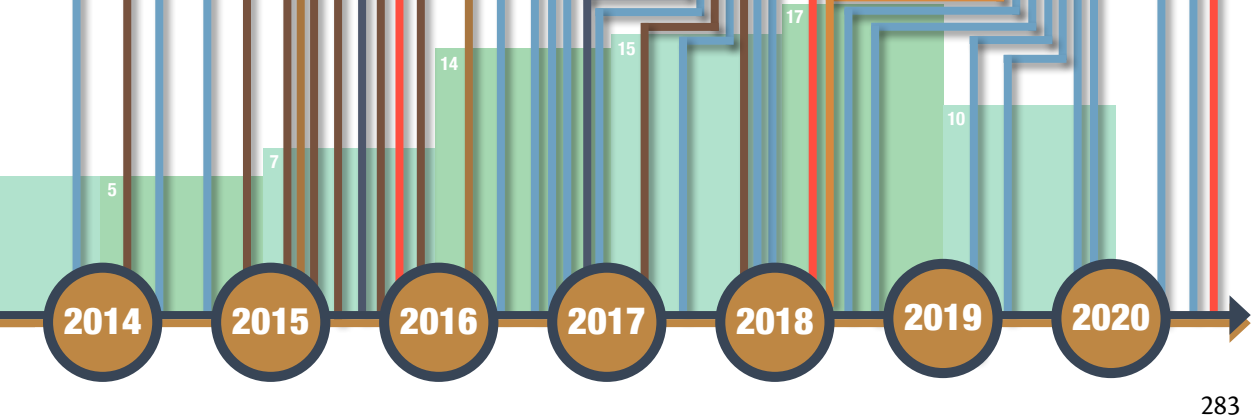
Mdluli & a co-accused convicted on kidnapping & assault charges.

NPA boss drops racketeering charges against Johan Booysen & co.

Zuma's legal team abandons intended appeal to ConCourt for a permanent stay of prosecution.

Mdluli sentenced to 5 years imprisonment on assault & kidnapping charges.

Almost 2 decades later Zuma is yet to stand trial re: the Arms Deal.



13.7 CONCLUSION

The Zuma Presidency was therefore associated with a hollowing out of key criminal justice agencies and weakening of their efficacy. Along with unstable and poor-quality senior leadership, the intensification of internal corruption and abuse of resources and numerous irregular promotions the period also saw the loss of competent staff demoralised as a result of the compromising of the institutions for which they worked. The result of this was not only a proliferation of corruption but the overall weakening of the ability of these agencies to tackle crime.

Despite Zuma's claims that government would prioritise the combating of violent crime during his Presidency (ANC, 2009), violent crime worsened during his term of office. After declining during the first three years of his Presidency, the last six years of Zuma's term of office resulted in substantial increases in both murder and armed robbery. During his final year of office, the number of murders (20 336) was 31% greater than during 2011-12 (15 554) and overall aggravated robbery had increased by 37%. Most forms of armed robbery increased by larger amounts including car hijacking by 73%, residential robbery by 33% and non-residential (business) robbery by 38% (Corruption Watch and Institute for Security Studies, 2019).

Zuma and his Executives meddling with criminal justice agencies had broadly debilitating consequences for South Africa's criminal justice agencies. The collateral damage of Zuma's criminal justice agenda and of state capture was therefore not only an enormous worsening of corruption, but a serious deterioration in the safety of the people of South Africa.

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14 A CAPTURED SECURITY CLUSTER

Marianne Thamm

14.1 STATE SECURITY ASSAULT

If the intelligence and security services of a country mirror its government, then the South African government between 2009 and 2018 – the nine years Jacob Gedleyihlekisa Zuma served as president – resembles a mafia, accountable to no one but the President himself.

This is the essence of the damning findings of a 141-page High-Level Panel Review into the State Security Agency (SSA) commissioned by President Cyril Ramaphosa in June 2018 (High-Level Review Panel on the SSA, 2018). Ramaphosa requested the review four months after Zuma had been forced to resign as President of the country on Valentine's Day amid mounting piles of evidence of industrial-scale fraud, corruption and the capture of the state on his watch. The redacted findings of the High-Level panel were publicly released in March 2019, putting an end to over a decade of official secrecy, the mothballing of earlier investigations into malfeasance in the security cluster and cover-ups by Zuma loyalists of the widespread criminalisation and politicisation of the security cluster.

An investigation into the SSA, ordered in 2009 by then Minister of State Security, Siyabonga Cwele, as well a 2013/14 investigation into the National Intelligence Agency (before it morphed into the SSA) Principle Agent Network (PAN) by Inspector-General of Intelligence (IGI), Faith Radebe, had both unearthed proof of fraud, corruption and the abuse of state resources (Merten, 2017; Maughan, 2018). From 2009 onwards, two Ministers of State Security, Siyabonga Cwele, and his successor, David Mahlobo, would have been aware of the clear and present danger illegal SSA operations presented to South Africa's democratic state.

But perhaps it was not the state that they were concerned with protecting.

The 2009 internal investigation into the SSA found that Arthur Fraser, then Deputy Director General of the National Intelligence Agency (NIA) who also headed PAN, was one of 15 people against whom there was "sufficient proof to institute criminal

investigations" (Merten, 2017; Maughan, 2018). "It appeared to the panel that there had been instances of serious criminal behaviour, which had taken place under the guise of conducting covert work and that this behaviour may have involved theft, forgery and uttering, fraud, corruption and even bordered on transgressions of the Prevention of Organised Crime Act", the SSA investigation found (Etheridge, 2019). Fraser left the SSA in January 2010 and the IGI and SSA reports were left to gather dust.

PAN was disbanded in 2011 having blown an unaccounted for budget of around R1bn in three years according to investigative journalist Jacques Pauw's *The President's Keepers* (Pauw, 2017).This claim by Pauw was later verified in a 2014 Report by the Office of the Inspector General of Intelligence (OIGI), Faith Radebe, to the Minister of State Security, Siyabonga Cwele and titled *OIGI investigation into The Principal Agent Network (PAN) Programme of the NIA*.[1] Cwele had instructed Radebe on 20 June 2013 to conduct the investigation into the PAN Programme of the NIA.

Fraser, a seasoned intelligence operative, has been named as the spy who leaked illegal NIA phone taps of the then Directorate of Special Operations – the Scorpions – who had investigated high-profile ANC officials, including Zuma and his financial adviser Shabir Shaik, between 2001 and 2009 before it was defanged (*Mail & Guardian*, 2009). The "spy tapes" were later leveraged by the NPA to drop the corruption prosecution of Zuma on the eve of the 2009 elections. At its 52nd Elective Conference in Polokwane in 2007, the ANC resolved to disband the Directorate of Special Operations, also known as the Scorpions. The independent, multi-disciplinary agency was replaced with the Directorate for Priority Crime Investigation (DPCI), also known as the Hawks. This agency falls under SAPS, diluting its independence considerably.

It was at the same Polokwane conference that Jacob Zuma trounced then State and Party President, Thabo Mbeki who was running for a third term. Zuma's path to power and dominance in the party had been prepared and swept clean.

Having left the SSA in 2010, Arthur Fraser was back in the official loop in 2016, having been appointed by Mahlobo as the Director General (DG) of the SSA. The appointment came despite accusations of impropriety in the OIGI investigations and a trail of dodgy deals, as uncovered following an investigation by former Public Protector, Thuli Madonsela, detailed in her 2015 report *Derailed* (Public Protector, 2015). Fraser's time away from government employment had proved highly lucrative. In the gap between running PAN and his reappointment as DG of the SSA, Fraser had co-founded a security company, Resurgent Risk Managers, with former NIA head, Manala Manzini. In 2014, the South African Social Security Agency (SASSA) forked

1 Some documents are not in the public domain, however, they have been viewed and verified by the author.

out R14.3m to Resurgent for "consultancy services". A year later, the Passenger Rail Agency (Prasa), with Lucky Montana as CEO, awarded a R90m security contract to Resurgent. A 2017 Treasury probe into the Prasa Resurgent tender found that Fraser's company had submitted a fake tax certificate in the bid (#UniteBehind, 2017; Van Wyk, 2017). Nothing has come of it.

Back in 2010, after the internal SSA investigation, Cwele at first appeared to have had an appetite to hold those implicated, including Fraser, to account. His intentions to refer the matter to the NPA as well as request assistance from the DPCI and the SIU also came to nought.

14.2 RED FLAGS AND SMOKE SCREENS

Two years into Zuma's term of office, in 2011, a potential "national security threat" – the relationship between the Gupta family, the President, members of the Zuma family as well as other high-profile governing-party politicians – was red-flagged by Zuma's three newly-appointed intelligence bosses. Moe Shaik, Zuma's Foreign Intelligence Head, Jeff Maqetuka, DG of State Security and Gibson Njenje, Head of the SSA's domestic branch, had investigated the Gupta family's apparent growing influence and had been concerned at "how they conducted themselves" (Letsoala & Molele, 2013). It subsequently emerged that the intelligence heads had been aware of the Gupta family's influence in Zuma's first cabinet reshuffle in October 2010. By then Zuma was regularly visiting the Gupta "compound" in Saxonwold, according to Njenje (Njenje, 2018; Zondo Commission, 2019).

All three former heads of SSA have testified at the Zondo Commission of Inquiry into State Capture, setting out how they had investigated the Gupta family and their influence, and the resistance they faced in this undertaking. The Commission is ongoing, and their evidence has yet to be tested.

In 2011, Cwele dismissed the investigation by the intelligence heads as "improper" before shutting it down, leading to the swift exit of Shaik, Maqetuka and Njenje who all resigned a short while later. Tensions between the Minister and the trio had already been simmering due to Cwele's "unauthorised" surveillance of Cabinet Ministers (*News24*, 2011; SAPA, 2011).

In 2014, Cwele was shuffled out of cabinet and replaced with the then little-known Mpumalanga biochemist David Mahlobo. Cwele's wife, Sheryl, had been convicted in 2011 of drug trafficking and had been sentenced to a 12-year jail term. The Minister had claimed that he had been unaware of his wife's criminal sideline. Maqetuka has testified to the discomfort he had with SSA personnel being assigned to accompanying

Cwele's wife during her trial – an abuse of power that added to tensions between the DG and the Minister (Zondo Commission, 2020c).

Cwele's canning of the investigation into the Gupta family's proximity to the President and Fraser's seeming impunity in the face of serious allegations, are examples of what the High-Level panel described as a "serious politicisation and factionalisation" of the intelligence services which had been perverted "into a private resource to serve the political and personal interests of particular individuals" (High-Level Review Panel on the SSA, 2018, p. ii).

It is likely that Zuma's own role in the ANC's intelligence structures in exile shaped and solidified his notion of power, control, paranoia and influence. It is, however, clear he deployed these skills long before being elected president of the ANC and the country. Zuma's grip on the intelligence services was consolidated almost immediately in 2009 when his incoming administration undertook to reverse the vision and values of the 1994 White Paper on Intelligence (adopted by parliament in 2005). By amalgamating (through a proclamation and not a parliamentary process), the country's intelligence services – the NIA, the South African Secret Service and the South African National Academy and National Communications Centre – Zuma centralised operations into the State Security Agency replicating apartheid era structures (High-Level Review Panel on the SSA, 2018; Shaik, 2019). Zuma, as the president, thus consolidated his control over the intelligence services.

With a history of apartheid, government abuse of the intelligence services against the country's citizens and in service to an undemocratic state, the authors of the White Paper sought to provide a policy framework for the "principles and functioning of the intelligence services in a democratic South Africa" (High-Level Review Panel on the SSA, 2018, p. 18). The White Paper set out the establishment of two separate civilian intelligence services – domestic (the South African Secret Services – SASS) and external (National Intelligence Agency – NIA) (Republic of South Africa, 1995). However, a Presidential Proclamation on 11 September 2009 collapsed the SASS and NIA into the State Security Agency (SSA). This was followed by the centralisation of command and control of civilian intelligence (High-Level Review Panel on the SSA, 2018).

With an absence of a clear legislative framework to guide this integration process, the scene was set for a reorientation of the intelligence services from "human security" to a narrow "state security orientation", the panel found. The panel noted that from 2009, there had been a "marked doctrinal shift" in the intelligence services away from the prescripts of the Constitution. It also noted that the amalgamation of NIA and the SASS into the SSA "did not achieve its purported objectives and was

contrary to existing policy". The SSA's unaccountable access to cash as well as the "disproportionate application of secrecy in the SSA" (High-Level Review Panel on the SSA, 2018, p. 2) created the perfect environment for Jacob Zuma's stealthy and steady grip on the levers of state power.

14.3 BY HOOK OR BY CROOK: REMOVING OBSTRUCTIONISTS

Zuma ascended the Office of the Presidency a marked man with the Arms Deal charges dangling like a sword of Damocles over his entire term of office. The profligate President's chaotic tax matters, too, snagged the attention of SARS, which had tried discreetly for several years, albeit unsuccessfully, to assist the President to "get his house in order" (see Chapter 15). Zuma's "Stalingrad strategy" aimed at keeping him out of court and enabling his encroachment on the independence of the state, began to play out in full public and parliamentary view. Most importantly Zuma needed to shift loyalists, whether qualified or not, into key positions where they could watch his back (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017). This included the powerful Office of the Inspector-General of Intelligence, the SSA, SAPS Crime Intelligence, the NPA and the Public Protector.

As the reality of the impending disaster of the Zuma administration began to dawn on ethical officials across government departments and they began to push-back, those beholden to the President deployed any means necessary to neutralise threats. Corruption-busting officials across ministries, law enforcement services, government departments and Chapter 9 institutions who were singled out as obstacles, were systematically targeted and hounded out of office.

Orchestrating these attacks, covert SSA agents embarked on "black ops" campaigns, including but not confined to planting stories in the mainstream media to discredit individuals. The *Sunday Times* "rogue unit" narrative which unfolded in 2014 is a case in point (Siqoko, 2018). The newspaper, after being taken to the ombudsman, offered an apology and later withdrew all articles which had sensationally claimed that the perfectly legal SARS High Risk Investigative Unit had been illegally established, had run a brothel and had spied on Jacob Zuma, high profile political figures, including opposition parties, members of the tobacco industry, as well as other politically connected business persons and tax evaders (see Chapter 11).

As the country headed for peak state capture around 2014, a network of deep state SSA agents was deployed to key departments, including SARS, the Passenger Rail Agency of South Africa (PRASA), electricity supplier Eskom, Transnet, South African Airways (SAA) and other government departments to act as Zuma's eyes and ears. In a conversation with Public Protector Busisiswe Mkhwebane in January 2019, current

Inspector-General for Intelligence, Setlhomamaru Dintwe, and his legal adviser, Advocate Jay Govender, admitted as much, adding that at least 186 of these SSA "sleeper" agents who were being paid "off the books" were still active (Thamm, 2019a).

The IGI has since resolved to reinvestigate around 60 complaints relating to covert and illegal SSA activities during the Zuma presidency, including that one agent placed at SARS had run a network of 21 agents in the tax agency. Her deep undercover work coincided with the attack on SARS, the construction of the "rogue unit" narrative and the ultimate purging and hounding by the DPCI of former SARS Commissioner, Pravin Gordhan, as well as the entire SARS executive after Zuma's appointment of Tom Moyane as SARS commissioner in 2014 (see Chapters 11 and 15).

Media reports that SSA agents were attacking SARS in order to hobble investigations prompted Mahlobo in 2014 to task then Inspector-General (IG), Faith Radebe, with an investigation into the SSA (OIGI, 2014). The result was a Report by Radebe which has since been declared by the North Gauteng High Court to be invalid and set aside. The ruling was made by Judge Sulet Potterill in June 2020 (Cowan, 2020a).

Radebe, while she had no mandate over SARS, found that an illegal investigative unit had been established in SARS and that commissioner at the time, Pravin Gordhan, should be charged (OIGI, 2014). Radebe based her findings on testimony given by SSA agents, including one of the most notorious, Thulani "Silence" Dlomo, known as "Zuma's spy" and head of the rogue SSA Special Operations Unit (Hunter, 2019). Dlomo was significantly implicated in the High Level Panel Review report (2018).

While Radebe's report remained classified, there were ongoing attempts by the Public Protector, Busisiwe Mkhwebane, herself a former SSA employee, to access these findings against Gordhan (Pheto, 2020; Thamm, 2020).

A pattern soon emerged in the onslaught against officials viewed as an obstruction to Zuma and his loyalists. This included the weaponisation of disciplinary proceedings coupled with reports commissioned from private legal and accounting firms (paid for by tax money) to arrive at tailor-made findings. These would then be used to formulate and justify trumped-up charges by the DPCI, SAPS and the NPA, all combined to exact maximum damage on state institutions and individuals seeking to protect these from predatory insider attacks (see Chapters 11, 13 and 15).

Those hand-picked to head the DPCI, the SAPS (as well as Crime Intelligence) and the NPA during this period were all Zuma loyalists. They include Hawks head Berning Ntlemeza, Crime Intelligence head Richard Mdluli, as well as NPA Heads at various times, Nomcgobo Jiba and Shaun Abrahams.

The targeted officials include former Ministers of Finance, Pravin Gordhan and Nhlanhla Nene, as well as Deputy Minister of Finance, Mcebisi Jonas. The body count also includes former SARS Deputy Commissioner, Ivan Pillay; the SARS Executive which reported to him; NPA Head, Mxolisi Nxasana; DPCI Head, Anwar Dramat; Gauteng DPCI Head, Shadrack Sibiya; KZN DPCI Head, Johan Booysen; Independent Police Investigative Directorate Executive Director, Robert McBride and NPA prosecutor, Glynnis Breytenbach.

In the costly long run, all of those officials targeted for their anti-corruption work, supported by civil society organisations such as the Helen Suzman Foundation (HSF) and Freedom Under Law (FUL), were vindicated by the country's courts, the one cog in the security cluster that remained relatively uncaptured during the Zuma years. Zuma's attack and attempt to capture the democratic state could not have succeeded without this direct and indirect control and command of key institutions, particularly in the security cluster.

14.4 A WEB OF ROGUE SPIES

South Africa's security cluster is a sprawling catchment, drawing 11 ministries and departments into its orbit. Its stated aim, at least according to government itself, is to foster an "integrated approach to governance which is aimed at improving planning, decision-making and service delivery" (South African Government, 2019). The cluster includes the Ministries of Justice and Correctional Services; Defence and Military Veterans; Finance; Home Affairs; Police and State Security. In the over decade-long erosion of accountability and transparency, four institutions – the SSA which falls under the Ministry of State Security, the NPA which falls under the Ministry of Justice and Correctional Services, and the DPCI and SAPS (Crime Intelligence) under the Ministry of Police – were to prove the most effective in dealing with threats to Zuma and his political faction.

Key to Zuma's ability to have eyes and ears everywhere was the SSA's Special Operations Unit (SOU), a parallel intelligence structure headed by Dlomo. The panel found that the SOU, under Dlomo's watch, "was a law unto itself and directly served the political interests of the Executive … It also undertook intelligence operations which were clearly unconstitutional and illegal" (High-Level Review Panel on the SSA, 2018, p. 65). These included the training of undercover agents in VIP protection and assigning these to Zuma, as well as others "who were not entitled to such protection" (High-Level Review Panel on the SSA, 2018, p. 65). Dudu Myeni, former SAA Board Chair, Nomgcobo Jiba, former National Director of Public Prosecutions, Collen Maine, former ANCYL President and Berning Ntlemeza, former acting Head of the

Hawks, were all provided with protection by SSA agents. The VIP protection mandate falls under the SAPS and not the SSA. A member of SSA has testified how the mandate for the SOU changed in 2012 to specifically support Zuma and his friends. Witness Y (testifying in camera) outlined in detail the VIP services provided to Myeni, highlighting the level of paranoia that prevailed at the time (Zondo Commission, 2020a, 2020b). The evidence is yet to be tested.

Dlomo was appointed Head of the SOU in 2012 under mysterious circumstances. Before this he had been head of security for the KZN department of social development but resigned when a forensic investigation revealed he had received R1m in kickbacks for tenders worth R45m awarded by the department (Basson, 2019). In 2020, the matter was still "pending" (Van Diemen, 2019). That Dlomo, who was later appointed Head of Counter Intelligence at the SSA's domestic intelligence branch, enjoyed high-level protection is evidenced by the fact that he was never prosecuted for receiving the alleged kickbacks.

In 2012, it was Dlomo who dispatched apartheid-era spy, Riaan Stander, to Europe on a mission to recover any evidence German arms manufacturer, Ferostaal, might have had on bribes Jacob Zuma or other senior officials allegedly accepted to ensure a smooth passage of the 1999 Arms Deal (Myburgh & Tau, 2016; Basson, 2019). Stander later instituted a damages claim against the SSA – settled out of court – which is where Dlomo's role in alleged sweeping of evidence for Zuma came to light. Dlomo's unit, the panel found, had also infiltrated and influenced "the media" in an attempt "to counter bad publicity for the country, the then president and the SSA" (High-Level Review Panel on the SSA, 2018, p. 65).

The SOU had also in 2014 set up, at the behest of President Zuma, a bogus union, the Workers Association Union, to spy on the Association of Mineworkers and Construction Union (Amcu) at the Lonmin mine in Marikana (Myburgh, 2016). The SOU had also surveilled civil society organisations and infiltrated the #FeesMustFall protests "to influence the direction of the student movement" (High-Level Review Panel on the SSA, 2018, p. 65).

In its findings, the High-Level panel found the manipulation of the SSA had emerged "from the top – the Presidency – through the Ministry of State Security and into the management and staff of the SSA" (High-Level Review Panel on the SSA, 2018, p. 69).

The activities of the SSA including "attempts at social engineering, through its SO arm, and the involvement of the President and the Minister [David Mahlobo] in these constitute a serious breach of the Constitution and law for which there must be consequences" (High-Level Review Panel on the SSA, 2018, p. 69).

Dlomo, who had been dispatched by Zuma as ambassador to Japan in August 2017, was recalled by President Ramaphosa in January 2019. Since then he has mysteriously "disappeared" failing to report to the SSA for duty. In October 2019 Minister of State Security, Ayanda Dlodlo, informed parliament that Dlomo had been fired (Basson, 2019; Hunter, 2019).

During all this time, parliamentary oversight was weak, with governing-party MPs, particularly those in the security cluster, either unwilling or unable to arrest or call out executive overreach or expose the abuse of tax revenue, amounting to billions. With regard to weak oversight by parliament's Joint Standing Committee on Intelligence (JSCI), in particular, the High Level report proposed a review of the functioning of the JSCI "given the demands of intelligence oversight, the idea of a dedicated capacity for the JSCI needs to be explored further" (High-Level Review Panel on the SSA, 2018, p. 97).

14.5 THE SECRETS OF POWER

As argued in the Introduction chapter, for Zuma to maintain his grip on the vast and corrupt patronage network that had begun to sprawl around in office, he (and the allied power elite) needed to maintain an iron grip on the governing party itself. As preparations for the ANC's highly factionalised 54th Elective Conference, which took place at Nasrec in 2017, gathered momentum, Zuma's shadow state kicked into overdrive. By then much of the endemic corruption as well as the influence of the Gupta family had been exposed. Much of the evidence given to the Zondo Commission has since corroborated this.

In the end, Deputy President Cyril Ramaphosa scored a surprise narrow victory pipping Jacob Zuma's leadership slate, led by Nkosazana Dlamini-Zuma, by 179 votes. In spite of Jacob Zuma's access to vast resources – both financial and human – including rogue SSA and specifically SAPS Crime Intelligence operatives, he failed to secure a victory for his faction. Allegations that Zuma had previously abused state resources to rig election results at the ANC's Mangaung elective conference in 2012, as well as at Nasrec, had been the focus of investigations by Independent Police Investigative Directorate's (IPID) dogged Executive Director Robert McBride, that is before parliament decided not to renew his contract (PMG, 2018a).

McBride, after receiving a tip-off in August 2017, had managed to thwart the illegal procurement by SAPS Crime Intelligence of a "grabber", a type of surveillance device, for the inflated price of R45m (it generally sells for R8m). The difference, said McBride, would have been laundered to buy votes at Nasrec in December (Thamm, 2019b). SAPS National Commissioner, Khehla Sitole, McBride repeatedly has told

parliament, is reluctant to hand over information about the illegal attempted R45m grabber procurement claiming the documents are "classified". The IGI, Setlhomamaru Dintwe, has agreed with McBride, however, that matters of procurement cannot be "classified" especially if this was being done to cover up alleged criminality (Sole, 2019). The matter remains unresolved.

IPID under McBride was also investigating the alleged capture of SAPS and SITA (State Information Technology Agency) by private individuals who at present still have the power to "switch off" SAPS IT systems – and in so doing place the country's security at risk (PMG, 2017, 2018b, 2018a). The lack of oversight in the awarding of these dodgy tenders concluded over the years by a corrupted SAPS leadership with suppliers has been the subject of numerous Standing Committee on Public Account and court probes which are ongoing.

14.6 CROSS HAIRS AND SLUSH FUNDS

In 2009, Zuma appointed former apartheid-era cop Richard Mdluli to head SAPS Crime Intelligence, which has played a key a role in the SSA and the capture of the security cluster. It is a position Mdluli held until 2012, in spite of facing serious charges of fraud, corruption, kidnapping and murder. Two Zuma loyalists, acting Head of Public Prosecutions, Nomcgobo Jiba, and Lawrence Mwrebi, Head of the NPA's Commercial Crimes Unit, ensured for years that the heat was taken off Mdluli (see Chapter 13). It was Mdluli who, as Gauteng Deputy Provincial Police Commissioner, had overseen the investigation into Zuma's 2006 rape charges and it was Mdluli who headed a bogus fraud and corruption investigation into Gauteng Scorpions Head, Gerrie Nel, who was prosecuting then National Commissioner, Jackie Selebi at the time (Corruption Watch, 2012).

The Zondo Commission of Inquiry into State Capture has heard extensive evidence of how Crime Intelligence operatives were responsible for planting stories in the media, specifically the *Sunday Times*, in order to discredit officials who were investigating Zuma, his family and their business associates. When KZN Hawks Head, Johan Booysen, began investigating (amongst others) Durban tycoon Thoshan Panday, a friend of the Zuma family who had scored a R45m contract (with planned additional R15m) from SAPS, Booysen soon found himself in the cross-hairs (Booysen, 2019).

A story leaked to the *Sunday Times* about an alleged "Cato Manor Death Squad", purportedly led by Booysen, soon saw the top cop and his team arrested on serious trumped-up charges of corruption and racketeering. All charges were later withdrawn. It was the hopelessly unqualified Berning Ntlemeza, whom Zuma appointed to head the DCPI in 2014 (Underhill, 2016). Ntlemeza replaced Anwar Dramat, who had

initially investigated the 1999 murder and kidnapping charges against Mdluli and which were dropped by the NPA in 2012 (Booysen, 2019).

High Court Judge, Elias Motojane, in the North Gauteng High Court in February 2015, had handed down a scathing judgment with regard to Ntlemeza's illegal firing of then Gauteng Hawks Head, Shadrack Sibiya, saying he had done so in "bad faith and for reasons other than those given"(North Gauteng High Court, 2015, p. 5).

In September 2020, Panday lost his bid to escape prosecution when the Pietermaritzburg High Court confirmed a 2017 decision by then NPA head Shaun Abrahams to prosecute Panday. Panday fought the prosecution for almost a decade (Cowan, 2020b; Ellis, 2020).

Testifying at the Zondo Commission in September 2019, Hawks investigator, Kobus Roelofse, detailed Mdluli's looting of the Crime Intelligence Secret Service Account over the years. Roelofse testified that the beneficiaries of the secret service account used it as a slush fund, amongst them two Police Ministers, current incumbent Bheki Cele and his penultimate predecessor Nathi Mthethwa. But it was Mdluli himself who was the main beneficiary of the CI slush fund using taxpayers money to fund security upgrades to his homes, trips overseas with his family, as well as the purchase of five luxury vehicles totalling R3.5m (Davis, 2019; Roelofse, 2019).

The Zondo Commission also heard evidence of how, between 2009 and 2012, vehicles worth R69m were bought by Crime Intelligence from one dealer in Pretoria. Roelofse said he had been unable to prosecute a single crime intelligence official because no Police Commissioner to date had been willing to cooperate or declassify critical information (Roelofse, 2019).

This evidence to the commission is yet to be fully tested.

14.7 UNDOING THE DAMAGE

The value of the Mufumadi High-Level Panel review and its report is that it has made visible so much of what was deliberately hidden and obscured during the Zuma years. The panel began its top secret work in July 2018 and held interviews with "a wide range of people" including "current and former ministers of intelligence/state security; former and current directors-general and senior leadership of the SSA and its predecessor services; the Inspector-General for Intelligence, the Coordinator for Intelligence, the National Security Advisor, the Auditor General, the heads of other arms of the broader intelligence community as well as individual members and former members of the community" (High-Level Review Panel on the SSA, 2018, p. 1). Current and former Heads of the National Intelligence Co-ordinating Committee

(NICOC), Crime Intelligence, Military Intelligence, the Financial Intelligence Centre (FIC) and Directors-General of the Departments of Home and Foreign Affairs were also engaged. The panel also reviewed and had access to "an extensive number of documents, including presentations and submissions from SSA units, other sectors of the intelligence community, past and current individual members of the community and other relevant arms of government; policies, legislation, regulations and directives; previous review reports and discussion documents; investigation reports and many others" (High-Level Review Panel on the SSA, 2018, p. 1).

President Cyril Ramaphosa acted swiftly to begin the massive clean-up of the SSA and other services in light of the release of the report of the High-Level panel. During his State of the Nation Address in February 2019, Ramaphosa announced that he would re-establish and Chair the National Security Council as well as re-establish the two security arms; Domestic and Foreign Intelligence. In the State of The Nation address, February 2019, Ramaphosa said that, on the basis of the report and its recommendations, "I will soon be announcing a number of urgent steps to enable the reconstitution of a professional national intelligence capability for South Africa" (Ramaphosa, 2019).

In April 2018, Arthur Fraser was removed as DG of SSA and replaced by acting DG Loyiso Jafta, while in August 2019 Advocate Mahlodi Sam Muofhe was appointed Head of the Domestic branch. During the parliamentary debate on the State Security budget in July 2019, Minister of State Security, Ayanda Dlodlo (2019), hinted that wide-ranging reforms of the intelligence services were underway. With a budget of around R5bn, Dlodlo said the SSA faced financial pressures and was "too small" compared with international standards. Dlodlo (2019) said a skills audit of the SSA was in progress and that an independent labour expert would be brought in by the agency to deal with the backlog of disciplinary cases which remain undisclosed.

Undoing the massive damage and contagion caused by Jacob Zuma to the country's intelligence services is a mammoth undertaking but the recommendations of the High-Level panel review has provided a detailed roadmap to recovery.

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15 THE REAL ROGUES THAT RUINED SARS

Robyn Foley

> Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes. – Benjamin Franklin, in a letter to Jean-Baptiste Leroy, 1789 (Smyth, 1907, p. 69)

The renewal of governance structures was viewed as central to the promise of a "New Dawn" for South Africa. On becoming President on 15 February 2018, Ramaphosa established several commissions to investigate those institutions that had been plagued by scandal and evident deterioration during the Zuma era. One of these was the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS) (known as the Nugent Commission), established in May 2018 (President of Republic of South Africa, 2018).

Based on the Commission's interim report, Ramaphosa fired Tom Moyane, Commissioner of SARS, on 1 November 2018 (Smit & Ritchie, 2018). Under Moyane's leadership (2014-2018), SARS went from being a "model public institution" to an organisation facing a crisis of (mal)governance (Nugent Commission, 2018a, p. 21). The final report notes "[t]here can be little doubt that the catastrophe at SARS is attributable to a massive failure of elementary principles of governance coupled with pervasive breaches of integrity" (Nugent Commission, 2018a, p. 168).

15.1 WHY THE REAL "ROGUES" CAPTURED SARS

There are many stories to be told in terms of how and why SARS was captured, with some still playing out. One that has become synonymous with the tax collection agency is that of the so-called "rogue unit". This chapter focuses on the implications of the rogue unit scandal and the role it played in decimating SARS.

Tax agencies' primary mandate is to collect revenue for the state, but they also function as an unofficial lifestyle auditor (Thompson, 2020). Curtailing an agency's ability to go after those that lie about their tax obligations and the origin of their wealth, is possibly the most obvious motivation for the capturing of SARS.

It is important to highlight that SARS is an integral part of the machinery within government that monitors, reports and pursues those that use a variety of methods to illicitly transfer their wealth offshore. Within large-scale corruption, it is critical that accumulated wealth is transferred to overseas tax havens and countries that are less discerning in terms of how a foreigner's wealth is derived. Even though a significant amount of wealth transfer is facilitated by banks and other financial institutions (see Chapter 17), the "old school" methods of smuggling high valued goods or even physical cash across borders (to hide their ill-gotten gains from the tax authority) are still frequently used by various criminal syndicates. As the principle customs authority in South Africa, SARS plays the crucial role of monitoring all goods and physical forms of wealth (including cash) that cross the country's borders. One of the primary focus areas of the High Risk Investigations Unit (HRIU) (the so-called rogue unit) was investigating the illicit transfer of wealth offshore. A possible alternate motive is the accumulation or rather the retention of rents for a broader shadow state network, by either lowering taxes due or increasing refunds for those that are favoured by the shadow state. A prime example being the Gupta family who received an illegal tax refund of approximately R240m (Van Wyk & Cowan, 2018). As highlighted by Judge Nugent (Nugent Commission, 2018b, p. 9):

> SARS is an institution that is vital for the welfare of the country. It is also a complex organisation. And it is one that is particularly vulnerable to corruption, bearing in mind that over R1 trillion passes through its hands each year.

Having access to and being able to leverage sensitive personal information against potential opponents is an added benefit for those that use state institutions to political ends, although this does not appear to be an explicit motivation in South Africa's case. In the case of SARS, it was the "rogue unit" narrative that was seemingly used to neutralise opponents of the shadow state (see Chapter 11). The last potential motive is the extraction of rents through large service contracts. The shadow state would need to dismantle various SARS structures, particularly its investigative and enforcement capacity (i.e., the rogue unit); centralise control over the institution by putting in place compliant senior officials and minimise dissent by creating "a culture of fear and intimidation" (Nugent Commission, 2018a, p. 4).

15.2 OUTSOURCING STRATEGIC THOUGHT: BAIN & COMPANY INC.

> The transition of SARS from what it was to what it became was brought about by events that are shocking. We think what occurred can fairly be described as a premeditated offensive against SARS, strategized by the local office of Bain & Company Inc, located in Boston, for Mr Moyane to seize

> SARS, each in pursuit of their own interests that were symbiotic, but not altogether the same. Mr Moyane's interest was to take control of SARS. Bain's interest was to make money. (Nugent Commission, 2018a, p. 27)

The statement above provides perhaps the most concise description of the collusion racket that unfolded. The Commission's report details how a US-based multinational consultancy company, Bain & Company Inc. (Bain) helped facilitate the wholesale decimation of SARS. Bain is one of the "Big Three" global management consultancies with the Boston Consulting Group and McKinsey & Co, as well as the "Big Four" auditing/consulting firms (KPMG, Pricewaterhouse Coopers [PwC], Ernst &Young and Deloitte) that dominate the global market of "professional services". What precisely the professional services entail is difficult to define, as they span almost the full spectrum of business activities, and as their services are focused on providing the private sector with competitive advantage, it is mostly secret. This is both true in terms of services they provide, as well as the way they are operate. None of these firms are publicly listed and as such are not required to be transparent about their operations or finances. There are several aspects of this industry that need to be questioned, particularly in relation to how they enabled state capture (Thakur, 2019). It is for this reason that understanding the story of Bain's role in the dismantling of SARS is so important.

15.2.1 How to Dismantle an Institution

Within three months of appointment in September 2014, Moyane suspended most of the Executives, halted all projects related to the ongoing Modernisation Programme and kicked off the restructuring of the organisation (Sole, 2014). The only motivation provided was that it was in response to the negative press coverage around the supposed rogue unit operating within the revenue service enforcement department.

On 11 November 2014, a memo was sent to then Minister of Finance Nhlanhla Nene, requesting approval for the SARS "transformation and turnaround". The "perfectly bizarre" motivation for undertaking a complete restructuring of a massive organisation, based on *Sunday Times* media articles seemed to be of little relevance (Nugent Commission, 2018a, p. 42). According to Nene, he was only responsible for approving the process of appointing external consultants and not the justification or outcomes thereof. Thus kicked off what the Nugent Commission justifiably called a "procurement sham" (Nugent Commission, 2018a, p. 43).

The request for proposals for "independent" services to provide SARS with a "diagnostic evaluation" was issued on 11 December 2014 with a value of more than R2.38m and a closing date one week later. Questions were raised at the Commission as to how it was possible for Bain to have completed some of their bid documents

in the space of a day (by 12 December) without prior knowledge. There were also questions asked about Bain's offer of 50% discounted professional fees as this seemed deliberately set up to enable Bain to increase their fees for any follow-on contracts that might materialise. Vittorio Massone, the Head of Bain in Africa at the time, professed that there was nothing untoward in how the process unfolded. Emails provided to the Commission, however, indicate that Bain was already the preferred service provider. Massone had already emailed Sipho Maseko, Group CEO of Telkom, on 4 December to find out if it was possible for SARS to piggyback off an existing contract Telkom had with Bain, but the proposed procurement process dodging did not materialise (Nugent Commission, 2018a).

Following the sham procurement process, Bain was awarded Phase 1. The bid adjudication mandated that Phase 2 would go back out to market, but Bain was directly awarded the work, which amounted to "approximately R164 million calculated at its ordinary rates less an initial discount of 12%"(Nugent Commission, 2018a, p. 50). Had Bain's services been extended to Phase 3, they could have received a further R50m. Ultimately Bain would repay R217m worth of the fees (with interest) that it had accumulated for about 18 to 20 months of work (Nugent Commission, 2018a).

While the process for contracting Bain was underway, Moyane aggressively stamped his authority on SARS management structures. By 14 December 2014, he had placed several senior Executives on suspension (a decision later overturned by labour court) and suspended his meetings with SARS Executives. Moyane also stopped all Modernisation projects without consulting the Chief Executive responsible for the programme, Barry Hore, prompting Hore to resign in December 2014. Moyane effectively shut down and turned off the taps to SARS' primary sources of institutional knowledge and expertise (Nugent Commission, 2018a).

The implementation of the proposed new structure for SARS became known as a "new operating model", but, as the Nugent report highlights (Nugent Commission, 2018a, p. 51):

> The new organisational structure of SARS was often called the 'new operating model' but that is a misnomer. An operating model is a strategy upon which a structure is built. There was no new strategy upon which the structure was rebuilt by Bain. It did no more than restructure the organisation, based largely, according to Mr Massone, upon what Bain considered to be 'best practice', drawn from Bain's second-hand knowledge of other tax collection agencies, with little insight, nor any apparent interest, into why SARS had been structured in the way in which it was, and in what direction SARS was headed.

There are theoretically many ways in which an organisation can be structured, the efficiency of which is dependent on how it is operationalised and managed. There are, however, three critical points in terms of how Bain carried out its work and how the new operating model was derived, adopted and then implemented.

First, according to Massone's testimony, Bain was limited to engaging with a list of individuals provided by Moyane. As a result, there were several persons whose insights might have better informed Bain, not included in the consultations. Second, Bain put forward four operating models it had developed based on organisational "design principles" for SARS. One of these was the decentralisation of power and control, but Moyane opted to go for a fifth and contradictory option. As noted in the Nugent report, "[t]he most significant change insisted upon by Mr Moyane was to combine the roles of overseeing individual tax and of corporate tax respectively into one division called 'Business and Individual Tax' (BAIT), reporting direct to the Commissioner" (Nugent Commission, 2018a, p. 50). Third, the implementation of the "new operating model" would negatively impact critical functions at SARS. The Large Business Centre (LBC), focused on providing end-to-end services for large tax-paying companies in various sectors and accounting for about 30% of revenue collected, was dismantled and its services fragmented under different line Managers. Overall control of all tax collection was, however, then consolidated under the new BAIT department reporting directly to the COO, Jonas Makwakwa, who was one of the few senior Managers not pushed out upon Moyane's appointment (Nugent Commission, 2018a).

When the *Sunday Times* exposes were at their peak, Moyane had already disbanded the HRIU, but the implementation of the new operating model led to the dismantling of other enforcement-related departments, such as the High Court Litigation Unit and a department focused on developing strategies to address tax non-compliance. The latter department and more importantly its function were not comprehensively catered for in the new structure (Nugent Commission, 2018a).

Phase 2 was to help implement the proposed new operating model. Bain had developed various plans and was responsible for tracking and monitoring the progress of the SARS structural transition. Regardless of the potential merits that there might have been to Bain's restructuring proposals, their implementation resulted in an exodus of highly skilled technical staff. The dismantling of the LBC made about 200 Managers redundant, and many former employees testified as to how they were either demoted, overlooked for new positions or placed in positions that served no function. The new SARS Commissioner, Edward Kieswetter, estimates that about 3 000 highly skilled employees left SARS during Moyane's reign – more than 2 000 experts resigned, 550 retired and about 600 faced disciplinary processes (De Lange, 2019; eNCA, 2019).

15.2.2 The Back Story: Getting to Sit at the President's Table

Moyane took to the courts to have his dismissal overturned. The High Court was scathing in its judgment noting that the case had no merit and went further to condemn the way Moyane took "every conceivable opportunity" to attack and insult President Ramaphosa and Judge Nugent. Punitive costs were issued for what the court considered to be "an abuse of the [court] process" and the judgment notes that "the conduct of [Moyane] in these proceeding is "particularly reprehensible" (High Court of South Africa: North Gauteng, 2018, p. 59).

Dissatisfied with the ruling, Moyane approached the Constitutional Court, which dismissed the application to appeal (Constitutional Court of South Africa, 2019). Former President Zuma made a submission to the Constitutional Court supporting Moyane, stating that it was never his intention for the Nugent Commission to make findings regarding employees (Maughan, 2018). Even though Zuma may have initiated the process for its establishment, it was Ramaphosa that promulgated the commission (National Treasury, 2017; President of Republic of South Africa, 2018). And as the sitting President, it was Ramaphosa's prerogative to act on the Commission's interim recommendations. For this to be publicly questioned by his predecessor was quite remarkable.

According to testimony presented by Pravin Gordhan at the Zondo Commission, Zuma appeared to already have a candidate in mind as SARS Commissioner – Moyane (Zondo Commission, 2019). Moyane was not able to complete his tenure as National Commissioner of Correctional Services because he had reached the legislated age limit of 60 years (Sapa, 2013). Within a month of leaving his post, it would appear that Moyane already had his heart set on becoming the next SARS Commissioner and according to Bain "[i]t would appear that Mr Massone understood that Mr Moyane was the President's intended appointee to be SARS Commissioner well before it happened" (Bain & Company, 2018).

Massone's supplementary submission to the Nugent Commission (after questions about his prior engagements with Moyane were raised during oral testimony) identifies the first meeting between Moyane and Bain to have occurred on Sunday 13 October 2013 with at least eight subsequent meetings. Email evidence attained by the Commission appears, however, to indicate more meetings. Massone details how the various meetings related to the progressive development of a SARS institutional strategy but insisted that there was nothing untoward in these engagements. For Massone, the year-long sequence of pro-bono engagements was considered normal practice of the company, what they refer to as "CEO coaching" (Massone, 2018, p. 3).

Indeed, it would seem that this practice has been a crucial part of Bain's business model, as recorded in an article dating back to 1987: "The creator of 'relationship consulting', Bain has built its business on the close ties that it develops with chief executives" (Perry & Caminiti, 1987).

Massone's submission revealed that, over the course of four presentations made by Bain to Moyane, the seeds for a "profound strategic refresh" at SARS were sown (Bain & Company, 2014, p. 20). The presentations consisted of "the SARS2.0 (dated 13 October 2013), TM first 100 days (dated 26 May 2014), 'Potential SARS organisation chart and focus areas' (meta dated 27 July 2014) and SARS2.0 'What needs to be done' (dated August 2014)" (Massone, 2018, p. 18). The *SARS2.0* presentation is explained as an "out-side-in" document that provides a broad overview analysis of the organisation. The other documents then go further, outlining a strategy for how to structure management at SARS, focused on creating a "sponsorship spine" and "identify individuals to neutralise" (Bain & Company, 2014, p. 7). The *TM first 100 days* document talks of a "framework and key actions" required, namely to "1-Keep the ball rolling", "2-Gain the high ground" and "3-Take control". With language such as this, it is easy to see why Judge Nugent refers to these presentations as "a strategy more appropriate to a corporate takeover".

Significantly, what these presentations collectively illustrated was that "[a] decision was taken that the organisational structure of SARS would be changed even before Bain and Mr Moyane had spoken to anyone at SARS" (Nugent Commission, 2018a, p. 39).

Bain had engaged with government officials prior to its work with Moyane. In his statement, Massone provides an account of various other engagements, including meetings held with then President Zuma. Massone says he was introduced to Zuma in August 2012, by Sipho Maseko, who had received "CEO coaching" from Bain prior to becoming the CEO of Telkom in April 2013, and that most of the meetings with Zuma were to discuss "Project Phoenix". Project Phoenix was only one of several strategic projects that Bain presented and discussed with President Zuma over the course of at least 12 engagements from 2012 to 2014, a breakdown of which is presented in Table 15.1 below.

Table 15.1 Breakdown of the various meetings Bain had with former President Zuma

Start Date	Meeting purpose	People Present
11 Aug 2012	Vittorio Massone introduced to Jacob Zuma by Sipho Maseko. Purpose was to discuss Project Phoenix[i].	Vittorio Massone, Duma Ndlovu, Jacob Zuma and Sipho Maseko
23 Aug 2012	To discuss Project Phoenix	Massone, Ndlovu, Zuma and Maseko. Jabu Mabuza (the Chairman of Telkom) may also have been at this meeting.
27 Oct 2012	To discuss Project Phoenix	Massone, Ndlovu, Zuma, Maseko and Mabuza
25 Apr 2013	To discuss Project Phoenix and to begin conceptualising Project Elephant[ii]	Massone, Ndlovu, Zuma and Maseko (possibly others)
04 Aug 2013	To discuss Project Phoenix	Massone, Ndlovu, Zuma and Maseko (possibly others)
25 Feb 2014	To discuss the central procurement agency (CPA)[iii]	Massone, Ndlovu, Zuma and Tom Moyane (in passing)
26 Apr 2014	To discuss CPA & ANC manifesto implementation plan[iv]	Massone, Ndlovu, Zuma and Fantas Mobu
22 May 2014	To discuss "new entrepreneurship and Small and Medium sized Enterprises (SME)" strategy[v]	Massone, Ndlovu, Zuma and Mandia KaNozulu (Ndlovu partner at Ambrorite)
May 2014–Jul 2014	Several meetings (unclear the number) to discuss "100 days' plan" for ANC manifesto implementation[iv]	Massone, Ndlovu, Zuma and possibly others
06 Jul 2014	To discuss Project Sirius[vi]	Massone, Ndlovu, Zuma and Busi Mabuza (Chairman of the IDC)
28 Jul 2014	To discuss Project Phoenix	Massone, Ndlovu, Zuma and possibly others

According to Vittorio Massone, the respective projects were described as follows:

i) *Project Phoenix (which was initially called Sisekelo) "was aimed at creating a national and regional ICT champion, leapfrogging economic development and transformation in urban and rural areas, creating a world class generation of professionals and infrastructures and maximizing the impact of government in the delivery of services to South African citizens". (Massone, 2018, p. 12)*

ii) *Project Elephant was a proposal for a new infrastructure delivery agency. "The idea was to change the way infrastructure deployment was done through the creation of a delivery agency that would take care of the most important infrastructure and then find improvements in the methodology that was used to plan the infrastructure and incentivise suppliers in delivering on time and within budget (later called project Elephant). Elephant was based on a set of global best practices." (Massone, 2018, p. 13)*

iii) *"The idea behind the CPA was to create an agency that would manage procurement for central government and create opportunities for significant savings in expenses and investments, improve the quality of supply and increase transparency." (Massone, 2018, p. 14)*

iv) *"[T]he idea of a workshop to be launched after the new government administration in order to create their 100 days' plan was presented at this meeting … The workshop (simply described, a more interactive form of presentation where ideas are generated and exchanged by the attendees) was aimed at ensuring the best delivery of the promises of the ANC Manifesto in the upcoming elections consistently with the recommendations of the National Development Plan. It was to focus on the prioritisation of the most important projects and the creation of a better process for the collaboration between government departments, the private sector and state owned entities." (Massone, 2018, p. 15)*

v) *"The idea behind this presentation was to acknowledge that SMEs were a potential major driver of employment and growth which was underdeveloped and to discuss a number of possible actions (regulatory framework, dedicated ministry, creation of incubators and specific funding." (Massone, 2018, p. 16)*

vi) *"Sirius was aimed at re-shaping South Africa's energy sector. This included the need for a turnaround at Eskom, similar to what was then being done at Telkom." (Massone, 2018, p. 16) (see Chapter 2 of this book, Section 2.6.1, page 51)*

Source: Vittorio Massone (2018) statement to the Nugent Commission

Present at most of Bain's interactions with President Zuma was Dr Duma Ndlovu and it was Ndlovu that introduced Bain to Moyane. Ndlovu in partnership with Mandla KaNozulu had established a "communications, events, project management and strategic stakeholder management specialist company" called Ambrorite (Pty) Ltd. In November 2013, Bain entered into a contract with Ndlovu's company Ambrorite for "business development and stakeholder management" (Bain & Company, 2013). The contract contains several insightful clauses that are worth noting, below are just three examples:

1. Under the current context section, it is highlighted that "Ambrorite intelligence has allowed Bain in the last few months to acknowledge that in the next few years a number of State Owned Enterprises and Agencies will be subject to leadership and strategic changes and will require significant transformation and tum-around processes".
2. For Ambrite the task of strategic analysis and intelligence gathering entailed "[gathering] data and information on consulting spend and competitive landscape in the different possible target clients" and "[identifying] key priority targets in the Government/SOE sector (an initial analysis performed by Ambrorite for Bain preliminary shortlisted company like SA Revenues Service (SARS), SA Post Office (SAPO), SITA, Eskom".
3. Assisting with Bain's brand positioning entailed "[identifying] the key opinion leaders and stakeholders in the public sector, in particular those who, even if not directly decision makers on consulting spend, have key roles in deciding or influencing future policies…" and "Help in translating those messages in a concrete set of actions: events, meetings, articles and publications, …".

It remains unclear as to how much Ambrite was paid for their services, but the contract indicates a R100 000 monthly retainer, with additional "success fees" of between R100 000 and R200 000 a month for any work that materialised as a result of their services. The principle service provided to Bain was access to intelligence and to influential decision-makers in the public sector. Though undoubtedly valuable, it is difficult see how the services provided to Bain do not amount to a form of "contractualised" influence peddling. To be clear, there is nothing in South Africa that prohibits or regulates these kinds of "business development" services and these types of activities are common practice throughout the world. Similarly, there is also nothing strictly illegal in the President or any other government official meeting with consultants and private sector actors. But that does not mean that they are good practices or that they do not have negative implications for a functional democracy.

WHO TORE SARS

TIMELINE OF THE INDIVIDUALS, COMPANIES & FIRMS THAT SAW THE PLANNING & DISMANTLING OF SARS

THE PLANNING & PREPARATION

- Vittorio Massone from Bain introduced to Zuma by Sipho Maseko - they discuss the 'Project Phoenix' strategy to "Reshape SA Economy".
- Maseko introduces SABC Muvhango TV series producer, Duma Ndlovu, to Massone.
- SARS Commissioner Oupa Magashula resigns after 'jobs for pals' scandal & Ivan Pillay is appointed Acting Commissioner.
- Tom Moyane retires/leaves his post as Commissioner at corruption-riddled Correctional Services.
- Massone introduced to Moyane by Ndlovu - starts 'CEO coaching'. Massone presents 'SARS 2.0' document on how to transform SARS.
- Bain signs 3 year contract with Ndlovu's company, Ambrobrite, for 'Business Development & Stakeholder Management' services.
- Massone bumps into Moyane at a meeting with Zuma at the president's residence in CT.
- Pillay establishes Kanyane Panel to investigate SSA & BAT triple agent, Belinda Walter's complaint on Johann van Loggerenberg (JvL).
- Massone 'coaches' Moyane - discuss 'first 100 days' SARS takeover document.
- Massone & Moyane discuss 'Potential SARS organisation chart & focus areas' document.

SETTING THE STAGE

- Sunday Times (ST) publishes unfounded Walter story - "Love affair rocks SARS" involving JvL. City Press also publishes article "Spies & lies: As a love affair ends".
- Kanyane Panel makes no definitive findings against JvL - finds Walter an unreliable witness.
- Massone & Ndlovu meet with Moyane & then mid-level manager Jonas Makwakwa - who gives intelligence on SARS to Bain.
- State Security Agency SSA minister David Mahlobo requests Office of Inspector General of Intelligence (OIGI) to investigate state security operatives (Belinda Walter & Mandisa Mokwena).
- Minister of Finance, Nhlanhla Nene instructs Pillay to establish Sikhakhane Panel to probe Kanyane JvL findings. JvL is placed on special leave.

SARS 2.0 KICKS OFF

- Jacob Zuma replaces Pillay with Tom Moyane as SARS Commissioner.
- Massone, Moyane, Ndlovu & Patrick Monyeki meet at Bain.

LEGITIMISING SARS 2.0

- ST publishes unfounded expose on the 'covert unit' titled "SARS bugged Zuma".
- OIGI Report finds High Risk Investigative Unit (HRIU) aka 'Rogue Unit' established irregularly & undertook "covert activities", but clears SSA operatives.
- Sikhakhane Panel concludes investigation spurred on by news reports & submits findings to Moyane.
- Rogue Unit' enters narrative in hyped ST article titled 'Taxman's 'Rogue Unit' ran brothel".

THE DISMANTLING COMMENCES

- Moyane suspends SARS executive committee meetings - citing ST article reason for "losing trust" in executive. He also halts all SARS modernisation programme projects without consulting COO Barry Hore.
- Moyane seeks Nene's approval for 'independent consultant' for strategic refresh (Bain).
- JvL suspended by Moyane.
- Moyane appoints Mashiane, Moodley & Monama Inc. (MM&M) to further investigate staff - they get 3 advocates to substantiate & facilitate removal of certain SARS officials.
- Hore resigns after halt of modernisation programmes.
- Massone, Makwakwa & Maseko discuss 'piggy-backing' Bain's contract with Telkom.
- Moyane suspends Peter Richer & Ivan Pillay - apparently motivated by Sikhakhane report.
- Monyeki (Rangewave) approaches Neville Willemse (Gartner) to prepare Request for Proposal (RFP) for the SARS IT contract.
- SARS releases RFP for independent consultants'.
- KPMG appointed. Makwakwa to oversee further investigations into 'Rogue Unit'.
- Makwakwa sits in on Bid Adjudication Committee meeting where Bain is appointed.
- JvL leaves SARS after being on suspension for months.
- Gartner & SARS sign (irregular) IT contract for Phase 1 (R12ml).
- Bain presents Phase 1 (R2.4ml) diagnostic of SARS where they propose four options. Moyane makes changes & a preferred fifth option is devised.
- Nene appoints Kroon Advisory Board (KAB) for further internal SARS investigations & they rubber stamp Bain's recommended 'New Operating Model'.
- MM&M continue using Senior Counsel Martin Brassey to provide legal opinion on disciplinary & criminal action against 'Rogue Unit' trio.
- Pillay & Richer resign after winning Labour Court dispute against SARS.
- Moyane opens criminal case on 'Rogue Unit' & Hawks investigate.
- Bain recontracted (irregularly) for Phase 2 at R164ml - implement 'New Operating Model' for SARS, dismantled Large Business Centre, Compliance & Enforcement units - destroying SARS' working structure.
- Moyane approves Gartner's (irregular) Phase 2 contract (R144ml).
- Draft KPMG report leaked to ST ("Confirms our story" editorial) - sparks Press Ombudsman complaint by JvL, Pillay & Gordhan.
- KPMG conclude & submit final report.

2012 — 2013 — 2014 — 2015

FIGURE 15.1 Timeline of State Capture of SARS

APART?



Over 3000 highly skilled employees exited SARS during Moyane's tenure.

According to the new SARS Commissioner, Edward Kieswetter, it is estimated that more than 2000 experts resigned, 550 retired & approximately 600 faced disciplinary processes during this period.

UNIVERSAL GRAPHICS KEY

- In The Public Interest
- The Power Elite
- The Casualties
- The Misleading Press
- The Expensive Enablers and Fixers

THE STRUGGLE TO SAVE SARS BEGINS

- Pillay, Gordhan & JvL win Press Ombudsman hearing - ST ordered to retract.
- Zuma fires Finance Minister Nene & replaces him with Des van Rooyen. Then forced to replace van Rooyen with Gordhan 5 days later.
- Mass Dubai power-elite gathering organised by the Guptas - Moyane is there at same time but denies meeting.
- Gordhan halts SARS plans to 'assess situation' - Moyane ignores instruction & continues his strategic refresh.
- Hawks send Gordhan list of "27 questions" re: 'Rogue Unit' just before his budget speech in parliament.
- ST publicly admits poor reporting after Press Ombudsmen finding.
- After Gartner didn't find anything wrong with Hore's procurement processes, Grant Thornton is appointed to re-look his modernisation program for procurement irregularities - 'Project Lion' (R12.5ml).
- Financial Intelligence Centre (FIC) submits reports to SARS containing serious allegations against Makwakwa about Monyeki payments - he is suspended pending investigation by Hogan Lovells.

- Bain recontracted for Phase 3 (R50ml) - operational improvement initiatives in customs collection.
- NPA Charge Pillay, Gordhan & Magashula with fraud relating to the early retirement, pension payout & reappointment of Pillay.
- After follow-on work (Phase 3) for SARS concludes at a cost of R9.8ml & R8.7ml, Gartner is no longer needed at SARS.
- On finding email proof supporting Pillay's valid early retirement NPA withdraws charges on Pillay, Gordhan & Magashula.
- Grant Thornton delivers 'inconclusive' report & recommends extending the 'Project Lion' contract for R50ml. National Treasury declines.
- Zuma fires Gordhan & Jonas - Malusi Gigaba made new Finance Minister.

PROJECT SARS 2.0 UNRAVELS

- Media reports emerge that SARS pays Guptas (who have no active bank accounts in SA) tax refunds of approximately R240ml.
- KPMG International withdraws findings & conclusions on their 'Rogue Unit' report - revealed report was 'copy & pasted' from an MM&M memo.
- Still under criminal investigation, Makwakwa returns to SARS.
- Ramaphosa sworn into Presidency following Zuma's resignation.
- Ramaphosa suspends Moyane - pending outcome of disciplinary proceedings.

- Ramaphosa appoints retired judge Robert Nugent to head up the Nugent Commission of Inquiry (NCI), to look into governance & administration at SARS.
- NCI hears daming testimony about Moyane & his destructive collaboration with Bain that led to gaps in tax collection compliance.
- Judge Kroon backtracks on finding 'Rogue Unit' unlawful & admits they did not interrogate the Bain/Moyane 'New Operating Model'.
- Moyane makes a filing at ConCourt to have the Nugent Commission of Inquiry dismissed.
- Ramaphosa fires Moyane following a recommendation in the Interim Nugent Commission Report.

THE REBUILDING OF SARS BEGINS...

2016 2017 2018

15.3 AND THE CONSULTANTS KEEP ON COMING

15.3.1 Gartner and Company

A question raised during the Nugent Commission was the explicit exclusion of the examination of the SARS Information Technology (IT) infrastructure and development plan in the scope of works contracted to Bain. SARS' IT system is central to its strategic vision, functional mandate and at the heart of the institution's original modernisation programme. Without a substantive explanation, the exclusion of IT from the Bain contract would appear to be to allow for a second, equally lucrative contract to be awarded to some other party. This other party would be the international IT company Gartner Inc. and their preferred local broad-based black economic empowerment (BBBEE or BEE) partner Rangewave, owned by Mr Patrick Monyeki. Monyeki had been present at one of the undisclosed meetings held just five days prior to Moyane's appointment (Nugent Commission, 2018a).

As has been seen in other examples of state capture (see Chapter 10), one of the best ways to ensure that one wins a tender is to write up the bid specifications oneself. Mr Neville Willemse, Gartner's representative in South Africa, was approached by Monyeki to do just that, giving Gartner a significant advantage over any potential competition. Like Bain, Gartner was awarded a Phase 1 contract to undertake an assessment of the IT strategy (about R12m), followed by Phase 2 (about R144m) and various Phase 3 contracts (approximately worth at least R18.5m). Of these fees, Rangewave would have received between R50-R70m (30% to 40%) (Nugent Commission, 2018a).

Various SARS employees and technical experts provided testimony to the Commission that raised the question of the need for Gartner's services, as well as the value for money of said services. Perhaps the most inexplicable portion of Gartner's work was in relation to the expansion of its initial Phase 1 scope of work to review the modernisation procurement process for any irregularities. The extension was requested by the acting COO at the time, Jonas Makwakwa (Nugent Commission, 2018a). It is unclear what the purpose was, other than to undermine the work done under SARS' previous management. Gartner evidently did not find any significant evidence of procurement irregularities, but this response was not satisfactory for SARS and in mid 2016 it contracted Grant Thornton to undertake a forensic investigation, at a cost of about R12.5m. This investigation came to naught, but Moyane appeared determined to find some fault with the modernisation programme and submitted a request to the National Treasury for a deviation on the contract with Grant Thornton to undertake more work (Nugent Commission, 2018a, p. 73). The National Treasury declined the request (Nugent Commission, 2018a).

15.3.2 Coincidence or Connections: Where Tom goes, Patrick Follows

One of the biggest and still unanswered questions is why Monyeki approached Gartner on behalf of SARS in the first place. No one from SARS could provide any explanation as what capacity Monyeki was acting in and it seems he did not have any contractual relationship with SARS. As neither he nor Moyane have provided any clarifying explanation, one can only assume that this was an informal arrangement, discussed and agreed to outside of normal government processes. It is known that Monyeki and Moyane are at the very least acquaintances, though many media reports suggest a close friendship. There are many incidences where Moyane's various position of influence in government appears to coincide with Monyeki securing lucrative contracts. Some of the allegations detailed below overlap with other cases of state capture presented in Chapters 10 and 12 in this book, namely the Bosasa corruption at the Department of Correctional Services and the capture of South African Social Security Agency (SASSA).

The story of Monyeki's role in the capture of the SASSA stretches back to the initial constitutionally invalid tender that was awarded to Cash Paymaster Services in 2012. The various court challenges (from High Court to ultimately the Constitutional Court) that ensued provided several revelations in terms of how the award came to be and the roles played by Moyane and Monyeki are particularly worth mentioning. Moyane was Chair of the Bid Adjudication Committee Chair and convened the final approval meeting in the absence of the only committee member (National Treasury official Willie Mathebula), who had raised concerns around the proposal and the committee's decision to change the scoring after oral presentations. Monyeki was a technical adviser for the bid evaluation process and is alleged to have contributed to CPS winning the lucrative social grants contract. He would continue to be involved in the social grant payment system and SASSA, when he was appointed to Minister Bathabile Dlamini's Ministerial Advisory Committee. He was also allegedly involved in several other potentially corrupt deals at the Department of Correctional Services, before, during and after the time Moyane was Commissioner.

There are also investigations around unexplained money transfers to Moyane's second-in-command Makwakwa, which were flagged by the Financial Intelligence Centre (FIC). A complex web of alleged corruption and money laundering has emerged, all tied to a February 2015 payment of R17.87m from the Department of Water and Sanitation (DWS) to a debt-collection company called New Integrated Credit Solutions. At the time Monyeki was the sole director of Mahube Payment Solutions, which appears to have received a payment of approximately R4.5m from New Integrated Credit Solutions, the reasons for which have yet to be fully explained (Comrie, McKune & Sole, 2016; Haffajee, 2017a; Van Wyk, 2018). Both the later

allegations of potential corruption, relating to correctional services, and the payments made by New Integrated Credit Solutions are still currently under investigation, by the Special Investigative Unit (Evans, 2019) and the Hawks (Haffajee, 2017a) respectively.

The FIC report was submitted to Moyane flagging that millions of rands had been deposited into the accounts of Makwakwa and his wife Kelly-Ann Elskie, who was also a SARS employee (Haffajee, 2017a). Moyane initiated an internal enquiry that seemingly cleared Makwakwa of all charges and reinstated him. Moyane allegedly hampered the investigation undertaken by Hogan and Lowell and a follow-on investigation by PwC and the disciplinary hearing is considered flawed. This would later be used as one of the charges levied against Moyane by then Minister of Finance Gordhan to motivate for his removal as SARS Commissioner (Gordhan, 2018a; Omarjee & Cronje, 2018).

15.4 THE ROGUE UNIT RACKET

Moyane used the narrative around the supposed rouge unit as a motivation for undertaking "the process of re-launching the SARS brand by embarking on a comprehensive overhaul of the organisation in all aspects" (Nugent Commission, 2018c, p. 42). With Bain to be appointed as the "independent consultants" and the rogue unit narrative driving the "massive 'transformation and turnaround of SARS'" (Nugent Commission, 2018a, p. 42), the institutions investigative capabilities were in effect stripped bare.

There are several investigative units within SARS that correspond to different aspects of tax enforcement. The supposed rogue unit was mandated to investigate individuals and companies suspected of committing criminal offences such as large-scale tax evasion, trading illicit goods and smuggling. The unit was not static in terms of its functions or structure and had undertaken several different transformations, consecutively being named the Special Projects Unit (SPU), National Research Group (NRG) and HRIU (from late 2009-2014). Prior to its dismantling, the unit (with other SARS investigative units and criminal justice entities) had been central to pursuing several high profile tax evaders – including Brett Kebble, David King, Glen Agliotti, Ivan Khoza, Lolly Jackson, Radovan Krejcir (particularly in relation to the cigarette trade) and Tigon and Gary Porritt (case still ongoing) (Haysom, 2016; Haffajee, 2017b).

The main allegation has been that the unit was established illegally, that it conducted covert operations and illegally intercepted the communication of targeted political connect individuals, under the leadership of the Minister of Finance Pravin Gordhan and senior officials Ivan Pillay, Oupa Magashula and Johann van Loggerenberg (Head

of the unit), amongst others. The story of the rogue unit and the events and actions that fuel the narrative dates back at least 13 years to 2007.

The latest investigations by the Public Protector launched in October and November 2018 were triggered by complaints laid by an anonymous source and an Economic Freedom Front Member of Parliament. This was around the time the Nugent Commission released its interim report, recommending Tom Moyane be fired (Smit & Ritchie, 2018; Public Protector, 2019b). As already mentioned, the Public Protector's report has been taken on judicial review.

The details and allegations entangled in the narrative are numerous and range from the salaciously absurd to more complex interpretations of law that remain matters of dispute. The more complex allegation, however, lies in the extent to which the unit could have been considered to have been established and operated "covertly" or undertaken "covert intelligence gathering" and whether or not any of those actions would be considered illegal.

Most of the investigations have not focused on any one allegation or specific area of SARS enforcement operations. Both the Sikhakhane and KPMG investigations scope were expanded to include perceived new areas inquiry or allegations, seemingly in response to *Sunday Times* media reports (Sikhakhane, 2014; KPMG, 2015). Only three seem to have become rooted in the real-politic. Two gained traction through an investigation by the Hawks, based on a case opened by Moyane in May 2015, which resulted in the National Prosecuting Authority (NPA) instituting criminal charges against the previously mentioned SARS officials. In his testimony at the Zondo Commission, Gordhan outlined how he believed the criminal charges were used to allegedly apply political pressure (and potentially as a cover) for him to be removed as Minister of the National Treasury (Gordhan, 2018b).

The first allegation relates to the early pension payout that Gordhan authorised for Pillay. The charges were later withdrawn after a supposed hostage drama unfolded and it emerged that Gordhan had received a lawyer's opinion clearing the payout and reinstatement. This legal opinion was for some unknown reason not included in the docket (*News24 Wire*, 2016; Van Wyk, 2017; *Fin24*, 2018). These allegations have absolutely nothing to do with the establishment or operation of the supposed rogue unit but do form the basis of a second Public Protector report finding against Gordhan, which has also been taken on legal review (Public Protector, 2019a).

The second allegation that had found its way into the hands of the NPA specifically relates to what has become known as Project Sunday Evenings. There is little factual evidence in the public domain to clarify what transpired, but this "story" seems to have emerged from Moyane's office. Two SARS employees and members of the SPU, Helgard

Lombard and Johan de Waal, approached the commissioner to "spill the beans" on events that had occurred seven years prior (Rampedi, Hofstatter & Wa Afrika, 2015). In 2007, Van Rensburg, head of the newly established SPU at the time, was approached by Gerrie Nel, a top prosecutor at the Directorate of Special Operations (DSO or "Scorpions"), and asked to install surveillance and interception devices in NPA offices. This was apparently in response to the number of leaks originating from this office and concerns over the sensitive nature of some of the high-profile cases at the time, such as the investigation into Jacki Selebi. Van Rensburg requested Lombard and De Waal to undertake the interception operations. It is alleged that Pillay sanctioned the operation and then requested copies of the interceptions. It also is understood that all the operational costs were covered by the NPA (KPMG, 2015).

There are, however, several details of the case that remain unclear or disputed, such as who authorised the operation and in what capacity the operation was undertaken. Was there an official agreement in place between SARS and the NPA?[1] Why were only certain individuals charged and not others? In short, the details of who, what, when and why all remain unclear, this is in part because the full docket outlining the details of the allegations and the supporting evidence has not been made public (Cowan, 2018). The NPA has since dropped the charges against Van Loggerenberg, Pillay and Van Rensburg and it is unlikely that full closure on this matter will be realised (Hotz, 2020; NDPP, 2020).

On reviewing the various investigations, it appears that it is the allegation relating to Project Sunday Evenings that forms the basis for the opinion that the investigative unit at SARS (NRG at the time) was conducting "covert intelligence gathering". The challenge with this idea is that other than the fact the two individuals had been employed by SARS at the time, there appears to be little evidence that the operation had anything to do with SARS or a rogue unit. It was not paid for nor formally authorised by SARS officials. The KPMG report lists several other operations of the unit that entail surveillance of goods and premises, but all of which would be considered permissible according to the legal opinion provided by Wim Trengove in late 2015 (KPMG, 2015; Nugent Commission, 2018a). This legal opinion was not made public until the Nugent Commission, and, though acknowledged, is not considered in the findings of the Public Protectors report in any meaningful way (Public Protector, 2019b).

1 Section 6 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act allows for "Interception of indirect communication in connection with carrying on of business" (Republic of South Africa, 2002). If the interception associated with Operation Sunday Evening was initiated and paid for by NPA for the purposes of monitoring NPA business, it is unclear why this would be illegal.

The confusion created (if not manufactured) through the rogue unit narrative is ultimately found in the deficiencies of South Africa's legal framework governing the intelligence capabilities of law enforcement and security sector. There are several gaps, loopholes, contradictions and overlaps in the various laws that govern intelligence, investigative authority, rights of privacy and the various law enforcement mandates. These are all matters that should be of concern to ordinary South Africans, as outlined in Chapter 14. They can have major ramifications for the potential abuse of state monopoly on violence and provide significant opportunity for the abuse of these powers (Duncan, 2020; Neille, 2020).

The last allegation that has been specifically tied to Gordhan is that the establishment of the rogue unit was itself illegal (Public Protector, 2019b). It is not disputed that the unit operated outside of the broader knowledge of SARS general operations, but this was done with the knowledge and supervision of senior management. How this "secretive" nature of operations is considered illegal remains unclear. The KPMG, Sikhakhane and Public Protector reports all rely on the National Strategic Intelligence Act to highlight that SARS was not part of listed national intelligent services. In this act, however, the term "intelligence" specifically relates to information required to "protect or advance the national security"(Republic of South Africa, 1994, 2013). It specifically identifies what is considered a threat to national security, including acts of terrorism, undermining "constitutional order of the Republic" and "exposure of economic, scientific or technological secrets vital to the Republic" (Republic of South Africa, 1994, 2013). SARS tax enforcement does not seem to fall within any of these. As highlighted by the Nugent Commission (Nugent Commission, 2018a, p. 76):

> Why such a unit was considered to be unlawful is not clear to me. While the National Strategic Intelligence Act prohibits the covert gathering of certain intelligence, that applies to intelligence concerning threats to the safety of the state, which hardly applies to intelligence relevant to collecting tax. That members of the unit might at times have acted unlawfully, that SARS employment policies might have been breached, that members might unlawfully have acquired and used equipment, all of which came later to be alleged, I see no reason why SARS was and is not entitled to establish and operate a unit to gather intelligence on the illicit trades, even covertly, within limits.

When the unit was established in 2007, it was envisioned that it would collaborate with (and to some extent could form part of) the National Intelligence agency (NIA). A memorandum requesting that additional funding be allocated to the NIA was approved, but the collaboration did not materialise. The NIA does not appear to have made any substantive appearance in any of the various investigations into the rogue unit. This is quite strange because if it is, as argued by Sikhakhane and the

Public Protector, the mandate of NIA (now SSA) to collect the alleged type of "covert intelligence", then why did they not agree to house the unit as was proposed in 2007? Hopefully, through the various court processes the truth will finally emerge and the matter of the "rogue unit" will finally be put to bed.

15.5 THE CONSEQUENCES: ISN'T IT TIME TO STOP DRINKING THE "CORPORATE KOOL-AID"?

> When revenue collection is compromised the consequences are one or more of three. Government programmes must be curtailed, or taxes must be raised, or money must be borrowed, all of which prejudice the country. (Nugent Commission, 2018a, p. 16)

Like most cases of state capture, it is difficult to quantify how much the capture of SARS has cost the country. The decline in economic activities and in taxpayer morale and the efficiency of the tax collection are all variables that impact the amount of revenue that the state can extract form the citizenry and business. These have been negatively been affected by state capture (Brown & Malary, 2019). Revenue collection has fallen short year-on-year of what the state needs to meet its budgeted obligations. The accumulated impact of this underperformance in tax collection is estimated to be R100bn, if not more (Nugent Commission, 2018a; Brown & Malary, 2019). The tax base is already strained and coupled with challenges of increased unemployment, a decline in economic activities and lower taxpayer morale, the task of tax collection is that much harder (Brown & Malary, 2019; Marrian, 2019b).

Since the release of the Nugent Commission's final report, Edward Kieswetter has been appointed as SARS Commissioner and has begun the arduous process of rebuilding the organisation. The LBC has been re-established, several of Moyane's Executive team have left and some experienced employees have returned (Marrian, 2019a; SARS, 2019). It will take time, effort and significant resources to attain the institutional capabilities, including investigative and enforcement capacity, demolished under Moyane's reign.

The fallout from the Nugent Commission has cost many of those private companies involved dearly, but have they been held accountable? KPMG retracted the recommendations from their investigation into the rogue unit and repaid its R23m worth of fees. When it was later revealed that these recommendations were a cut and paste from a legal opinion sent to them by SARS, the Executive responsible was fired (KPMG, 2017; Chabalala, 2018). Given the damage that resulted from the report, including the Hawks investigation and the laying of criminal charges based on their

recommendations, the response seems hardly commensurate. Gartner has denied any wrongdoing and has not responded publicly to the Nugent Commission's findings.

In response to the release and the damning findings contained in the Commission's final report, Bain apologised and committed to pay R217m back to SARS (Nugent Commission, 2018a; Marrian, 2019b). In a company media statement released in December 2018, Bain concedes that:

> We accept that through various lapses in leadership and governance, Bain South Africa became an unwitting participant in a process that inflicted serious damage on SARS. We understand the justifiable anger felt by South Africans and are deeply sorry for what has happened to SARS and for our involvement. (Bain & Company, 2018)

In a later statement on 20 December 2019, however, they attempted to absolve themselves of any responsibility for what happened at SARS: "This [internal] investigation, which is now complete, did not find any evidence that Bain was involved in any scheme with Mr Moyane to damage SARS" (Bain & Company, 2019). This is just one example of the cleverly crafted statements of logic acrobatics which professionals deploy to deliberately avoid any sense of accountability. It is important to highlight that the internal investigation that is referred to has never been made public and has been drawn into question, by none other than the individual whom they appointed to oversee the "ethical rejuvenation" of the firm, Athol Williams. In October 2019, Williams resigned from Bain and in a public gathering in December 2019, he stated "When I ask questions, I get shut down. As an internal person, as a partner who has to stand up publicly and say 'they are doing the right thing', for my own credibility, my own conscience and also for the good of SA, I couldn't be part of that … It is obvious that they [Bain] have lots to hide" (Mahlaka, 2019). In an interview Williams further indicated: "I don't have additional evidence regarding SARS, but I do have evidence on other institutions" (Buthelezi, 2019). At the time, Williams indicated he would be making submissions to the Zondo Commission regarding Bain's role in state capture.

The aspect that needs to be noted in Bain's denial is the deliberate conjunction that is made between the action and a specific intent. Proving intent is almost always the most challenging aspect of any investigation. Even though the company may not have intended to "damage SARS", it is evident from the sequence of events and the evidence by the company itself that Bain undoubtedly "was involved in [a] scheme with Mr Moyane". The statement is in effect an untruth and the racket is the complicit silence from business, government, and society at large. The notion that this type of response is acceptable, if not expected, cannot be sustained if we want to stop the practices of state capture.

The role of private sector consultancies has been extensively documented, but they often do not receive the same extensive scrutiny and criticism as their public sector counterparts. There is often much controversy around their appointment processes, how they are paid and the various entities they "partner" with to be awarded said contracts. All of these are valid concerns, but the question that seldom gets asked is why they are appointed in the first place and what is the real value they provide to warrant their unashamedly exorbitant fees.

SARS "was held up in this country as a model public institution" prior to Moyane's appointment (Nugent Commission, 2018a, p. 21). Consultants were bought in, even though "[m]any were puzzled at why it was thought necessary to 'fix what was not broken'" (Nugent Commission, 2018a, p. 49). Often these consulting firms are bought in to "find" the problems to which only they can provide the solutions. The tactic of getting a foot in the door, with regards to procurement pricing and then ballooning contracts over time is a common occurrence. Behind all these contracts are the "business development partners", outside advisors or preferred BBBEE partners that have links or connections to the people in power. These predatory business practises become reinforcing and self-perpetuating and will continue if left unchallenged.

Under the subheading 'Honesty & Openness' on Bain and Company's website, they profess that "We [Bain] have a deep intellectual honesty, and the candor to tell it like it is in straightforward language. We remain open to the possibility that current beliefs could be wrong" (Bain & Company, 2020). One hopes that they look beyond their profit margins and candidly reflect on their role they have played in decimating one of South Africa's crucial financial institutions.

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16 HOW STATE CAPTURE WENT NUCLEAR

Dzvinka Kachur

16.1 INTRODUCTION

South Africa's nuclear deal has been described as one that would have bankrupted the country if it had not been forestalled by National Treasury in 2016 and overruled by the Western Cape High Court in April 2017. The building of a facility to produce 9.6 gigawatts (GW) of nuclear energy would have constituted the single largest public infrastructure procurement programme in the history of South Africa, valued at an estimated R1tn, if not more (Gordhan, 2018; Nene, 2018). Thanks to the efforts of two women anti-nuclear activists, Makoma Lekalakala of Earthlife Africa Johannesburg (ELA Jhb) and Liz McDaid of the Southern African Faith Communities' Environment Institute (SAFCEI), who took the matter to the High Court, the nuclear deal was stopped.

In most countries, nuclear energy programmes are historically tightly connected to nuclear weapons programmes and unaccountable budgets (Fig, 2010; Locatelli, 2018; Wealer, Bauer, Göke, Von Hirschhausen & Kemfert, 2019). With the global shift towards peaceful nuclear programmes, most notably after the Chornobyl disaster in 1986, the emphasis shifted towards the need for robust public participation and following of due process in nuclear-related procurement and implementation processes (IAEA, 2011). The South African nuclear deal was legally thwarted on these two counts.

The following analysis of the nuclear deal reveals the institutions, processes and people who worked to uphold the rule of law and keep the tenets of democracy alive. A debt is owed to the in-depth investigations undertaken by journalists, non-governmental organisations (NGOs), the Public Protector's *State of Capture* report (2016), the State Capacity Research Project's *Betrayal and the Promise* (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo & Swilling, 2017) and the South African Council of Churches' (SACC's) Unburdening Panel (2017), which provides a safe space for reporting incidents, amongst other actors and organisations. The roles played by South Africa's courts, robust energy and nuclear regulatory frameworks,

finance processes and civil society are encouraging indicators that this country's democracy is underpinned by substantial checks and balances that are enduring and have not been corrupted. This is promising given that the prospect of nuclear energy in the national energy mix persists.

16.2 BACKGROUND AND CONTEXT

16.2.1 Nuclear Energy in South Africa Pre-2009

Nuclear energy is one of the oldest energy industries in South Africa. The country was a founding member of the International Atomic Energy Agency (IAEA) in 1957, although its membership was suspended in the apartheid era and only extended again in 1995. South Africa also operates the only nuclear power station on the African continent, which opened in 1984. The 1.8 GW Koeberg plant in the Western Cape province provides 5% of the electricity supplied to the national grid.

During the apartheid era (1948-1994), the nuclear industry grew under cover of the National Party's (NP) weapons programme and, to a lesser extent, from the country's desire to establish energy independence after suffering an oil embargo in 1973 and growing internal social unrest towards the end of the 1970s (Fig, 2010; Martin & Fig, 2015; Kantey, 2017). Given the association with the military, the culture around the nuclear industry was secretive and conspiratorial. There was little public knowledge of the industry.

It is challenging to communicate to the general public about nuclear technology because of its highly technical nature and the invisible risks that it presents (Chernobyl Forum, 2006). The industry also tends to involve only a small circle of highly skilled employees on long-term employment plans. This often results in top-down planning that takes place without public consultation and in which technicians and government officials can make costly decisions with no accountability. Global experience of the industry illustrates that manufacturers of nuclear technology are at high risk of being drawn into corrupt activity and are regularly embroiled in scandals (Tanter, 2013).

The apartheid NP voluntarily closed its nuclear weapons programme and dismantled the weapons in 1989 (Fig, 2010). While the ANC had opposed nuclear power development prior to independence in 1994 (Fig, 2010), in 1996, the first democratic President Nelson Mandela's administration launched a broad public debate around the energy policy and peaceful use of nuclear energy (Fig, 2010). During this period, a group of skilled nuclear scientists approached a faction of ANC leaders to lobby for continuing nuclear research to save the rare skills in the country (Fig, 2010; Kantey, 2017). As a result of that lobbying, government agreed to support the Pebble Bed Modular Reactor (PBMR) project, which had been an attempt to develop a small-scale nuclear reactor

(Kantey, 2017). It became a state-owned enterprise (SOE) in 1999, but government officially stopped investing in 2010 (Fig, 2010). In 2015, however, when Brian Molefe became Eskom CEO, the project was funded again from a pre-allocated research budget (Yelland & Potgieter, 2017). And in January 2020, an expression of interest was issued to explore interest from the private sector in taking the PBMR project completely out of Eskom's care.

Many individuals have played key roles in the nuclear industry from the apartheid era nuclear weapon projects through to the launch of the PBMR project and the nuclear programme under the Presidency of Jacob Zuma (2009-2018) (Kantey, 2017). Amongst them are lobbyists Kelvin Kemm and Dave Nichols.

The ANC tried to transform the predominantly white nuclear industry by appointing more race- and gender-diverse employees (Fig, 2006). Scholarships were provided to train young South African nuclear scientists through initiatives such as the Eskom Nuclear Project 100. The opening of the sector failed, however, to change its secretive and non-transparent character. Nuclear-related companies were also opened to black economic empowerment shareholders, which resulted in the creation of vested interests and further division within the ANC, as well as confrontation between the nuclear lobby and anti-nuclear groups (Rennkamp & Bhuyan, 2016).

Thabo Mbeki, President of South Africa from 1999-2008, stopped broad public conversation around the use of nuclear energy,[1] resulting in a better coordinated and stronger anti-nuclear coalition (Kantey, 2017; McDaid, 2019).

In 2003, the NGO Earthlife Africa challenged the approval of the environmental impact assessment undertaken for the demonstration model of the PBMR (Western Cape High Court, 2005; Death, 2006). The NGO went to court in 2006, asking for disclosure of Eskom Board meetings related to the PBMR (Fig, 2010; McDaid, 2019). When the project closed in 2010, it had cost taxpayers more than R9bn for a project riddled with accusations of corruption and inadequate public participation that had never actually produced a demonstration model (Fig, 2010).

Growing demand for energy and severe disruptions to electricity supply in 2007/8 put pressure on government to investigate and pursue different energy options. The expansion of nuclear energy capacity had always been on the table. In January 2007, the

1 Public participation for the Nuclear Energy Act (1999) and the National Nuclear Regulatory Act (1999) was only extended to members of the Chamber of Mines, representing the larger mine owners. The National Radioactive Waste Management Policy and Strategy did not accommodate public comments and the content of public participation engagements around South Africa's 2007 Nuclear Energy Policy and Strategy were never acknowledged, nor made public.

Eskom Board announced its plan to construct 12 nuclear reactors that could generate 20 GW to grow the country's overall electricity capacity by 2025 (Eskom, 2007). The Department of Minerals and Energy (DME) approved the new nuclear policy in 2008 (Department of Minerals and Energy, 2008), with much talk about job creation and socio-economic development through uranium mining and construction and operation of the plants.

Government explored offers from two companies: Areva, a French company, and Toshiba's Westinghouse from the United States (US), which owned shares in the PBMR project. Both options were too expensive (Department of Public Enterprises, 2008). Despite this, Director-General of the Department of Public Enterprises (DPE), Ms Portia Molefe, stated, "the South African government remains committed to introducing nuclear, because we have to deal with our carbon footprint, and we have to diversify our energy mix" (Department of Public Enterprises, 2008). It was suggested that the government explore new opportunities for nuclear development using a "strategic equity partner" (Eskom, 2009, p. 16). A new large-scale nuclear programme was presented in the 2010 Integrated Resource Plan (IRP) and approved in May 2011 (Department of Energy, 2011). The plan proposed the addition of 9.6 GW of nuclear energy in the energy mix by 2030 to mitigate risks to the security of supply (Department of Energy, 2011).

The IRP is a key energy planning process that guides decision-making about the choice of technology, planning and implementation timeframes based on expected energy demand and dictates investment and infrastructure decisions (Department of Mineral Resources and Energy, 2019).

The Department of Energy (DoE) prepares the draft IRP with Eskom and energy-intensive users (Montmasson-Clair & Ryan, 2014). It integrates energy policy priorities such as a low carbon trajectory, job creation and poverty alleviation strategies and sets different limitations, such as those on coal imports or caps on levels of renewable energy. The public participation process is critical to ensuring transparency around targets and limitations, which otherwise can manipulate outcomes. The 2010 IRP was made available for public comment and 5 090 specific comments were received, resulting in an increase in nuclear costs by 40% (Department of Energy, 2011).

The nuclear programme developed quickly. On 15 September 2011, the Minister of Energy, Ms Peters, announced that the proposal for the rollout of new nuclear power plants had been "signed off", was expected to be finalised by the end of 2011 and that the bidding process was expected to begin in 2012 (Flak, 2011). According to the Minister, Eskom would manage and operate the nuclear process, while the private sector would undertake the construction of the nuclear plants. At that time,

it appeared that implementation of the nuclear programme would be a quick and easy process, but the costs, lack of transparency regarding decision-making and lack of inclusive public dialogue about the nuclear strategy became critical challenges that caused delays to the implementation and resulted in a court case.

16.2.2 Symbiotic Visions of Zuma and Putin

Following the approval of the 2010 IRP, the presence of the Russian nuclear industry grew in South Africa. Rosatom, the Russian State Atomic Energy Corporation, joined the South African Nuclear Industry Association (NIASA) as a member-sponsor in March 2012. In June 2012, its Rusatom Overseas Joint Stock Company, responsible for international nuclear construction projects, signed a memorandum of understanding with the South African Nuclear Energy Corporation (NECSA) to undertake joint business projects in the fabrication of nuclear fuel, manufacturing of power equipment for nuclear power plants, production of radioisotopes and marketing (Press-service of JSC Rusatom Overseas, 2012). Rosatom opened a marketing office for sub-Saharan Africa in Johannesburg in July 2012; its third overseas office after the strategic decision was made in early 2012 to roll out 20 offices to improve international cooperation (Rossiyskaya Gazeta, 2012). Rosatom, which is a 100% SOE, serves as a vehicle for promoting the Russian nuclear industry. It is associated with regular corruption scandals involving top management, which provides evidence to support the notion that Rosatom is a critical player in Putin's elaborate neo-patrimonial network (Slivyak, 2019).

Russia felt politically supported in South Africa because President Vladimir Putin and President Jacob Zuma had developed a close relationship. Zuma had visited Russia for the first time in his official capacity in August 2010, a year into his Presidency, when then Russian President Medvedev offered South Africa the opportunity of "building nuclear power plants, [and] of joint exploration and development of uranium deposits" (Kremlin, 2010). With the acceptance of South Africa into the BRICS group of countries, the relationship between the two countries deepened. Zuma visited Russia at least seven times during his Presidency, which was unprecedented for a South African President.[2] Mandela and Mbeki had visited Russia only once during their terms of office.[3] In return, Putin visited South Africa in March 2013 (BRICS Summit) – Putin and Zuma met more than five times at other BRICS summits.[4] According to

2 State visits: August 2010 and 2011, May 2013 and August 2014; G20 Summit in Russia – September 2013, for Victory Day – May 2015; and as part of BRICS meeting in July 2015.

3 Mandela in April 1999 and Mbeki in July 2006, as part of the G8 meeting where South Africa was invited for consultations.

4 April 2010 in Brazil; April 2011 in China; March 2012 in India; July 2014 in Brazil; October 2016 in India and September 2017 in China.

press statements, the nuclear programme formed part of the conversation during all bilateral meetings.

Zuma and Putin appeared ideologically close. Like many other ANC cadres, Zuma and Mbeki had trained in the Soviet Union during the apartheid era and had ideological and emotional connections to Russia (Shubin, 2008; Filatova and Davidson, 2013).

The South African newspaper, *The Citizen*, claimed that the connection between the two Presidents was secure because "they worked together in the 70s and 80s during the apartheid years when Zuma rose to be the head of intelligence for Umkhonto weSizwe, and Putin gained increasing access to the levels of power in Russia's highly feared intelligence service, the KGB" (Cilliers, 2016). During his interview with *Business Day*, Zuma explained his understanding of the South Africa-Russian relationship as: "They would not come for us. They would understand, we would have an agreement to work out another arrangement. We know they [Russia] are trusted people. We know they will never sink us; they will lift us" (Maughan, 2019). Both Zuma and Putin openly used anti-west rhetoric differentiating the west from Russia and China in their support for the "real development" of African countries.

In addition, both Putin and Zuma were Presidents with legacy on their minds. Zuma was intent on radical economic transformation, and nuclear energy seemed like the best option for solving South Africa's severe energy scarcity challenge and ensuring that black people owned and controlled significant assets and supply chain in the industry. Going further, South Africa could become a leader in promoting nuclear energy on the continent, an idea that had been actively promoted by NECSA and other state officials during the PBMR project (Kantey, 2017). Zuma also had a more pragmatic interest in promoting nuclear energy as it would ensure that his family and their proxies gained economically from uranium mining (Gosam, 2017; Wa Afrika, Jika & Skiti, 2017).

The Gupta-linked company Oakbay purchased the non-operational uranium mine Dominion (renamed Shiva) on 14 April 2010. The state-owned Industrial Development Corporation (IDC) provided 90% of the purchase price for the mine (R250m) (amaBhungane, 2014). A minor shareholder in Shiva mine was Duduzane Zuma, son of President Zuma. Oakbay was meant to repay the funds in 2013, but the IDC opted to receive 3.6% shares in the mine instead (amaBhungane, 2014; Gosam, 2017). The IDC is now attempting to recover their investment through the courts (Sidimba, 2020).

For Putin, building a nuclear fleet in South Africa and regaining the geopolitical influence lost after the collapse of the Soviet Union would support the rebuilding of

"great Russia".[5] Putin has a long track record of using traditional energy resources (gas and oil) for political gains (Gonchar, Chubyk, Dyachenko, Ishchuk, Lakiichuk, Hychka & Mukhrynsky, 2017). The experience of nuclear power plant construction in Turkey and in some other countries illustrates how Russia is able to convert these projects into political gains (Nakano, 2020).

Exporting nuclear technology would generate economic benefits and satisfy both priority areas of Russian interest in Africa: international influence and access to mineral resources (Arkhangelskaya & Shubin, 2013). Western observers have criticised Kremlin-backed nuclear initiatives, describing them as a means for Russia to create energy dependencies and establish a semi-permanent foothold in Africa (Burke, 2019; Hairsine, 2020).

Multiple sources have suggested that 2013 was the most critical year for Zuma and Putin's agreement about the nuclear deal (Hunter, 2014; Wa Afrika, Jika & Skiti, 2017). As Putin himself explained in March 2013, "[i]n Durban, we reached agreements that were important for our bilateral relations" and in May 2013 in Sochi "[discussed] how to practically implement them" (Putin, 2013). The negotiations manifested in the signing of the intergovernmental agreement in 2014. The timing of the announcement coincided with Zuma's State of the Nation Address (SONA) in February 2014 at the annual opening of Parliament. Zuma mentioned nuclear energy for the first time since 2009, stating, "We expect to conclude the procurement of 9 600 MW [9.6 GW] of nuclear energy" (Zuma, 2014). He kept up the rhetoric in the following year's address, setting a target for the first new nuclear grid connection by 2023, stating that it would be "just in time for Eskom to retire part of its aging power plants" (Zuma, 2015). 2014 was also the year in which mention of renewable energy procurement disappeared from SONA speeches.

Testimony at the Zondo Commission by Nhlanhla Nene has shown that the nuclear deal was directly negotiated between Zuma and Putin (Zondo Commission, 2018b), while Pravin Gordhan has stated that the nuclear deal was personally driven by Zuma (Gordhan, 2018). According to Mcebisi Jonas, Zuma was exerting "immense pressure" to get it approved (Zondo Commission, 2018a, p. 30).

16.3 WHAT'S REQUIRED TO GET NUCLEAR?

The procurement of energy in South Africa is highly regulated and nuclear programme implementation requires significant coordination of efforts across multiple governing institutions (see Figure 16.1 on p. 339). The quality of the governance is ensured by

5 The concept of great Russia is described in multiple works of Aleksandr Dugin and had a strong impact on Putin during his first terms in power.

splitting functions such as licensing, procurement and control between different governmental institutions. There are also mechanisms of accountability built in via public participation processes and Parliament's oversight role.

The Electricity Regulation Act (Republic of South Africa, 2006), Nuclear Energy Policy (Department of Minerals and Energy, 2008), National Development Plan (2012) and IRP 2010 provide the legislative framework for the nuclear industry in South Africa (Prins, 2018). Figure 16.1 illustrates a simplified governance and regulatory structure for the sector.

The Minister of Energy[6] plays the most critical role because only she/he can issue a Section 34 Determination that specifies how much energy of each source is procured, based on the IRP (Republic of South Africa, 2006). The Minister of Energy also coordinates the authorities that set the "rules" for the nuclear programme (Prins, 2018):

a. The National Energy Regulator of South Africa (NERSA) regulates the energy industry and ensures licensing, monitoring, performance and compliance.
b. The National Nuclear Regulator is responsible for nuclear safety.
c. NECSA is mandated to undertake and promote research and development in the field of nuclear energy.

As the Minister of Energy is responsible for both promoting and regulating the nuclear industry, s/he is vulnerable to conflict of interests (IAEA, 2013).

The Minister of Public Enterprises oversees the SOE Eskom, the institution defined by energy policy as the owner of nuclear power plants. State ownership in nuclear power plants must be at least 50%, and energy needs to be procured based on the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness. Permission from the Minister of Finance/the National Treasury is required for procurement.

The Minister of Finance provides the final approval for public capital expenditure, state guarantees and the procurement process. Parliament bears final oversight of the procurement, licensing and regulation of nuclear energy, with public participation taking place at different stages.

The Minister of Environment is responsible for environmental Impact assessments, the mechanism that allows for public participation, and which was used by civil society to oppose the rollout of the nuclear energy programme (Kantey, 2017; McDaid, 2019).

6 Responsibility for South Africa's energy policy was allocated to Department of Minerals and Energy (DME) from 2004-2009; Department of Energy (DoE) from 2009-2019 and Department of Mineral Resources and Energy (DMRE) from 2019 onwards.

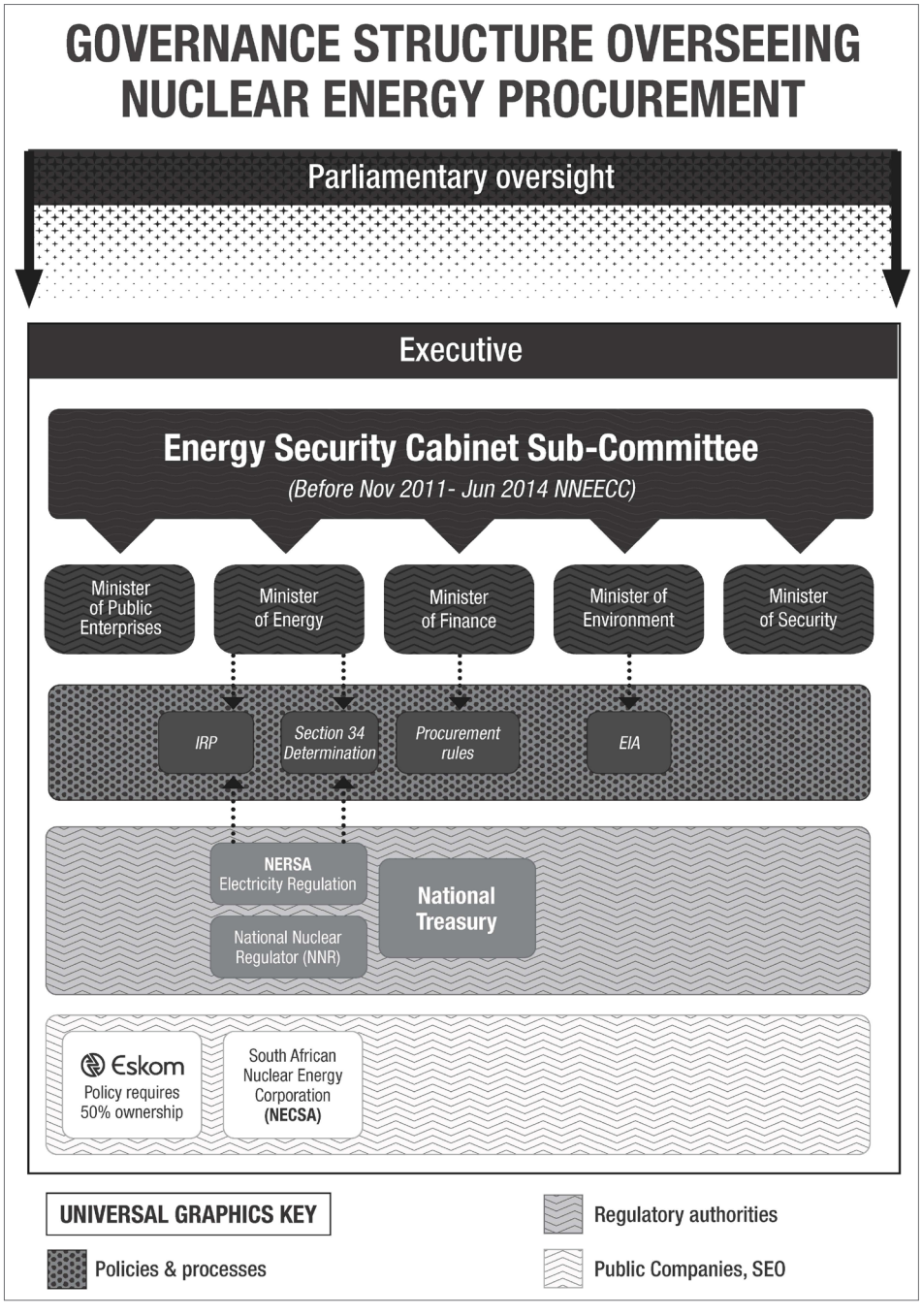


FIGURE 16.1 Organisational structure of South African institutions managing nuclear energy

The following section describes the breakdown in governance structures that allowed personal interests to operate in secret, manipulate and ignore policies and create

parallel processes, all the while disregarding the financial and development risks that the proposed deal held for South Africa.

16.3.1 Creating Unaccountable Structures: National Nuclear Energy Executive Coordination Committee/Energy Security Cabinet Subcommittee

On 9 October 2011, Cabinet established the National Nuclear Energy Executive Coordinating Committee (NNEECC) within the Presidency to "ensure implementation and exercise oversight over all aspects of this nuclear energy policy" (Department of Minerals and Energy, 2008, p. 22). This structure was established to coordinate efforts but was used instead to hide nuclear programme processes from the public and from Parliament.

Deputy President Kgalema Motlanthe, a loyal Zuma supporter, chaired the NNEECC when it was established. But in April 2013, Zuma claimed the position – he had in any case been acting as chair and officials sometimes "would be invited to two separate meetings, one chaired by Motlanthe and another chaired by Zuma" (*Fin24* and *City Press*, 2014). Later, in an interview in November 2015, Motlanthe criticised Zuma for not following the Constitution, stating that in the nuclear discussion there is "a monopoly in the realm of ideas, or you have people who have a consensus even before they discuss any subject matter…" (Mkokeli & Marrian, 2015). The NNEECC had several technical committees, the names of members were not disclosed to the public or to Parliament.

Former Finance Minister Pravin Gordhan suggested in his statement to the Zondo Commission that the NNEECC was established because "former President Zuma wished to procure 9.6 GW of nuclear power generating capacity for South Africa from Russia" (Gordhan, 2018, p. 16). The lack of transparency regarding the functions, structure and work done by the NNEECC led to diminished public and industry trust in government, making the committee just one of the examples of unaccountable structures that undermine collective political institutions (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo & Swilling, 2017).

16.3.2 A Reason to Pursue It: The IRP

The IRP itself posed the first challenge to implementation of the nuclear deal. The IRP goes through extensive public participation and approval processes. The IPR 2010 approved the procurement of 9.6 GW of nuclear energy. The Minister of Energy must refer to the IRP when issuing the S34 Determination to procure energy. The IRP is designed as a "living plan" because energy technology develops extremely fast. It is meant to be reviewed biannually. The IRP 2010 was thus due to be reviewed in 2012

(Department of Energy, 2011), but it took nine years for the next iteration to be gazetted in October 2019. This delay left open a window for nuclear implementation, despite the advances of alternative energy technologies during this time.

Provision had been made in the IRP 2010 for the Renewable Energy Independent Power Procurement Programme (REIPPP). The process got underway between 2011 and 2013 in procuring 2 400 MW of renewable energy from independent power producers (Martins, 2013). Renewable energy is a fast-changing technology and during the Window 3 procurement on 4 November 2013, the prices for renewable energy had already dropped from 202 ZARc/kilowatt hour (kWh) to 70 ZARc/kWh (Eberhard & Naude, 2017). When this new pricing was included in the draft update for the 2013 IRP model, the model indicated that the nuclear power decision could be delayed until 2025 or even post-2035, and "that alternative options, such as regional hydropower and shale gas, could fulfil the requirements" (Department of Energy, 2013, p. 8). The draft IRP 2013 was never approved by the Cabinet, and no comments were made as to why the process went silent. This conflict between renewable and nuclear energy defined the development of both industries over the next seven years as well as the energy discourse post-2017 (Kachur & LeRoux, 2021).

To address the conflict between the renewable and nuclear energy industries and to speed up the signing of the intergovernmental agreement with Russia (explained further), the NNEECC was transformed into an Energy Security Cabinet Sub-Committee (ESCS) in June 2014. This expanded its mandate to oversee the development of South Africa's future energy mix (Zuma, 2014).

Zuma chaired the ESCS, which included the Ministers of Energy, International Relations and Cooperation, Public Enterprises, Finance, State Security, Trade and Industry, Economic Development, Mineral Resources, Environmental Affairs and Defence. The Committee was responsible for all decisions and information with regards to feasibility studies, different aspects of technology and assessment of submissions for requests for proposals, and determination of the owner and operator of the new nuclear fleet. Gordhan, in his statement to the Zondo Commission, encouraged the Commission to "investigate the rationale for these changes and the activities undertaken by the ESCS in advancing 'the nuclear deal'" (Gordhan, 2018, p. 21).

All information about the agenda and documents of the NNEECC and ESCS were classified under the Minimum Information Security Standard Act (1996), designated as top secret and even kept from the Parliamentary Committee on Energy (The Presidency, 2015b). As Zuma controlled these institutions, he was able to prevent Eskom, government Ministers and Parliament from having any technical oversight or access to information regarding the nuclear deal.

THE TOXIC NUCLEAR
THAT NEARLY COST SA TRILLIONS

UNIVERSAL GRAPHICS KEY

- Disasters
- Interactions with Russia
- Questionable interests
- In the public's interest
- Shadow State Power Elite
- State energy concerns
- No public participation



Vladimir Putin

For Putin, Rosatom is key to the expansion of Russia's geopolitical influence. Having secured a relationship with Zuma during apartheid, South Africa presented an entry point for Russia's nuclear presence on the continent.

Dikobe Ben Martins

Zuma appoints struggle veteran, Martins as Minister of Energy, 2013. Martins kicks off Russian Nuclear Deal by stalling 2013 Integrated Resource Plan (IRP) and signing Determination 34 for nuclear energy.



David Mahlobo

Trained in Russia during apartheid, Mahlobo as Minister of State Security is believed to be Russia's eyes and ears in government. He is appointed Minister of Energy in 2017, advancing the Nuclear Deal even after the High Court finds it unlawful and unconstitutional.

Jacob Zuma

Trained in the Soviet Union during apartheid, Zuma developed close ideological and political affinity with Russia & Putin. He visited Russia seven times during his presidency, pushing the Nuclear Deal to cement this bond regardless of cost.

Tina Joemat-Pettersson

Staunch Zuma supporter, Joemat-Pettersson is appointed Minister of Energy by Zuma in 2014 (despite 2 prior scathing Public Protector findings against her). She oversees much of the Nuclear Deal's unconstitutional processes including signing the second Determination 34.

1989
SA dismantles its nuclear weapons.

1993
To retain & develop local nuclear energy IP/capabilities the Pebble Bed Modular Reactor (PBMR) project is started.

1999
PBMR becomes a State-Owned Enterprise (SOE).

2007
Eskom board announces plans to construct 12 nuclear reactors to grow the country's overall electricity capacity with +20 GW by 2025.

2008
After bids from Areva (France) & Westinghouse (US), nuclear option is deemed too expensive. (Rosatom not selected as a preferred bidder).

2010
PBMR project officially closed - Riddled with accusations of corruption & inadequate public participation the R9bn project never produced a demonstration model.

Gupta-linked Oakbay purchases 'Dominion' uranium mine with IDC support. Duduzane Zuma's company gains shares in mine.

One year into presidency, Jacob Zuma makes first official visit to Russia.

1989 · 1993 · 1999 · 2007 · 2008 · 2010 to 2012

FIGURE 16.2 Timeline of the Nuclear Deal

DEAL WITH RUSSIA
AND LAID THE RAND TO WASTE

Zuma's firing of Nene cost South Africa an immediate loss of over
R500 Billion
in equities alone

9.6 GW of nuclear energy approved by 2010 IRP, to be operational by 2030. Same IRP also approves the 2.4 GW Renewable Energy Independent Power Procurement Programme (REIPPP) delivered by independent power producers.

Fukushima nuclear disaster.

National Nuclear Energy Executive Coordinating Committee (NNEECC) established to coordinate efforts. Minister Peters announces roll-out of nuclear power plants.

Russia opens Rosatom office in Johannesburg.

Nuclear Deal "principal agreement" reached during Putin's SA visit for BRICS summit.

Zuma becomes Chair of NNEECC. Committee documents remained secret from Parliament and the public.

Zuma visits Russia (Sochi) "to discuss practical steps" of Nuclear Deal.

Zuma visits Russia to attend G20.

2013 IRP draft updated but not approved
Cost of renewable energy (RE) drops from 202 ZARc/kilowatt hour (kWh) to 70 ZARc/kWh. Suggestions to delay nuclear until 2025 in draft IRP.

Intergovernmental Agreement (IGA) with Russia is ready but National Treasury won't sign without feasibility study.

Determination 34 for nuclear energy signed by Minister of Energy Ben Martins. (Only disclosed in December 2015)

NNEECC is replaced with Energy Security Cabinet Sub-Committee (ESCS) to oversee all future energy mix - Zuma chairs.

South African Nuclear Energy Corporation (NECSA) becomes an implementing agent for nuclear programme as Eskom is financially unstable.

Zuma visits Russia for "medical" reasons - returns with the negotiated details of Nuclear Deal.

New Minister of Energy Tina Joemat-Pettersson signs IGA on Strategic Partnership & Cooperation in the Fields of Nuclear Power & Industry with Russia

Zuma visits Russia to celebrate WWII, Victory Day.

Joemat-Pettersson tables agreement with Russia as non-technical & non-binding, avoiding parliament & public debate.

Zuma visits Russia for BRICS meeting & asks Minister of Finance Nene to sign the state guarantee with Russia without the feasibility study. Nene refuses.

Eskom CEO Brian Molefe refuses to sign purchasing agreements with REIPPP plants & pushes nuclear.

Anti-nuclear activists, Makoma Lekalakala of Earthlife Africa Johannesburg (ELA–JHB) & Liz McDaid of the Southern African Faith Communities' Environment Institute (SAFCEI), launch a High Court case against government to stop nuclear development on grounds of irregular Russian Nuclear Deal & lack of public participation.

Mcebisi Jonas is offered R600m bribe by Gupta family to become 'their' Minister of Finance. He informs Nene.

Nene Gate
Zuma fires Nene, appointing Des van Rooyen – financial market responds, inflation rising from R14.59 to R15.90. 3 days later Zuma is forced to replace Van Rooyen with Gordhan.

Final EIA report submitted to Department of Environmental Affairs for approval. Eskom submits site licence applications to National Nuclear Regulator (NNR) for both Thyspunt & Duynefontein Nuclear Power Plant (NPP) sites.

NERSA no longer financially able, Eskom is made owner, operator & procurer for nuclear power plants. 2nd Determination 34 is signed & published accordingly.

New IRP 2016 draft published for comments, but not approved by Cabinet.

Eskom announces Request For Proposals (RFP) for nuclear power plant (NPP) construction.

Treasury withdraws authorisation for Request for Proposal (RFP) and tones it down to a non-binding Request for Information (RFI) instead.

Zuma fires Gordhan & Jonas - South African Rand drops 7.7% in less than a week.

Nationwide mass protests demand Zuma leave office.

High Court rules the Nuclear Deal unlawful & unconstitutional based on further findings of irregular approval processes.

Minister of Energy Mahlobo announces IRP 2017 has been finalised & approved by cabinet. Following an outcry by civil society for lack of transparency, the plan was never gazetted or shown to the public.

Zuma forced to step down as President - replaced by Cyril Ramaphosa.

Government publicly abandons plans to build 9.6 GW nuclear.

Almost 10 years later the official, updated IRP 2019 is gazetted. New energy mix sees renewables increase to 6.8 GW with coal still the primary energy source. Nuclear remains an option with plans for 2.4 GW.

2013 2014 2015 2016 2017 2018

16.3.3 Estimating the Costs of Nuclear Energy and Political Will

Nuclear power projects, whether they are in the US, Russia or China, are tightly connected to the military sector and because they are hardly ever based on pure market principles tend to easily run over budget (Nakano, 2020). To finance these expensive projects, it is most common to combine state funding with private funds (Pehuet Lucet, 2018). In such situations, political commitment is critical. According to the head of Nuclear Infrastructure Development at the IAEA, new nuclear programmes require "broad political and popular support and a national commitment of at least 100 years" (Gil, 2018). South Africa lacked such a commitment.

The country's 2012 National Development Plan sets out the country strategy for South Africa until 2030 and it noted serious concerns about the development of nuclear energy and the need to "reassess the timing and/or desirability of nuclear power" (National Planning Commission, 2012, p. 172).

The DoE had invested R200m for "preparatory work" to conduct the feasibility study between 2012 and 2017; 80% of this went to Central Lake Trading (trading as Empire Technology), owned by Shantan Reddy, the son of Zuma's friend Vivian Reddy (Department of Energy, 2015b). In December 2013 when the National Treasury received a draft feasibility study for the nuclear programme, it became apparent that, according to Nene's statement to the Zondo Commission, "regardless of the underlying policy rationale to develop nuclear energy capacity, the costs associated with it are astronomical" (Nene, 2018, p. 22). The estimate of costs differed significantly; for example, head of Rosatom Sergey Kiriyenko estimated the programme's total cost at between $40-50bn, which would include "preferential" funding from the Russian state budget and up to $10bn in contracts for local companies (TASS, 2014). Then Minister of Finance Gordhan's[7] estimate was around R1tn (Gordhan, 2018). When including the establishment of a local fuel supply, the building of waste facilities and the decommissioning plan, project costs would likely reach R1.4tn (Staff Reporter, 2015). The lack of clarity around the financial model made it impossible for the National Treasury to support the procurement process.

A successful nuclear programme requires long-term state commitment in terms of resources, policy and time because the process from initial conceptualisation to electricity production at maximum capacity, waste management and eventual decommissioning is both long and exorbitantly expensive.

7 Pravin Gordhan was South Africa's Minister of Finance from 2009-2014 and 2015-2017.

16.3.4 Non-disclosure of Information that Should Be Available for Public and Parliamentary Oversight

Despite the lack of support from the National Treasury and the fact that the draft IRP 2013 had suggested the postponement of the nuclear energy programme, it was approved. In December 2013, the key document for the procurement process – the S34 Determination for 9.6 GW of nuclear energy – was signed by then Minister of Energy Ben Martins and the Head of NERSA Ms Cecilia Khuzwayo (Department of Energy, 2015a). This document was not disclosed to the public for more than two years. It was finally gazetted on 21 December 2015, a few weeks after SAFCEI and ELA Jhb launched the court case against the programme based on the lack of public participation. There was no explanation given by government as to why this document had not been made public.

Pressure to sign the intergovernmental agreement on nuclear cooperation with Russia was growing. The agreement was ready for signing in November 2013 but disagreements with the National Treasury and the absence of the S34 Determination stopped it from going ahead (Western Cape High Court, 2015; Zondo Commission, 2018c). Then Minister of Energy, Ms Joemat-Pettersson, wrote to Zuma explaining the delay as due to "technical issues" that had not allowed her predecessor (Martins) to sign the agreement, but that these issues were finally resolved (Western Cape High Court, 2015). On 21 September 2014, Rosatom and Joemat-Pettersson signed the intergovernmental agreement *On Strategic Partnership and Cooperation in the Fields of Nuclear Power and Industry* (Republic of South Africa and Russian Federation, 2014). The parties issued a joint press statement in which Rosatom announced that they had secured the right to build the capacity for 9.6 GW of nuclear power in South Africa (Department of Energy, 2014).

On 22 September, the Minister of Energy clarified that this was only one agreement and that similar agreements had and might be signed with other countries. Similar, but not legally binding agreements were signed with the US (2009); South Korea (2011) and later with China and France (2014). Nevertheless, the contents of the agreement with Russia were not disclosed to the public or Parliament until leaked by the EcoDefense, Russian environmental activists (Western Cape High Court, 2015; McDaid, 2019). The document outlines the structure of the Russia-South Africa agreement and indicates that Russian technology would be used exclusively for the construction of the 9.6 GW capacity against South Africa's constitutional requirements for open bidding. The agreement also proposed a tax exemption (Article 9) for the nuclear cooperation programme (Article 3 describes the design, construction, operation and decommissioning of nuclear power plants in South Africa). It also left space for the negotiation of the location and rollout of 7.4 GW prescribing only the location of an initial 2.4 GW (Article 4) (Republic of South Africa and Russian Federation, 2014).

On June 2015, the Minister of Energy bypassed legislative requirements by tabling the agreement instead of submitting it for approval by resolution as suggested by the State Law Advisor (Western Cape High Court, 2015). This example of non-disclosure to the public or Parliament of critical information has significant implications for the financial stability of the country and illustrates the secrecy surrounding the nuclear deal.

16.3.5 The Implementing Agent: Stretching SOEs with Financial Obligations

The door to procurement for the nuclear programme seemed to be open with the signed intergovernmental agreement, but new challenges arose from Eskom's financial instability. Eskom is defined as the owner of any nuclear power generation plants (Department of Minerals and Energy, 2008) and as the procurement agency in the S34 Determination signed by Minister Martins in 2013 (Department of Energy, 2015a).

Its financial situation had deteriorated in June 2014 and its Fitch rating revised from stable to negative (Eskom, 2014). Its debt was at more than R250bn (Mbatha & Crowley, 2014) and the Eskom Board was forced to write to the DoE indicating its inability to commit to any funding beyond already existing commitments (Gordhan, 2018). NECSA became the implementing agent in June of that year "to mitigate delays with the nuclear programme" (PMG, 2016). Fuzile in his statement to the Zondo Commission noted that NECSA, predominantly a government-funded research institution, lacked financial soundness and implementing capacity (Fuzile, 2018).

Eskom management changed in 2015 with Brian Molefe appointed as CEO and Ben Ngubane as Board Chairman[8] (Eberhard & Godinho, 2017). The Board reported to the DoE in September 2015 that the financial situation of the company had improved and that it was capable of being the majority owner and operator for the nuclear programme. According to Joemat-Pettersson's presentation to Parliament, the funding for the procurement programme would come from Eskom's balance sheet (PMG, 2016). Molefe halted procurement of renewable energy within the REIPPP to remove any threat to the nuclear programm, and contracts during the Window 4 period remain unsigned until March 2018 when Cyril Ramaphosa came to power.

Cabinet approved Eskom as the owner-operator and procurer for nuclear power plants on 2 November 2016 in accordance with the 2008 Nuclear Energy Policy and approved NECSA as the procurer for the fuel cycle and multi-purpose reactor for the new nuclear fleet. In the same month, a new draft IRP 2016 was published for comment. It included building capacity for 1.4 GW of new nuclear capacity by 2037,

8 The appointments of Mr Molefe and Dr Ngubane were later investigated in a parliamentary inquiry into Public Enterprises.

and a total of 20 GW (electrical) over the long term (Department of Energy, 2016b). This document included a number of manipulations, such as a cap on renewable energy (Wright, Bischof-Niemz, Calitz, Mushwana, Van Heerden & Senatla, 2017) and it did not contain calculations of the least cost scenario (Levington, Van Dyk, Eberhard & Bischof-Niemz, 2016). The Council for Scientific and Industrial Research noted that both least cost and uncapped decarbonised scenarios would result in cheaper, cleaner (fewer emissions and less water usage) energy that had the potential to create more jobs (Wright, Bischof-Niemz, Calitz, Mushwana, Van Heerden & Senatla, 2017). After opening for comments, however, the IRP 2016 process went silent and was not signed or approved by the Cabinet.

On 14 December 2016, the second S34 Determination was signed for the full nuclear capacity of 9.6 GW with the adjusted ownership (Department of Energy, 2016a). But six days later, the National Treasury withdrew authorisation for the request for procurement and toned it down to a non-binding request for information instead – to be handled by Eskom. The request for information asks countries that wish to bid as suppliers to answer questions on the localisation of construction and fabrication of the technology, training schemes, intellectual property sharing and exposure and other issues that form the basis of any large-scale construction programme.

16.3.6 Securing Control: The Five Ministers of Energy, Manipulating the Process to Seal the Deal and Nene-Gate

South Africa's President has the full authority to appoint or dismiss Ministers and Deputy Ministers. In what has become known as Nene-Gate, Zuma fired Finance Minister Nene in December 2015, apparently for his refusal to sign off on the nuclear deal and several other procurement deals relating to Denel and Transnet – two other SOEs that were heavily looted during the state capture period. Nene-Gate was the turning point in the nuclear deal and revealed to the public the National Treasury's opposition to Zuma, as well as unveiling an important player in the resistance to state capture – the country's financial markets.

In July 2015, Nene refused to sign the state guarantee to Russia without the feasibility study. He explained that for him, as a Minister of Finance, it was important to ensure "the secure, accountable, transparent, sound, effective and efficient management of the country's public finances, sovereign debt and the economy at large" (Zondo Commission, 2018b, p. 70). On 9 December 2015, Zuma fired Nene.

Just several hours earlier, Joemat-Pettersson had presented an outdated report to Cabinet on the cost estimations of the nuclear programme (De Lange, 2018), using an exchange rate of ZAR10/USD1 when the actual exchange rate was more than ZAR14/USD1. On the same day, Zuma's Cabinet approved procurement of the 9.6 GW

nuclear programme. Cabinet decided not to disclose the cost of the project to the public (Gordhan, 2018).

Zuma appointed Des van Rooyen as Finance Minister, which led to an immediate reaction from the financial markets. In just 48 hours, the rand exchange rate grew from R14.59 against the US dollar to R15.90 (Bezuidenhout, 2019). This forced Zuma to replace Van Rooyen with a more acceptable choice for financial markets and within three days of Nene's firing, Pravin Gordhan was appointed Minister of Finance. In his media statement, Zuma explained that he had changed Ministers due to public concerns because he had "received many representations to reconsider" his decision (The Presidency, 2015a). In March 2017 when Zuma fired Gordhan and his deputy Mcebisi Jonas, rating agencies, such as Fitch Ratings, Moody's Investor Service and Standard & Poor's, downgraded South African indexes as a direct response, according to Gordhan's statement to the Commission (Gordhan, 2018). This did not, however, influence Zuma's decision in this instance.

Nene-Gate also illustrated the different capacities for resistance between the ministries of Energy and Finance. Organisations dependant on decisions of the Minister of Finance, such as the financial markets, held significant political weight while organisations affected by decisions of the Minister of Energy did not. During Zuma's reign as President, there were five Ministers of Energy: Dipuo Peters (10 May 2009 to 9 July 2013), Dikobe Ben Martins (9 July 2013 to 25 May 2014), Tina Joemat-Pettersson (25 May 2014 to 30 March 2017), Mmamoloko Kubayi (30 March 2017 to 17 October 2017) and David Mahlobo (17 October 2017 to 25 February 2018)[9] (Van Onselen, 2017). The rapid cycling of Ministers did not evoke the same political and financial crisis as the removal of Minister Nene.

The officials cited in *Sunday Times* news articles on the topic suggest the direct involvement of the Russian Presidency in the dismissal of Minister of Energy, Ms Mmamoloko Kubayi. On her appointment, she had launched several investigations into irregularities in the nuclear tender process and had suspended high-level officials (Joubert, 2017). The *Sunday Times*, based on interviews with undisclosed officials, reported that during Minister Kubayi's visit to Russia in June 2017, she had refused to sign any commitments on the nuclear deal before the new IRP came out in February 2018. According to *Sunday Times* sources, the Russian representatives requested that Zuma replace her (Wa Afrika, Jika & Skiti, 2017). In her place, Zuma appointed David Mahlobo, a former State Security Minister who was trained in Russia.

9 Their respective lengths of term in office cast some light on their utility to Zuma and should be read in conjunction with the obstacles to the nuclear deal discussed in this section. Peters: 4 years, 1 month and 8 days; Martins: 10 months and 24 days; Joemat-Pettersson: 2 years, 10 months and 29 days; Kubayi: 6 months and 16 days; Mahlobo: 4 months and 242 days.

According to Forensics for Justice, Mahlobo in cooperation with Russian experts conducted illegal surveying of ANC members and other important personas in South Africa (Forensics for Justice, 2018). In his position as State Security Minister, he was believed to be the Russians' eyes and ears in the South African government. Mahlobo's loyalty to Russia is proven by his continued engagement with Russian counterparts even following the High Court's decision on 26 April 2017 to ensure that the procurement of 9.6 GW of nuclear energy remained an option (Mahlobo, 2017).

On 7 December 2017, after the fast organised Africa Energy Indaba, with invitations sent to the public just a few days before the event, Minister Mahlobo announced that the public consultation process was finalised and that the long-awaited IRP 2017 had been approved by Cabinet. Mahlobo stated that all energy sources would remain the same, but be reduced by 20% due to decreased demand (Joubert & Magubane, 2017; Yelland, 2017). This statement caused an outcry from civil society organisations because of the lack of a public consultation process (Centre for Environmental Rights, 2017). Despite the Minister's statement and his reassurance to Parliament that the IRP was finalised (PMG, 2018), the plan was never gazetted or shown to the public. The Russian Embassy denied its involvement in South African politics (Kulyaev, 2017).

While Zuma managed to overcome a lot of obstacles in operationalising the nuclear deal, civil society organisations, with the support of media and justice institutions, delayed its implementation until Zuma ran out of time.

16.4 DEMOCRACY AT WORK: CIVIL SOCIETY AND THE HIGH COURT

Civil society resistance to the nuclear deal had reached new heights in October 2015, when Lekalakala and McDaid launched a legal challenge against the deal (Western Cape High Court, 2015). Both women were anti-apartheid activists with long histories of resistance and struggle. Since early 2013, they had held standing protests every Wednesday in front of Parliament against the new nuclear programme. There were also some ANC allies, such as the Congress of South African Trade Unions (COSATU) and the National Union of Mineworkers (NUM), who spoke out against the nuclear deal after President Zuma's SONA in 2014 (Mammburu, 2014).[10]

Investigative journalists from the *Mail & Guardian*, amaBhungane, *City Press*, *Business Day*, and the *Daily Maverick* played a significant role in building public awareness around the nuclear deal and in enabling the launch of the Public Protector's investi-

10 In June 2014, it was unclear whether Zuma would review his nuclear ambitions after the government's alliance partners, COSATU and NUM, aired objections to the President's pro-nuclear SONA delivered on 17 June. COSATU aired its position on the matter in a statement (COSATU, 2014) and the NUM expressed itself very strongly after a special meeting of its National Executive Committee on 19 June 2014.

gations (Public Protector, 2016). The journalists provided considerable insight into the nuclear deal processes, giving whistle-blowers in government institutions the opportunity to speak out about corruption from as early as 2011. The media attention and public awareness became enabling factors that supported the work of civil society organisations on litigation and in protests. Finally, on 26 April 2017, the High Court ruled the nuclear deal unlawful and unconstitutional, based on the following findings:

- The intergovernmental agreement with Russia had been tabled by the Minister in Parliament as non-technical and non-binding instead of debating and seeking acceptance by Parliament of a binding agreement.
- Both Determinations 34 (signed in 2013 and 2016) were declared unlawful and unconstitutional because due process had not been followed.
- NERSA had not undertaken any public participation processes, as required by law and had failed to assess both Determinations 34 properly.

McDaid has noted that the application to the Western Cape High Court was not a random choice; it was selected as a court that would have the capacity to ensure an independent ruling (McDaid, 2019). For civil activists to succeed in a legal case, they need to have the necessary capacity. The anti-nuclear movement in South Africa appears to be well-established with a history of successful litigations on information disclosure and public participation.

16.5 NUCLEAR DISCOURSE POST-ZUMA

Cyril Ramaphosa became President in February 2018 and made changes to the Cabinet and the Boards of SOEs. Following the appointment of Jeff Radebe as the Minster of Energy, the draft IRP 2018 was tabled for comments on 27 August 2018, signed and eventually gazetted in October 2019 (Department of Mineral Resources and Energy, 2019).

The original draft of the IRP had not included procurement of nuclear energy, but several NGOs lobbied for the inclusion of nuclear energy. The National Society of Black Engineers of South Africa, the Black Business Council and the South African Energy Forum (SAEF) jointly submitted their "People's IRP" document to Parliament's Commission on Energy. This submission suggested that nuclear and coal energies should play a significant role in the South African energy mix to drive economic development (Black Business Council and South African Energy Forum, 2018). The document suggested an increase from the currently installed 1.8 GW of nuclear power to 29 GW of installed nuclear generation by 2050. SAEF, an NGO that actively protects Zuma's interests and is not transparent regarding its funding and membership, set up a Twitter campaign and established dedicated WhatsApp groups to promote nuclear

energy as a technology that would allow for transformation in South Africa and to position renewable energy as serving private Western interests (Kachur & LeRoux, 2021). While nuclear energy can be a valid option for South Africa, the funding and representation of current lobbing organisations are secretive, creating suspicions about transparency and accountability of any future nuclear programme.

The long-awaited IRP 2019 was then gazetted, but it was an "older version" that stated that South Africa would "immediately commence the nuclear build programme to the extent of 2,5 GW because it is a no-regret option in the long term" (Omarjee & Cronje, 2019; *BusinessTech*, 2019).

The revised, official document then changed to: "Commence preparations for a nuclear build programme to the extent of 2.5 GW at a pace and scale that the country can afford because it is a no-regret option in the long term" (Department of Mineral Resources and Energy, 2019, p. 48).

16.6 CONCLUSION

South Africa needs a large-scale, evidence-based public dialogue about the country's energy mix to foster a common understanding and to develop a shared strategy. It is critical that the government's procurement process for energy, whether renewable or nuclear, is transparent and accountable. Not following transparent procurement processes will inevitably lead to significant developmental and financial losses, like those that occurred when the REIPPP programme was halted in 2015, while all the investments in the nuclear programme up until 2017 came to nought.

The nuclear energy deal has illustrated how legislation can be manipulated, institutions overpowered, and decision-making processes shaded from the public to serve personal and geopolitical interests. More specifically, NERSA has proven itself incapable of ensuring the independent regulation of energy processes. This needs to be addressed to ensure transparent and accountable energy procurement processes in the future.

The deal has also illustrated how a well-crafted legal framework and an active civil society can prevent those in executive power from taking unilateral and irrational decisions. A few of the factors that prevented the nuclear deal from being implemented were the bravery of whistle-blowers, the strength of the financial system, international regulatory systems, an active civil society and South Africa's Western Cape High Court.

The personal examples of public servants who openly spoke out against corruption like Nene, Gordhan, Jonas and many other whistle-blowers, play an important role in setting examples of good governance. The agency of the individual in defending the principals of democracy is essential. In this act, we are reminded that often it

is singular people who take personal risks in the interests of good governance and transparency. The financial markets acted as a counterweight to individual political ambitions in its vehement reaction to the dismissal of Nene, triggering Nene-Gate. This negated the appointment of a new Minister of Finance more supportive of Zuma's ambitions who would most likely have approved the deal. The IAEA requirement for an intergovernmental agreement between South Africa and Russia for the purpose of building nuclear power stations provided an opportunity for civil society to submit their opposition to the courts and expose the dangers related to the proposed agreement. An active civil society was able to collect evidence and pursue the legal court case against the government without fear of reprisal from the state. And the Western Cape High Court was able to make an independent ruling and thus ensure a fair and transparent outcome. The independence of the judicial system is crucial for democracy to flourish.

Looking back at this protracted and desperate battle against power held by manipulative and largely self-serving hands, an important question needs to be asked: what needs to happen to prevent attempts of a corrupt nuclear deal in future? McDaid (2019) notes that, "We will keep going in loops unless we extract people from the department who were taking bribes and put them in jail". The Zondo Commission, which began its work on 21 August 2018 and was still hearing testimony at the time of writing, is an attempt to restore justice and heal the state from the rackets of corruption, but much will depend on its final report and the subsequent actions taken by state institutions. Individuals that have been removed from state institutions due to misconduct are already interviewing for reappointment, such as NECSA CEO Phumzile Tshelane (Yelland, 2020).

What is chillingly clear is that South Africa's failed nuclear energy deal, in which two Presidents tried to implement an ambitious project not aligned with this developing nation's energy demand and financial capabilities, remains a reality in another 18 countries on the African continent where discussions about building nuclear power stations by Rosatom continue.

In 2020, the DMRE issued a request for information to be able to assess nuclear technologies for the 2.5 GW capacity stipulated in the 2019 IRP. The department explains this as a market testing exercise and is exploring the option of modular reactors. With job creation, social equality and a Covid-19 recovery economic pathway as priorities for South Africa, the exploration into any energy option, including nuclear, needs to comply with transparent and accountable governance processes and sound development practices.

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Part 5

STATE CAPTURE IS A MIRROR OF THE GLOBAL RACKET



17 FROM THE MARGINS TO THE CENTRE: PRIVATE SECTOR'S ROLE IN STATE CAPTURE

Michael Marchant and Mamello Mosiana

17.1 INTRODUCTION

In the South African imagination, the phenomenon of state capture has been largely relegated to the story of corrupt actors within the executive branch of government, dubious middlemen, and the disintegration of governance at state-owned enterprises. It remains crucial to analyse the public sector, and the vulnerability of public procurement processes at SOEs to manipulation for personal gain. It is similarly important to interrogate the causes of institutional weakness in the state that contributes to governance failure. Yet, this analysis should not exclude the role of South African and international private corporations. These actors have been both enablers and active participants in corruption. Any analysis of state capture that does not account for the private sector's role is incomplete.

Private professionals play a key role in constructing a global architecture to move and obscure the proceeds of grand corruption, and in effect, legitimise these illicit gains (Radu, 2019). Without the facilitation of money laundering by private-sector professionals, it would not be possible for those engaged in the looting of SOEs to profit from their crimes. Money laundering requires the active assistance or wilful ignorance of banks, company formation agents, auditors, lawyers and consultants. While the façade of legitimacy enjoyed by these professions shields them from meaningful scrutiny, they have regularly made the decision to privilege profit over their legal and ethical responsibilities. In the case of state capture in South Africa, these professionals were on the front-line of observing that their systems and services were being used to enable grand theft. Yet they failed to act, placing profit above their legal duties.

In this chapter, we move these actors to the centre of state capture analysis. In doing so, we analyse the systemic role of private corporations as enablers of grand corruption, including the looting that defined the particular era of 'state capture' under the Zuma administration. The chapter will then use this framework to explore the role of these private 'enablers' in the capture and looting of Transnet.

17.2 GLOBAL FINANCE: ENABLING GRAND CORRUPTION

There are a set of myths that have hindered the interrogation of how the private sector assists money-laundering for the corrupt, terror groups, drug traffickers, authoritarian regimes, and those involved in organised crime. The first myth is that corruption is a problem related only to governments, and second that corporate crime ought to be separated from public sector crime (Open Secrets, 2018, p. 6). These myths can be dispelled by the evidence found in the Panama Papers and Luxembourg Leaks – both of which reveal a network of bankers, accountants and lawyers engaged in and assisting corrupt officials and corporations around the world (Ballard, 2018). Their systems move and conceal billions in corrupt proceeds. Closer to home, the two-decade long corporate fraud at Steinhoff was pulled off through a network of secret front companies around the world that allowed Markus Jooste and other Steinhoff executives to stash wealth in secret (McKune, amaBhungane & Thomson, 2018).

South Africa's history evidences the confluence of private and public interests in profiting from a crime against humanity. Integral to the survival and violence of the apartheid regime, was a network of international banks and arms companies, predominantly in Europe, that collaborated with the government in contravention of UN Sanctions (Van Vuuren, 2017). Foreshadowing contemporary stories of state capture, these crimes were achieved through anonymous shell companies and banks willing to facilitate their illicit payments.

The term 'state capture' has been used most recently and popularly by the World Bank to describe the 'capture' of state institutions in former soviet-bloc countries by private interests, including politically connected corporations (Kaufmann, Hellman, Jones & Schankerman, 2000; Yakovlev & Zhuravskaya, 2009). The uncovering of the Russian Laundromat in 2014 (OCCRP, 2017), the Troika Laundromat in 2019 (Radu, 2019) and the burgeoning Danske Bank "scandal" has illustrated how corrupt state actors laundered money through Eastern European banks, who in turn moved this money extensively through European and American banks (OCCRP, 2018). Secretive corporate vehicles in the UK and its crown dependencies are equally important to this financial architecture.

Yet, as has been the case in South Africa, analysis of the capture of former USSR states has been confined to the names of political actors like Russian President, Vladimir Putin, and Azerbaijani President, Ilham Aliyev. The evidence shows that, without some of the world's largest and wealthiest banks (including Danske Bank and Deutsche Bank) and anonymous corporate vehicles set up in the United Kingdom, these actors would be unable to disguise, legitimise and ultimately enjoy their ill-gotten gains (Bullough, 2018). Therefore, one cannot say that the capture of one state is geographically

confined to its borders. Rather, the evidence shows that grand corruption involves the extensive involvement of a secretive global financial architecture.

17.3 THE ROLE OF BANKS

Money laundering is a lucrative industry. The United Nations Office for Drugs and Crime (UNODC) suggests that up to $2tn is "laundered" every year – a staggering 5% of global GDP (Katz, 2019). Global banks are at the heart of this system. There are a range of hard and soft law requirements for countries and financial institutions to combat the scourge of money laundering. In most jurisdictions, including South Africa, it is a requirement for all banks to institute and enforce anti-money laundering (AML) systems, including the requirement to Know Your Customer (KYC). South Africa is also one of 36 member jurisdictions of the Financial Action Task Force (FATF), an intergovernmental body established in 1989 to combat money laundering (FATF, 2019).

The FATF's typology of money laundering is as follows: illicit funds are "placed" into the financial system by deposit (often through multiple smaller transactions) into a bank account, this is called "smurfing". Then, the money is "layered" which involves moving assets through multiple accounts (often in different jurisdictions and in the name of front companies) to make them untraceable (Open Secrets, 2018, p. 28). Banks are crucial to the placement and layering phases of money laundering (FATF, 2019). Once the money is cycled within the global banking system, it is hard to distinguish 'dirty' money from 'clean' money, thus the money is 'laundered'. This typology will be immediately familiar to those who have seen how the Gupta network laundered kickbacks from corrupt deals through the legitimate banking system.

Under South Africa's Financial Intelligence Centre (FIC) Act, banks are required to investigate the identity of their clients and consider "the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent business or lawful purpose" (Republic of South Africa, 2001, section 21 c (a)(ii)). This is in line with FATF recommendations.

These requirements are shared across most jurisdictions today. Yet in many cases in the past decade, banks appear to have fundamentally failed to fulfil these most basic anti-money laundering requirements.

Standard Bank, for example, held accounts for Gupta shell company Homix, which has been implicated in laundering kickbacks related to several corrupt SOE contracts, including receiving a multi-million 'kickback' from Neotel to access a lucrative contract with Transnet (Bezuidenhout, 2019). South African Reserve Bank official Mr Shiwa Mazibuko testified to the Zondo Commission of Inquiry that the Homix

transactions raised almost every single red flag for money laundering and that it was inexplicable that Standard Bank did not pick up on the risk. Mazibuko also said that, if Standard Bank did pick up on these risks, it did not act on the warning signs (Zondo Commission, 2019).

Standard Bank is not the only bank implicated in such failures. Most of South Africa's big banks and many global banks facilitated money flows linked to the plunder of SOEs. The Estina dairy project in the Free State is one such example, it should have alarmed banks that a small shell company (Estina) suddenly started receiving large sums from the Free State Department of Agriculture for a dairy project. Most of this money was diverted through Dubai-based shell companies, and some was used to pay for the luxurious Gupta wedding at Sun City. Despite numerous red flags, First National Bank, Standard Bank, and the Bank of Baroda (amongst other international banks) all facilitated the money flows that enabled this (Pather, 2018).

These local failures are indicative of systemic global failures in the banking system. Despite burgeoning legal requirements to combat money laundering – breaches and failures of these systems are on the rise. In 2018 alone, Goldman Sachs (US), Union Bank of Switzerland, Rabobank (Netherlands) and US Bancorp all faced litigation and penalties for failing to adhere to their AML systems (Neale, 2019). In the same year, the story of the biggest ever global money laundering crime broke: Danske Bank had laundered $230bn between 2007 and 2015. Much of the money had suspicious or corrupt origins in Russia and elsewhere in Eastern Europe, and had not just moved through Danske, but also through Deutsche bank, Swedbank and Nordea (Schwartzkopff, 2019).

Despite renewed efforts to fine banks for AML breaches, banks continue to participate in money laundering because the profits far exceed possible penalties. A 2012, $1.9bn fine for HSBC's laundering of money for drug cartels Sinaloa and Norte del Valle, though the largest for a bank at the time, was worth less than a month of the bank's profits (Keefe, 2017). Banks profit significantly from illicit transactions, and thus have substantial incentives to ignore suspicious transactions. Global evidence suggests that fines for money laundering are not deterrents. If anything, they are becoming the cost of doing business.

Nor are bankers the only professionals failing to exercise the due diligence required of them. The so-called 'Big 4' audit firms (Deloitte, PwC, EY and KPMG) are increasingly implicated in assisting corporations to siphon money offshore, and the evidence suggests that as profits from their consulting arms grow, audit quality is in decline. KPMG, in particular, has been implicated in several scandals linked to state capture. This includes a failure to report glaring reportable irregularities when it audited

Linkway Trading, the most important conduit for the laundering of funds linked to the Estina dairy farm scandal (Bloomberg, 2018). KPMG's audits of Linkway Trading were riddled with errors, including ignoring the fact that R30m used for the Gupta wedding at Sun City passed through Linkway's bank account and constituted 55% of Linkway's revenue (Khumalo, 2018). Instead of flagging this irregularity, the auditors were complicit in hiding it, passing the wedding off as an expense that could reduce Linkway's tax burden. Arguably, this action alone goes far beyond 'facilitating' corruption, rather showing active complicity of KPMG in the looting of the state.

17.4 FRONT COMPANIES FOR SALE: COMPANY FORMATION AGENTS THAT SELL SECRECY

In addition to the failures of banks to counter money laundering, there is a second issue that lies at the core of money laundering, namely the ease with which corrupt elites and organised criminal networks can procure secretive 'front companies'. Front or shell companies are corporate vehicles that conceal the true owners or beneficiaries while providing a thin veneer of legitimate activity (Transparency International UK, 2017). It is usually these entities that hold the bank accounts used to launder illicit gains. The examples stated above all reference shell companies and their role in laundering corrupt proceeds.

In 2011, the United Nations Stolen Asset Recovery Initiative (StAR) undertook a review of over 150 cases of 'grand corruption' around the globe. Unsurprisingly, it found that in, almost all cases, a corporate vehicle (such as a company or trust) was misused to launder the proceeds of crime (Van der Does de Willebois, Halter, Harrison, Park & Sharman, 2017). In most cases, beneficial ownership information of the company was not available, however, if it was available, the company was almost always "established or managed by a professional intermediary" (Van der Does de Willebois et al., 2017). These 'company service providers' (also called 'company formation agents') are staffed by lawyers, chartered accountants and other professionals. They specialise in quickly setting up a company with a bank account for any client with very few questions asked.

Some jurisdictions around the world 'specialise' in the supply of secret corporate vehicles – the city of London is a perfect example and attracts vast inflows of proceeds of corruption as a result.[1] These jurisdictions profit from attracting this money, while undermining governance and the rule of law elsewhere by allowing illicit flows to be moved and stored in secret (Cobham, Janský & Meinzer, 2015). Evidence presented to the Zondo Commission of Inquiry indicates that to profit from corrupt procurement

1 UK LLPs (Limited Liability Partnerships) funnel billions of US dollars of illicit origin through dormant front companies set up by company agents in London.

deals, those in the so-called 'state capture network' registered multiple shell companies in both Dubai and Hong Kong. Hong Kong and Dubai are ranked in the top 10 most secretive jurisdictions in the world, predominantly because of the ease with which secrecy is preserved and corporate vehicles can be abused to launder illicit proceeds (Tax Justice Network, 2018b). Unsurprisingly, many of the registered offices of state capture network companies in Dubai and Hong Kong were often vacant and had no active business; many only existed on paper but received large sums of South African public money that originated from corrupt deals (Anderson, 2017).

The modern global economy sees billions funnelled through registered companies with no actual staff or activities whatsoever. For example, the Luxembourg Leaks revealed how PwC had secured secret deals to eliminate tax for hundreds of multinational enterprises, through 1 600 corporations all ostensibly housed in one small building in Luxembourg – a notorious tax haven (ICIJ, 2014).

It is not always necessary to go offshore to notorious tax havens to achieve anonymity. Many illicit transactions linked to state capture were funnelled through front companies registered in South Africa. Here too it is far too easy to buy a ready-made shell company that is susceptible to abuse. South Africa also lags behind many countries in terms of our requirements to have publicly available information on beneficial ownership. This means that those involved in criminality here can purchase a corporate vehicle with a 'nominee director' (often provided by the company agent as well) and use it to conduct illicit business without having their identity publicly linked to it.

The ease with which one can procure a shelf company in South Africa whose beneficial ownership remains secret should be a matter of grave concern. In light of the exhaustive evidence pointing to the abuse of these corporate vehicles for the purposes of fraud and corruption, there is an urgent need for greater corporate transparency in South Africa. This includes the need to amend the Companies Amendment Bill to include a public registry of beneficial ownership (McGregor, 2019). Unfortunately, the latest draft of the Bill (tabled in 2018) did not include these recommendations, despite the global trend towards including beneficial ownership transparency as an essential tool in fighting corruption and corporate crimes (McGregor, 2019).

17.5 CASE STUDY: ENABLING THE LOOTING OF TRANSNET

The now infamous procurement of 1064 locomotives by Transnet as part of their modernisation process is one of the most glaring examples of the sheer scale of the financial cost of state capture. The contract and its related costs eventually totalled around R55bn. This is R16bn more than initially projected by Transnet. Subsequent

forensic investigations have surmised that the R16bn escalation can be explained by a manipulated procurement process designed to enrich a few individuals and corporations linked to the Gupta family (Werksmans Attorneys, 2017).

The Werksmans Attorneys Report, procured by Transnet, identifies the Transnet board of directors as being potentially liable for gross negligence in the loss of billions of rand (Werksmans Attorneys, 2017, p. 107). These directors should be declared delinquent and face criminal sanction where appropriate.

But the private actors who facilitated and participated in these activities should similarly be interrogated and sanctioned.

17.5.1 China South Rail: How to Launder Kickbacks

One of the more nefarious aspects of the 1064 locomotive deal was the contract with China South Rail (CSR) for the delivery of 359 locomotives for South Africa's trains. The 359 locomotives were delivered late and did not work when they arrived, but the deal was still worth around R20bn. Over 20% of that was set aside for 'commissions' to be paid to companies linked to Salim Essa, a known Gupta associate, purportedly for being CSR's 'supplier development'[2] partner (Sharife, 2017). This meant that Transnet had to foot the bill for nearly R5bn in what appear to be kickbacks, as the firms paid appear not to have actually provided any meaningful services. These payments were made predominantly to offshore companies in secrecy jurisdictions and routed through numerous accounts so as to make tracking the money more difficult.

CSR had already done deals with Transnet before the purchase of the 359 locomotives. In those earlier deals, kickbacks were laundered through Dubai. Significant sums of money paid to CSR were funnelled through two companies based in the UAE; JJ Trading FZE (JJT) and Century General Trading (CGT). CSR's 'consulting fee' on one of the procurement deals went to CGT while the fees related to the other deals went to JJT (amaBhungane & Scorpio, 2017). It has never been clear what services these companies provided that would have explained these fees; 'consulting fees' are a common red herring for corruption or money laundering and have been widely cited as the reason for the payment of numerous Gupta shelf companies. A whistle-blower with knowledge of the deal told amaBhungane that JJ Trading was essentially a front for the Guptas: it signed the original agreements with CSR but remitted proceeds to Gupta-linked companies (amaBhungane & Scorpio, 2017).

2 South African law requires public procurement to consider transformation and empowerment requirements when choosing suppliers. In the case of state capture, these requirements were often abused by paying front companies kick-backs and presenting them as 'empowerment partners' without any actual work being done.

CGT and JJT are registered in the UAE Free Zone, a jurisdiction notorious for secrecy and turning a blind eye to illicit and criminal money. When journalists travelled to Dubai to find the offices of the companies that had received billions of rands in fees, they unsurprisingly found nothing. While they were not allowed in to the complex where JJT was registered, a security guard said that no such company existed there (Van Zyl, 2017).

Crucially, by the time of the deal for the 359 locomotives, the locus of the money laundering network linked to the CSR deal moved from Dubai to front companies in Hong Kong. Thanks to the dedicated work of investigative journalists, the public is now aware that around R1.5bn was paid to the accounts of two companies linked to Salim Essa. The two firms – Tequesta and Regiments Asia – were set up in Hong Kong on exactly the same day and registered to the same address, likely by the same company formation agent.

Soon after registration, both companies started receiving multiple large inflows of money (Sharife, 2017). As mentioned above, Hong Kong is one of the most secretive jurisdictions in the world, it is ranked 4th by the Financial Secrecy Index. Hong Kong provides a wide range of 'offshore services' ranging from tax avoidance to the provision of opaque companies that can be used for clandestine purposes, without publicly disclosing beneficial ownership (Tax Justice Network, 2018a).

Salim Essa registered Tequesta in Hong Kong in June 2014 and signed the contract with CSR in May 2015, under which the 21% 'fee' for the 359 locomotives became due to Tequesta (amaBhungane & Scorpio, 2017). Tequesta was required to "play [an] active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the country" (Tequesta Group Limited, 2015, para. b). In return for providing these services, Tequesta would be entitled to the 21% fee. Of course, it made no sense that a company set up months before and with no discernible infrastructure would be a party to such a large contract.

According to banking data obtained by journalists at the OCCRP, R5.3bn was paid by CSR into two accounts: the first was Tequesta's HSBC account, which received R651m between June and October 2015 (Sharife, 2017). The other payment was made to the HSBC account of Regiments Asia (Sharife, 2017). CSR's payments to Tequesta and Regiments Asia accounted for 90% of the credits to these accounts (Sharife, 2017). Yet these funds did not remain in these two companies' bank accounts for long. More than $100m was transferred from Regiments Asia to two dozen companies, mostly via HSBC, with other banks in Johannesburg, Dubai, and the USA playing a part in the movement of money (Sharife, 2017).

The fact that these companies received such large sums in a very narrow period, and the tendency for large sums to be deposited and immediately moved on, the OCCRP concluded that these companies were shell corporations (Sharife, 2017). These payments by Regiments Asia were all made between late 2014 and February 2017 – the bulk of these transfers occurring in February 2017 (Sharife, 2017). The same shell companies also received payments from Tequesta (Sharife, 2017).

17.5.2 HSBC

Global banking giant HSBC provided the banking facilities for both the Dubai based laundering network (CGT and JJT) and the latter system set up in Hong Kong (Tequesta and Regiments Asia). HSBC actually did flag suspicious transactions that had flowed between CGT and JJT and other shell companies, but three years too late. By then, CSR had already paid JJT and CGT R1.6bn of the intended R5.3bn – and there is substantial evidence of this then flowing into the Guptas' other offshore accounts (Stenhauser & Patrick, 2017). HSBC has denied culpability for its poor money-laundering checks on CGT and JJT, and stated: "To the best of our knowledge, HSBC previously exited, is in the process of exiting, or never had a banking relationship with JJ Trading [or] Century General Trading" (Stenhauser & Patrick, 2017).

HSBC is a sprawling mega-corporation comprising entities in 71 countries, it is also currently the biggest bank in Europe (Garcia-Bernardo, Fichtner, Takes & Heemskerk, 2017). It is incredibly well resourced and ostensibly has a dedicated compliance department to fulfil its legal anti-money laundering duties. Thus, HSBC's vague answers on their AML failures are simply not good enough. HSBC should account for how it failed to identify the overtly suspicious transactions immediately and close the accounts.

HSBC also should have applied the necessary due diligence to 'know their customer' before allowing Salim Essa to establish bank accounts and immediately channel over R1bn through them and on to other shell companies. Yet these controls failed. Using the typical money laundering tricks of smurfing and layering, the money was sent regularly in smaller amounts, and quickly paid on by Tequesta and Regiments Asia to a number of other shell companies that were receiving this money despite having no visible employees or operations. By this point, payments had not just passed through HSBC accounts but through a range of banks from South Africa to Dubai and the United States (Davies, 2017).

Importantly, smurfing and layering are common money laundering manoeuvres, and so should have been identified by a bank as well-resourced as HSBC. Not only were the companies registered at the same time by Essa, an individual already alleged

to be a Gupta frontman, but within months of their formation they were receiving millions of dollars in payments, purportedly for 'advisory services'. The payments into the accounts came from Chinese SOEs and were the only sources of income for these accounts. Any bank should want to know what sort of legitimate business, newly formed and with no discernible infrastructure receives such large payments from four related state entities, without receiving any income from any other parties. In addition, a red flag for money laundering should be raised when large sums are received and immediately dissipated again.

Finally, HSBC had already acted in relation to some Gupta-linked accounts on the basis of what it had deemed suspicious activity. According to a statement released by HSBC in November 2017, it felt compelled to close a number of front companies linked to the Guptas in 2014 (Tax Justice Network, 2018a).

In light of all of this, it is inexplicable that no attempt was made to shut these accounts, or, at the very least, investigate and establish what connections the Tequesta and Regiments Asia accounts had with the Gupta family or other South African corruption scandals. One possible reason for these failures is that tricky or high-risk accounts often bring in larger bank fees, providing a possible motivation behind HSBC not reporting, investigating or shutting these accounts.

Either the banks and authorities did not pick up on this conspicuously suspicious activity, or if they did, they refused to act and stop it. Reportedly, when compliance departments did flag suspicious transactions, nothing was done to stop the process. Both in the case of Hong Kong and HSBC, there appears to be an approach that puts profit above all other obligations. In this world of financial secrecy and rapid money flows, regulation and ultimately the provision of basic services to South Africans was sacrificed for the sake of profit.

17.5.3 China North Rail

While the story of CSR's kickbacks are egregious and have dominated the headlines, a lesser told story is the role of a South African front company in facilitating kickbacks linked to Transnet's dubious contract with China North Rail (CNR) – CSR's sister company.

Business Expansion Structured Products (BEX) was first registered in 2009 and is registered to an address in the affluent Melrose Arch in Johannesburg (CIPC, 2019). The company is in the process of deregistration but still shows that it has two 'active principals' – Taufique Hasware (another known Gupta frontman), and Legal Frontiers (Corporate Services) CC (CIPC, 2019). BEX was central to an inflated deal that saw

CNR charge Transnet over R600m simply to move a building site from Pretoria to Durban. Ultimately, BEX earned a R66m 'commission' for itself from a massively inflated contract for the relocation of the site (Pillay & Prins, 2018). As has been alleged by CNR's South African partners to the Commission, "there was absolutely no justification for Transnet to agree to pay China North Rail SA (CNR SA), contracted to supply 232 diesel locomotives, close to R700m for moving a yet-to-be operational plant" (Sole, 2018).

Subsequent investigations have shown that BEX was ultimately controlled and used by Salim Essa, a known Gupta Lieutenant, to extract a lucrative kickback. Yet Essa gave instructions from afar and was not a listed director of BEX, even though he was clearly the company's directing mind and beneficial owner. Salim Essa was able to set the company up and operate it through a South African Close Corporation – Legal Frontiers (CC).

Legal Frontiers has admitted that it 'sold' BEX as a standard shelf company together with a VAT number, a nominee director to act as signatory, and a Standard Bank account – all to Salim Essa, for a fee (*Daily Maverick*, 2018). When asked why instructions came from Salim Essa instead of the named director Taufique Hasware (whom Legal Frontiers never met), the firm insisted that this was not unusual (Tugendhaft Wapnick Banchetti & Partners, 2018). Their legal representative, writing to journalists investigating the story, insisted that the kinds of services provided by Legal Frontiers were standard practice in South Africa and that there was nothing 'irregular' in their behaviour:

> As part of its stock-in-trade, Legal Frontiers maintains a number of shelf-companies, which it makes available to clients at request and on short notice. The process involves Legal Frontiers … appointing its representative as director and shareholder for each such shelf-company … Bank accounts are established prior to the company being disposed of and where at that time the signatory is a representative of Legal Frontiers … There is nothing irregular in the process as set out a foregoing, which is common in any number of company secretarial firms in the Republic. (Sole, 2018)

The fact that such a process is viewed as standard procedure is cause for concern. These kinds of entities operate with little scrutiny, and the professionals that facilitate them seem to ask very few questions, even when they are signing contracts and facilitating transactions that are deeply suspicious. In this case, the relocation contract was inflated hugely to over R600m and had very little if any supporting documentation. Yet, as amaBhungane's investigation notes, a registered auditor (Shaw) in capacity as a nominee director for BEX was happy to sign off on the transaction (Sole, 2018).

17.5.4 Lack of Accountability

While calls to jail corrupt politicians have reached fever pitch (and rightly so), it is clear that corporations in South Africa and across the world have faced little scrutiny and accountability for their role in enabling grand corruption linked to state capture. None of the banks or other professionals discussed here have yet faced prosecution or sanction for their conduct. Moreover, the Zondo Commission of Inquiry has not yet summoned and interrogated these actors. In fact, the banks appearing at the Zondo Commission have only appeared to complain about alleged political interference, not to answer hard questions on their own complicity. This oversight must urgently be rectified. There is enough evidence in the public domain that demands the banks, auditors and consultants publicly account for their role in enabling theft of public money on a grand scale.

The absence of accountability is a result of several factors. There are deficiencies in South African and international law when it comes to corporate accountability. While banks do have extensive legal duties related to AML, their consistent failures do not result in sanction. This is largely because gutted state institutions, including law enforcement and prosecutors, lack the resources to investigate and prosecute often complex financial crimes. Further, professional bodies are clearly failing to hold their members accountable.

The veneer of legitimacy that is afforded bankers, lawyers and accountants conceals the pervasive role of the private sector in corruption. As a result, the nature of our discourse on corruption and state capture has tended to minimise and obscure the role played by these actors. The evidence increasingly shows that the global economy is shaped by these actors in such a way that fundamentally entrenches secrecy and enables criminality, all for the sake of profit.

17.6 CONCLUSION

South Africa now grapples with efforts to discover the causes of state capture in the country, and then to pursue accountability and restitution. These efforts will be undermined if they do not move the question of the private enablers of state capture from the margins to the centre of their analysis. Without accountability for the bankers, lawyers and accountants that have enabled and profited from grand corruption, new and old criminal networks alike are bound to continue to profit from their crimes. This requires law enforcement authorities to also include these kinds of prosecutions as priority cases.

The looting of Transnet is emblematic of this problem. Transnet was targeted because of its high capital expenditure, making its procurement a lucrative prize for the Gupta

network. Further, Transnet executives and other public officials ignored their legal duties and chose to allow a group of private actors to profit at the expense of the South African public. Yet, all of the efforts of the Gupta enterprise would have gone to waste without a system of banks and shell companies that allowed them to move and hide their ill-gotten proceeds.

As we consider ways of strengthening institutions of the state, it is imperative to simultaneously demand stronger systems to ensure that corporations and private actors no longer enjoy impunity with regards to their role in plundering already limited and stretched public resources. While those actors often bemoan the current crisis, they have not been open about the way in which they profited from facilitating many of these crimes. Those implicated are not the exceptions to the rule. Rather, the enablers discussed here represent a systemic problem whereby secrecy and profit prevail at the expense of accountability and justice.

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18 RISKY BUSINESS: CORPORATE ETHICS IN THE ERA OF CAPTURE

Rob Rose

Michael Katz, a professor and one-time lawyer for former President Nelson Mandela, tells a story that illuminates just how the years of state capture caused a slow rot in the private sector. At the height of Jacob Zuma's Presidency, one Executive of a large South African company listed on the country's stock exchange, the JSE, came to his office at law firm ENS for a chat. This Executive was looking for advice on how to structure a deal he wanted to put in place and Katz, as the country's pre-eminent corporate lawyer, was the man to ask. Katz was aghast at the man's plan. "I told him, well, what you're suggesting would not only breach the JSE listings requirement, but also the Companies Act", he says. He stared back at Katz, apparently incredulous. "Michael", he replied, "why are you talking to me about a breach of the JSE's listing rules? Just look at what's happening in the country around us!" (Michael Katz, 2019).

It was a sobering moment for Katz, not least since he was one of the original architects of the King Code of Corporate Governance, the set of principles around which all South Africa's blue-chip companies are meant to organise themselves. "This was a wake-up call", says Katz. "The wide scale looting, and absence of integrity in the public sector always had the potential to spill over into the private sector. Especially because of the lack of prosecutorial consequence for those who broke the rules", he says (Michael Katz, 2019). This lack of consequence had emboldened those who might otherwise have been less inclined to cut corners.

It is a simple formula, says Katz. If someone is considering something ethically dubious, like insider trading, the trajectory of thinking goes like this: first, they consider the likelihood of detection and apprehension; second, if they're caught, will there be a successful prosecution; and third: how severe is the sentence. "The last thing people look at is the severity of the sentence. If I don't think there's any chance I'll be apprehended, I won't be worried whether the sentence is 10-years in jail, or 20-years" (Michael Katz, 2019).

Looked at through that lens, it's entirely clear why the knee-jerk reaction of regulators and Parliamentarians, to call for harsher sentences for corporate crime, is entirely the wrong medicine. If no one is being brought to book in the first place, it is pointless.

It is a sobering analysis. And this fraying of corporate ethics over the decade from 2009 which Katz describes has manifested in an alarming smorgasbord of accounting scandals. This, in turn, has had a severe dampening effect on foreign investment in South Africa – one of the few tonics that could meaningfully shift the country's sub-1% GDP growth.

In 2017, for example, inward foreign investment into SA totalled $2bn – less than half the annual average of $4,5bn which SA got between 2005 and 2007. Though this rebounded to $5.3bn in 2018, it is some way off all-time records (United Nations Conference on Trade and Development [UNCTAD]; 2019).

Consider the big daddy of the country's corporate scandals: retailer Steinhoff.

18.1 ENRON, AFRICA STYLE

It seems somewhat incongruous that a company that began life as a furniture trader in 1964 in the sleepy northern German town of Westerstede, where the annual mid-summer rhododendron festival is front page news, holds the ignominious distinction of being South Africa's Enron.

Yet, this is the case of Steinhoff. Started by crusty German entrepreneur Bruno Steinhoff, based on the premise of buying furniture cheaply from behind the Iron Curtain and selling it in the west, the turning point came in 1995 when a friend introduced him to a South African lounge suite manufacturer from Ga-Rankuwa named Markus Jooste. "From the beginning, I found him to be a wonderful man. Markus would also tell people: 'This is my father.' And to me, I thought of myself as his father," said Bruno Steinhoff (2018).

Jooste, who had qualified as an accountant at Stellenbosch University, was smart, cunning and entrepreneurial. Rather than serve in the army in the mid 1980s, he chose to work at SARS where he evidently developed a keen sense of just how flexible the tax rules could be. Jooste stitched his company, lounge suite maker GommaGomma, together with Bruno's European furniture company, and listed it on the JSE in 1998. "To go to the stock market was absolutely new for me", said Bruno. "I never learned that – I was never in a high school, I was always in my personal high school, learning everything by doing" (Steinhoff, 2018).

Steinhoff, with Jooste as the CEO, began to expand. At home, it hoovered-up logistics company Unitrans, timber company PG Bison, manufacturing company KAP and JD Group, which owned consumer brands like Joshua Doore, Hi-Fi Corporation and Incredible Connection. But Jooste also began expanding overseas, buying Homestyle in the UK (2005), Freedom Group in Australia (2005) and Conforama in Europe (2011).

In fact, by 2013, it had become the second-largest furniture retailer in Europe, trailing only the iconic Swedish chain Ikea. In 2014, Jooste added discount clothing chain Pep to Steinhoff's portfolio – a blockbuster R63bn deal that had the added attraction of enticing Pep's largest shareholder, South Africa's richest man, Christo Wiese, into the Steinhoff stable.

Andrew Cuffe, the former head of research at JP Morgan, says the Pepkor deal was a turning point for Steinhoff, establishing them as a serious contender in South Africa's investment world. "If some considered them the Mafia until that point, perhaps that deal was Steinhoff's way of going straight – like buying some legit dry-cleaners", maintains Cuffe (2018).

Quite how bent Steinhoff was would only become clear sometime later. But as it was, even back in 2014, the clouds soon began to gather as whispers of accounting hi-jinks gathered steam. A year later, December 2015, was meant to be a triumphant homecoming for Bruno Steinhoff. The company planned to list its shares on the Frankfurt Stock Exchange, becoming Germany's largest stock exchange listing that year. It took place to much fanfare – flashmobs of dancers outside the exchange, accompanied by glitzy banners. Only, the weekend before that listing, German police had arrived in Westerstede, and conducted an extensive raid on the business. "There are suspicions that sales are overstated in the balance sheet," the prosecutors said. Accounting irregularities, in other words (Rose, 2015).

Wiese, by now Chairman, went on radio calling the allegations "drivel". Nothing to see here, no crime has been committed.

Fast forward to December 5th 2017: Steinhoff releases a statement, saying Marcus Jooste has "resigned with immediate effect", and the company now believes that actually, yes there were indeed "accounting irregularities" (Steinhoff International Holdings NV, 2017). This, in the end, turned out to be a whopping euphemism. Indeed, the extent of quite how corrupt the company was astounded even the most sceptical of Jooste-cynics.

In the end, forensic accountants established, Steinhoff's profits had been artificially boosted by R106bn in "fictitious or irregular" profits over the course of a decade. This was, in other words, money that just did not exist (Steinhoff International Holdings NV, 2019). It was terrifying in its audacity: fake cash flows, "buying groups" that supposedly provided discounts, but which actually did not exist, and secretive deals designed to enrich Jooste and his inner circle. The scale of it dwarfed any other South African fraud. That includes those involving Brett Kebble (R56bn, adjusted for inflation, in today's money), Masterbond (R4.1bn), LeisureNet (R2.4bn), Fidentia (R2.2bn) or, more recently, VBS Mutual Bank (R2bn).

Heather Sonn, the former investment banker who replaced Wiese as Steinhoff's Chair, has likened the scale of it to Enron – the Houston-based energy company that went bankrupt in 2001. Like Enron, she says, "there was purposeful deceit where certain people went to great lengths to misrepresent the financial statements, in collusion with others" (Rose, 2018b).

It is similar, too, in that both Enron and Steinhoff had been amongst the largest 40 stocks listed on the US and South African stock exchanges respectively; and in both cases, a large cross section of their country's pensioners were exposed to the collapsing companies. In SA, the regulator, the Financial Sector Conduct Authority (FSCA), told Parliament in January 2018 that 87% of pension funds surveyed at the time had exposure to Steinhoff and had lost billions as a result (Ensor, 2018). It is an important point: this wasn not just a minor fracas taking place on the fringes of society affecting only stock market traders; it was a fraud that had an actual impact on the retirement savings of South Africa's working population. And, ultimately, on the decisions by foreign companies to invest in the country.

18.2 A SLIPPERY SLOPE

It is an arresting picture. But what is more alarming, and suggestive of a systemic problem, is that Steinhoff was just one of a number of former blue-chip South African companies to suffer a governance crisis in recent years. Down in Umhlanga, on KwaZulu-Natal's north coast, the province's largest employer Tongaat Hulett has been battling an "accounting scandal" of its own. In that case, it was not "fake buying groups", or complicated German guarantees. Tongaat, battling a 25% collapse in the global price of sugar from 2015 to 2018, began looking for accounting "short cuts" to fill its profit hole, hoping that the cycle would turn back.

Here is an example of one such short cut, indicative of a badly misfiring ethical compass. As you would expect, a sugar company's main assets are the land it farms on, and its sugar cane. So Tongaat began selling land at a furious clip to plug the hole in its profit. But when the ANC government began talking about "expropriation without compensation" in 2018, buyers became understandably more reluctant to sign the documents. Tongaat, however, could not afford delays. So, as forensic investigator PwC concluded in November 2019 after spending months decoding the scandal, Tongaat had "backdated … a number of land sale agreements" to push through the deals (Tongaat Hulett Limited, 2019).

This was not the only *schlenter*. When it came to its sugar cane, Tongaat pushed up the value of these plants radically, allowing it to claim higher assets and profits than was really the case. So, over nine years to 2018, the value of Tongaat's "standing sugar cane" in South Africa soared 580% to R764m, while the value of its roots more than

doubled. It meant that Tongaat valued its sugar cane roots at R27 869 per hectare – more than double what you would see at rivals like Illovo Sugar (Rose, 2019).

Why do this, you ask? So that Tongaat could include these "revaluations" in its profit numbers, convincing investors it was doing better than it was. In 2018, for example, of the R86m operating profit reported by Tongaat's sugar division, no less than R57m came from "revaluing cane upwards". It was a short-cut. As Tongaat's new CEO Gavin Hudson, who took over last February, puts it: "Hope is the key word. Believing that things will turn and that tomorrow will somehow be greener and brighter has been the underlying view of this business for years" (Rose, 2019).

Only, it just got worse. A drought, a glut of imported sugar, and problems in Zimbabwe meant that it was never able to climb out of the hole. However, when this author tracked down the former CEO Peter Staude, who has been at the helm from 2002 until he resigned in August 2018, his response suggested an alarming moral relativism.

First, he admitted that in recent years, "we needed to pick up the pace of sales from land conversion (and) there's no doubt that we used year-end deadlines to get the other parties involved over the line," he says. But he seemed remarkably unconcerned over the "backdating" of land deals. Staude's response: "all backdating might mean is that you've done a deal, but finalising the paperwork needs to be concluded".

The forensic auditors took another view, however. As a result, Tongaat laid criminal charges against the Executives responsible for backdating these deals. This would seem to be another example of the blithe lack of concern for the rules, which Katz described earlier.

There is another grim example, technology company EOH. Between 1998 and 2015, it was the best performing tech company on the stock exchange: a R10 000 investment would have turned into R640 000. It was also the country's largest technology company, servicing 2 000 large companies. But there was a major caveat: it got to this position by either buying smaller rivals or doing business with people it should not have.

Here is one example: in November 2015, EOH forked out R868m to buy three companies, Grid Control Technologies, Forensic Data Analysts and Investigative Software Solutions, owned by a former policeman named Keith Keating (Ziady, 2017). Clearly, EOH had not done its homework into quite how Keating makes his money. It emerged that for seven years from 2010, Keating's companies scored R5.4bn in contracts from the SA Police Service (SAPS) and the State IT Agency (SITA) to supply equipment, like cameras and torches (Rose, 2017). A report by the Independent Police Investigating Directorate (IPID) in October 2015 said those contracts were the fruits of a "corrupt relationship" between Keating and former police commissioner, Khomotso Phahlane.

Consider what the police bought: crime scene torches for R300 000 each (which you could pick up for R7 000), R129 for each pair of latex gloves (which you could buy at a pharmacy for R1), disposable face masks for R1 000 each, and distilled water for R1.6m (Hosken, 2017). As a quid-pro quo, Keating allegedly paid R1m to a car dealer for a number of vehicles, including a Toyota Hilux bakkie, Hyundai i20, Ford Ranger and Volkswagen Polo for Phahlane, his wife, daughter and sister. Helpfully, they were invoiced to "Joe Doe" (Hosken, 2017) (Phahlane was later arrested for procurement fraud, though apparently this was an unrelated case).

There were many other problems at EOH, but this is just a sample of the flavour of what went wrong. In September 2018, a banker from Absa, Stephen van Coller, was appointed CEO of EOH to fix it up. Speaking more than a year later, Van Coller says that one of the lessons he learned is that corruption had been "normalised" at the company. "If you don't have a culture of doing the right things, in the right way, with the right customers, you're finished," he wrote (Van Coller, 2020).

Mirroring the wider political environment, accountability at EOH was poor. There was, Van Coller pointed out, only one compliance officer for the whole company, spanning more than 500 businesses. As Van Coller put it: "suddenly you're doing 10-15 tenders a week and you can't look at every single one and make sure everything is perfect, so you start cutting corners. Cutting a corner becomes the new norm, because you can't keep up" (Talevi, 2019).

18.3 COINCIDENCE, OR A REFLECTION OF THE SOCIAL FABRIC?

Cutting corners, clearly, was not just the preserve of EOH. The question is, was there a golden thread linking all these scandals together?

Firstly, just to get the obvious point out of the way: South Africa's economic collapse during the Zuma years wedged many companies into a corner. Had the economy been booming, either the CEOs might not have been tempted to sweeten reality, or their crooked activities might not have been detected. Still, it seems remarkable that all these scandals – each of them precedent-setting in the South African context – emerged over a two-year period at the end of Jacob Zuma's presidency. It could, of course, just be a coincidence. But it seems unlikely.

Nicky Newton-King, who headed the JSE during the state capture years until she retired in October 2019, says the prevailing lack of accountability in government during those years dominoed into the private sector. "Once the fish rots from the head, and once there's no visible accountability on even the small things, it's easier for moral compasses to wobble," she says (Newton-King, 2019). And now, she maintains, there's a definite sense that the country's private sector needs to reset that ethical compass.

Still, it has been a bracing realisation that many of the comforting assumptions we had about the strength of the corporate sector – particularly, that it was somehow more 'ethical' than the public sector – were simply wrong. Newton-King argues: "we imagined that we lived in a regulatory regime, which was stable and robust, where people were held to account. Now, we don't think that anymore. When the tide went out, people in various industries were caught out" (Newton-King, 2019).

The truth was those who believed the private sector was ethically unimpeachable were simply fooling themselves. For a country that had complacently believed it was top dog in governance and regulation, these scandals were like a bucket of ice water.

Until 2016, the (admittedly faulty) World Economic Forum competitiveness survey had ranked South Africa top of 138 countries when it came to "strength of auditing and reporting standards". Its corporate Boards were ranked third in the world too – as was the regulation of our stock report (Schwab, 2016). By 2019, South Africa had sunk to 51st of 141 countries when it came to auditing standards, and 26th overall for corporate governance (Schwab, 2019). Asief Mohamed, the CEO of Aeon Investment Management, says there has been a problematic corporate culture going far back, to the years of apartheid. "Before 1994, we had very little competition in our industries, and our guys thought they were fantastic. Then, with some exceptions, like Discovery and SA Breweries, our guys went overseas and discovered they weren't as good as they thought they were," he says (Mohamed, 2019).

For Mohamed, the collapses at Steinhoff, Tongaat and EOH show that our Boards of directors – the forum for accountability and oversight in the corporate sector – have not really improved over the years. And, as a result, these Boards are chronically unable to hold people to account. "In the case of Steinhoff, you had unmitigated greed of a few individuals, with an utter lack of accountability. The Board was fast asleep, and it's the same thing we've seen elsewhere too, like at Tongaat Hulett," he tells (Mohamed, 2019).

Perhaps the most remarkable thing about Steinhoff is that, on paper, it was the best equipped Board in the country. It had three directors on its Board with PhDs in accounting – Dr Len Konar, Steve Booysen and Theunie Lategan – and yet, it had the worst accounting scandal in South African history. Another, former Sanlam CEO Dr Johan van Zyl, had a PhD in economics into the bargain. Members of Steinhoff's Board dispute the view that they were napping, however. They argue no one could have detected an ingenious, deliberate and complicated fraud. Konar, for example, said: "[W]e were misled, we were lied to. We asked for information and either it was not forthcoming, or [it was] presented in a way that wasn't representative of the truth" (Rose, 2018a).

Johan van Zyl, however, admits that the Board could have been more vociferous in probing individual deals done by Jooste. "We could have interrogated the purchases of things like Mattress Firm more, perhaps" (Van Zyl, 2018). And he adds that far too many Board Members had entrenched relationships with Jooste, as they had been on Steinhoff's Board for many years. "So, it perhaps wasn't as independent as it should have been," he says.

18.4 WATCHDOGS WHO DIDN'T BARK

If the state capture era was notable for the failure of accountability, and efforts by rent-seekers to weaken institutions of accountability, it is instructive to look at what happened to the watchdogs in the private sector. This includes Boards of Directors, regulators, pension fund trustees, investment companies and analysts. But perhaps the most trusted of all these "guardians of governance" were South Africa's audit companies. Those auditors are, after all, the ones who sign at the bottom of each set of financials that the numbers "fairly represent" the position of the company.

It is clear Steinhoff's financial statements, which allowed R106bn of fictitious profits to creep in, should not have carried the signature of its auditor, Deloitte. Neither should Tongaat's financials, also audited by Deloitte.

Look wider and there are many such cases. Take Eskom, where SizweNtsalubaGobodo (SNG) have been auditors since 2012 (alongside KPMG for two of those years) and should have known what was going on. And yet, Eskom racked up R19.6bn in "irregular expenditure" between 2012 and 2018. As Public Enterprises Minister Pravin Gordhan pointedly asked when Eskom's financials for 2018 were released: "where were the auditors when these corrupt acts were going on?" (Steyn, 2018) (SNG, who was also auditors to state entities Transnet and Denel, has since merged with the larger Grant Thornton to become SNG Grant Thornton).

Perhaps the audit firm that has most reaped the state capture whirlwind is KPMG, the multinational auditor with officers in 154 countries which traces its South African roots to 1895, when the Scottish-born Alexander Aiken opened an office in Johannesburg. KPMG had been the auditors to the Gupta companies for 15 years, something the family had proudly trumpeted as evidence of its legitimacy. In the end, it was the audit of the Guptas' company Linkway Trading in 2014 that led to KPMG coming unstuck.

It turned out that Linkway was used as a conduit for many of the expenses for the notorious Gupta wedding held at Sun City, which four KPMG partners attended (Marriage, 2019). Here, KPMG's partner Jacques Wessels signed-off Linkway's accounts, which deducted the R6.9m in wedding costs from its tax liability, classifying

it as a "business expense". For this, Wessels was struck off the register of auditors by the Independent Regulatory Board for Auditors (IRBA). "There was no evidence that he had applied professional scepticism or that the threats to objectivity were identified or considered", IRBA (2019) said.

It was a damaging ruling, especially as it came shortly after KPMG had apologised for work its consulting arm had done for SARS, which concluded that a "rogue unit" had operated within. This finding allowed a new Commissioner close to Zuma, Tom Moyane, to oust several veteran tax officials.

But the biggest scandal was yet to come: in October 2018, a Reserve Bank investigation into the collapse of a small bank in Limpopo, VBS Mutual Bank, concluded that KPMG's senior banking partner, Sipho Malaba, had intentionally lied, covering up the theft of more than R2bn from the bank (Motau, 2018). It was a deceit aimed at some of South Africa's most vulnerable citizens. VBS is situated in one of South Africa's poorest province Limpopo, where 43.9% of citizens, at the widest definition, do not have jobs (Stats SA, 2019).

As it was, VBS' accounts were an elaborate fairy tale: almost R2bn had been stolen, covered up with "phantom deposits"; while the R770m in cash reported for 2017, was "in truth overstated by approximately R700m". VBS's Executives had behaved with impunity, as if they were feudal kings whom bank depositors were obligated to support. The bank's CEO, Robert Madzonga, spirited away enough cash to pay off six cars (worth more than R6m), cover his R213 000 monthly mortgage, and pay for lavish seafood dinners. Evidence given to the Reserve Bank's investigator, advocate Terry Motau, illustrated clearly how Malaba, who was KPMG's senior banking partner in the county, was central to this heist.

Consider the evidence of Zondi Ntuli, a trainee auditor. Ntuli described how, when he was helping prepare VBS's accounts in July 2017, nothing seemed to add up. So, he called the other KPMG audit manager on the VBS audit, Kafuma Munalula. "Look, Kafuma, there is cash missing here, because none of this is stacking up," he said. Munalula said she would get "Sipho to look at it". But when she asked him, he simply brushed her off. "He told me that he was handling it," she says.

Nonetheless, Munalula wrote a report to the audit committee, which pointed out that "not all bank reconciliations have been received". However, Malaba took that draft, and in a green marker, scratched out her words. Later, when she asked him again if he was happy with the cash number, Malaba replied by SMS: "Yes, happy to go ahead". The next thing, Malaba had simply signed off VBS' accounts, where almost all the reported cash was missing.

Why would he do this, you ask? Was it just naivety? Incompetence? In reality, the answer was much more sinister.

As it turns out, VBS had not only given Malaba a R7.3m mortgage bond for a house in Fourways, the bank had also given him an R20m overdraft, and had financed the purchase of several cars, including a Range Rover, Landrover Discovery and a Mercedes Benz. Remarkably, he had never paid a cent of these loans. Nor, in fact, had VBS even tried to recover any of the money. When asked by Motau, why he had not repaid anything, Malaba said he was "over-stretched". And the zinger was that Malaba has also hidden all the details of his loans from KPMG (Motau, 2018).

It is a damning picture. In the end, Motau concluded that Malaba was "indeed complicit in the cover-up of the vast cash hole in VBS … by signing a fraudulent audit report". He concluded that Malaba had "deliberately disguised the fact that he was the beneficiary of the various facilities" and "when KPMG made an enquiry about his facilities at VBS he obtained a fraudulent letter from VBS to put KPMG off the scent"(Motau, 2018).

While the Gupta audit of Linkway was poor, KPMG's complicity in the VBS fraud is on another level entirely. Auditors often make errors, like at Steinhoff or Tongaat. But intentional corruption? That is a step change.

Unlike Steinhoff or the other cases, KPMG *did not* fail to detect the fraud at VBS – it *did* pick up that hundreds of millions of rand was missing. It is just that the senior partner in charge had been compromised.

KPMG later said it would "support criminal action" against Malaba who resigned in April 2018, facing a disciplinary inquiry for not declaring his financial interest at VBS (Dlula, 2018).

It caused tremors across the globe. The *Financial Times*, for example, reported the views of economist Iraj Abedian who said:"increasingly it is becoming self-evident that KPMG is not fit to be in business – never mind being a 'major audit firm'" (Marriage, 2018). The taint of state capture hung heavy over KPMG and, predictably, it lost about a third of its R3bn in revenue between 2017 and 2019, as both clients and partners fled (Henderson, 2019).

Today, Ignatius Sehoole, the CEO of KPMG South Africa, says the firm's efforts to fix its culture – including putting partners and their spouses through lifestyle audits – are paying off. Clients are returning, he says, and there is a renewed interest in working at KPMG. Asked why the VBS debacle happened in the first place, Sehoole attributes this partly to the country's ethical culture during the state capture years. "We often talk glibly about the 'tone at the top', but it's a real thing. If you see politicians feeding

from the trough all the time, the temptation is there to think, 'why can't I be part of that too','' he says (Sehoole, 2019).

18.5 BRIDGING THE 'EXPECTATION GAP'

Audit firms are aware of the public perception that they not only failed to red-flag state capture, but that they actually aided it. Many of them are now going through deep internal angst about the "expectation gap" between what the public wants of them, and what they actually do. "It's clear that some people believe auditors are meant to detect fraud when this is not the focus of an audit. But we need to address this gap, as best we can, if we want to restore trust," says Lwazi Bam, CEO of Deloitte Southern Africa. Bam says, rightly, that a "fundamental recalibration is needed to reposition the audit product as a synonym for trust" (Bam, 2019).

Quite how successful that will be depends on whether the scandals keep on coming. It does not help Deloitte's case, for example, that in early 2020, revelations emerged of how Eskom is seeking to recover R207m from it for consulting contracts awarded it by the power utility in 2016 (Comrie, 2020). But Bam's message – that auditors need to win the public's trust again – is on point. To do so, they need to ensure every decision is ethically unimpeachable.

Which it has not been to date. Auditors bending over backwards to hide wedding expenses for his client or looking the other way as a bank is robbed blind because he is getting effectively paid-off, does deep structural damage to the profession. If state capture is about repurposing institutions to fit the will of venal rent-seekers, it does not help that the auditors who are at the front-line, and who could blow the whistle, instead displayed an alarming moral agnosticism. At worst, cynics would argue that their professional opinion was for hire to the highest bidder.

South Africa's auditors are not an island, of course. Globally similar questions are being asked about the profession in other countries. In the UK, EY came under fire for its flawed audit of collapsed travel company Thomas Cook, while a British Parliamentary report found KPMG failed to exercise "professional scepticism" at construction company Carillion (House of Commons, 2018). And in India, the government actually sought a five-year ban for KPMG and Deloitte for allegedly "actively conniving" to hide bad loans at construction firm Infrastructure Leasing & Financial Services (Vyas & Dave, 2019).

Across the globe, the industry was in need of an overhaul, and into the breach stepped Sir Donald Brydon, the former Chair of the London Stock Exchange (LSE). In 2019, Brydon concluded a 10-month investigation into the quality of UK audits. His report, released last December, was highly critical. On the "expectation gap", Brydon suggested

the problem was wider than simply a disconnect with the public – it was more that auditors just are not doing their jobs thoroughly anymore. As one submission to him succinctly put it: "the problem is not one of expectations, rather we have a grave 'delivery gap' when it comes to audit," he said (Brydon, 2019).

It is a sentiment that most people in South Africa would agree with. To simply dismiss the concerns about auditing standards under the rubric of an "expectation gap" fails to account for just how dismally they actually perform their core job. Critically, Brydon stressed the need for auditors to realise they perform a "public interest" function, and he suggested the UK's rules be changed to "make clear that it is the obligation of an auditor to endeavour to detect material fraud in all reasonable ways" (Brydon, 2019).

It is a revolutionary suggestion which, if it were implemented in South Africa, would change the game for auditors. South Africa, of course, is not obliged to follow Brydon's lead, but many senior auditors believe the country is likely to do so. Had there been a heightened requirement to detect fraud, perhaps VBS, Steinhoff and Tongaat may never have happened. And the repurposing of Eskom and Transnet to suit the state capturers would not have passed 'go'.

18.6 WANTED: CEOs IN JUMPSUITS

It is clear that auditors, and the watchdogs meant to ensure the corporate sector behave properly, went missing when they were most needed. They became part of the general malaise of a lack of accountability in South Africa. But the introspection since the scandals of Eskom, Steinhoff and VBS – of how Boards of Directors, auditors and regulators operate – may yet be a catalyst for a fundamental shake-up in behaviour.

For Michael Katz, the tide could shift very quickly to restore trust in accountability in the corporate sector. "I met Shamila Batohi, the Director of Public Prosecutions, and I told her that all we need is just one arrest, and one prosecution – and it'll have a meaningful impact. From day one, there'll be a material change, as it will signal that the days of acting with impunity and without consequence are over," he says (Michael Katz, 2019).

Quite why no one has been arrested at Steinhoff, considering there is a forensic report running to more than 3 000 pages (15 000 with annexes) detailing exactly who did what is a mystery. The Hawks, supposedly South Africa's priority crime unit, have access to parts of that dossier, yet have not acted. Markus Jooste still goes for a stroll on the Hermanus cliff walks; those who stole R2.1bn from EOH act as if nothing happened; and the VBS masterminds are jetting around in their luxury cars.

Of course, it would be supremely naive to imagine the criminal authorities were shining examples of speed and action before Jacob Zuma took charge.

Take the case of Tigon, and Gary Porritt. Tigon was once one of the top 40 stocks on the JSE, but in 2002, Porritt and his co-Director Sue Bennett were arrested and charged on 3 160 counts of fraud (Groenewald, 2018). But as it stands today, Porritt and Bennett have been running rings around first the NPA, and then the judiciary. They are, in theory, "standing trial" in the South Gauteng High Court, 17 years later (Mabuza, 2020). But you would be a brave man to bet they would be sentenced anytime soon.

Batohi is, however, apparently determined to act on Steinhoff. "There have been proposals by the joint team – the investigators and the prosecutors – about certain steps that can be taken in the shorter term," she said in October 2019 (Gerber, 2019).

Reintroducing accountability could not come a moment too soon. Using Katz's hierarchy, had the crooked Executives believed there was any chance of detection and apprehension, they might not have broken the rules in the first place.

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19 FINAL REFLECTIONS BY THE EDITORS

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When we started the journey of compiling this book some two and half years ago, *Anatomy of State Capture* was intended to serve as an "update" of the *Betrayal of the Promise* (Bhorat, Buthelezi, Chipkin, Duma, Mondi, Peter, Qobo, Swilling & Friedenstein, 2017). Much of the information presented in the various chapters was still emerging through the various investigations, inquiries and court cases. At the time of going to the publishers, the Zondo Commission is yet to complete its work and there will undoubtedly be more revelations to emerge in the years to come. The story of State Capture in South Africa is far from over. When we gathered the group of contributors to discuss the content and reflect on the progress (or rather changes) that had occurred since the release of the *Betrayal* report, we realised that even though there had been significant shifts within South Africa's political landscape, the discourse around State Capture had not shifted. What has shifted is the official acknowledgement that State Capture was – and still is – a political reality. This much was acknowledged by Cyril Ramaphosa during his evidence in chief at the Zondo Commission on 28 and 29 April 2021 in his capacity as President of the ANC (Zondo Commission, 2021b, 2021a). He described how it emerged as a term that was initially contested, but is not accepted by the ANC.

Two and a half years ago, most of the focus was on removing the "rotten apples" and cutting off the "sore thumbs", a perspective that assumed that the systems and institutions dismantled under the Zuma administration would self-correct. The assumption was that function would flow from form. This assumption incorrectly assumes that these systems were working before the Zuma administration and fails to recognise that it was these very systems that enabled State Capture in the first place. It is this prevailing stance that this book seeks to confront by providing a detailed account of what happened and how it happened across at least 10 case studies of State Capture. The second challenge which arises through the discourse on State Capture is a tendency to relegate it to being merely a form of "grand corruption". Though this is true, according to the original definition of term provided by Hellman, Jones and Kaufmann (2000), in the context of South Africa, it represents a phenomenon that has far greater implications for the nation's democratic project.

As argued in the Introduction to this book, "State Capture is not just about corruption (though it is key). It is ultimately about the abuse of power and the dismantling of the social compact between society and those who should be considered the 'guardians of governance'". It is not a grand conspiracy or a result of simply wanting to loot the state (though this is the most readily visible consequence of State Capture). We argue that State Capture as experienced in South Africa, was akin to a silent coup – a political project.

This political project entailed the subversion of laws and repurposing of functions of the state. Most of the chapters of this book provide a detailed account of how different institutions were repurposed to achieve objectives they were not designed to achieve. The aim was to undermine the democratic systems of governance, including the controlling of rents, the weakening of accountability and maintaining of legitimacy for the power elites. These objectives are intertwined and interconnected, all serving to ultimately build, consolidate, and maintain power over the state in a way that benefited a select few. This political project is directly opposed to the vision and intention of our systems of governance set out in the constitution – it is a predatory logic that is authoritarian at its core.

State Capture is not just the explicit "breaking of the rules" or acts of criminality. It is the manipulation of the logics built into pre-existing systems. Much of the evidence flowing out of the Zondo Commission presented in this book provides us with a deeper understanding of what State Capture is all about. The appointment of loyal people to positions of power, the intentional weakening of institutions, manipulation of government policies and processes and the creation of parallel decision-making structures are now all identifiable traits of State Capture. What is still missing is an understanding of how State Capture happened. In the Introduction we suggest that the notion of 'rackets' helps to address this gap in current discourse.

We define rackets as a pattern of behaviour where individuals or groups are enrolled by racketeers to undertake some action (or inaction) for the benefit of the racketeer. The racketeer leverages emotive reasoning and coercive logics to enrol others, a convincing story based on fundamental untruths that is used to hide their true intentions and exploit others for their benefit. A racket succeeds if a believable untruth is accepted by those who need to be enrolled in the racket, which can be a select set of individuals, all the way through to the public in general. Rackets can be multi-layered and occur at various levels within a system. They are self-perpetuating, self-reinforcing and self-replicating if left unchecked. State Capture is an example of what we refer to as the Racket of Predatory Power where individual instances of corruption become increasingly accepted patterns of behaviour (capture of state institutions), ultimately becoming standard practice (oligarchy/authoritarian state).

These rackets are not consigned to the public sector/government alone. State Capture requires a blurred line between the private and public, and the participation of the full spectrum of role players and functionaries that constitute the body politic. The chapters in this book provide details of the roles of various politicians, civil servants, company Directors and Executives, auditors, lawyers, financial institutions and journalists that have enabled and executed the political project of State Capture.

As noted in the Introduction, this book is not intended to provide answers or solutions for how to rid South Africa of the scourge of State Capture; but rather to provide a foundation for the difficult discussions and complex actions needed to unravel the rackets and address the systemic causes of State Capture. This requires deep reflection beyond individuals and the single instances of malfeasance. It requires identifying the type of racket that is deployed and the level at which it is experienced. One needs to determine and acknowledge the untruth within the racket and expose the "big lie" that is used by racketeers. The underlying untruth can be exposed by considering the vested interests and the power dynamics at play, recognising the contradictions that inherently present themselves in the difference between what is 'intended', and what the outcomes are. It is equally important to identify the 'coercive feelings' (or predatory logics) that are leveraged to support the untruth. The importance of understanding these predatory logics is to realise that while there may be a "big lie" underpinning the racket, there can also be an even "bigger truth" that is often used to conceal it. Like all good cons, the story must be convincing.

Perhaps the most profound example of a racket is the mantra of "Radical Economic Transformation" that has been heard so frequently at the Zondo Commission. The bigger truth that supports this "ideological" stance is the reality that the economy of South Africa is still dominated by the white minority. We are still faced with high levels of inequality and unemployment, and transformation to a just and prosperous society for all has not been realised. Zuma's election promise was to speed up transformation. He intended to do this by leveraging preferential procurement policies and embarking on a massive infrastructure development drive. This is not necessarily a 'bad policy' (though there are legitimate debates on the effectiveness of this strategy for realising developmental state objectives). The "big lie", however, presents itself when we examine how this policy was implemented, who benefited from it and what the devastating consequences have been for both the state and South Africa more broadly. Had implementation occurred with the collective well-being of the nation in mind, the outcomes may have been different. Based on the evidence we have presented in this book, it was deployed with the narrow objectives of benefiting a select few, ensuring they escape any form of accountability or prosecution and enabling them to accumulate sufficient influence to continue exploiting positions of power and undermining government's ability to fulfil its constitutional mandate.

The crude forms of rents extraction and accumulation (through BBEEE fronting and influence peddling) has not resulted in the promised development of a "black industrialist class" and the underlying structure of the economy has remained intact. Money looted from the state has found its way to offshore bank accounts in places like Dubai and Hong Kong, pumped into lavish homes and fast cars, squandered on extravagant holidays abroad and ultimately ended up in the pockets of luxury goods merchants (the owners of which remain mostly white or foreign). Most of the companies that benefited from the large investment drive are multi-national corporations that have no real vested interest in the country's development. One would think that these entities are the face of so-called "White Monopoly Capital", and yet they were perhaps the greatest beneficiaries under the Zuma administration. There is nothing radical about creating a small group of elites that exploit influence to accumulate wealth at the expense of the nation (we have had that for over 300 years).

As this book demonstrates, there are many rackets that enabled State Capture, and each will need to be explored and addressed individually and collectively. This is not a question that one group or individual can answer. It is in this spirit that we suggest some provocations that we hope will contribute to the ongoing discourse on South Africa's democratic project.

19.1 "FIXING" GOVERNANCE

Perhaps one of the most challenging aspects of State Capture is that many of the individual actions taken by members of the shadow state are not explicitly illegal or criminal. This is the stance taken by many who are fingered as State Capture actors. They assert that if the act is not illegal or criminal then the individual has done nothing wrong. This reductionist logic fails to recognise that just because something is not illegal does not make it is morally or ethically right. The conflation of legal action with ethical action has been a crucial enabling condition for State Capture.

Most of the activities that have enabled State Capture fall within the strict definitions of legal statutes. In some instances, they are a result of shortcomings in the design of the legal framework governing various institutions. An example is the case of SASSA, where the Minister had the power to override decisions taken by the CEO with no independent oversight body to prevent political interference (Foley & Swilling, 2018). Another example is the confusion surrounding the various pieces of legislation governing the intelligence agencies and law enforcement mandates which was used in the capturing of SARS. The legislative inconsistencies were understood as far back as 2007 when the Scorpions were disbanded (Ginwala Enquiry, 2008), and yet there has been no effort made to address these shortcomings.

As already highlighted, most of the discourse around what to do in the wake of State Capture has focused on fixing the processes and "capacitating" government by addressing the structure of institutions. Closing loopholes in legislative frameworks for procurement processes and making key appointments more transparent and participatory are all notable and necessary undertakings required to curtail State Capture, but they are not enough. Most of the 'solutions' focus on the formal (Weberian legal-rational) aspects of State Capture and fail to address the informal (relational) practices of the shadow state that subvert the formal. President Cyril Ramaphosa's testimony before the Zondo Commission in April 2021 is a case in point, where he lauds the new Political Party Funding Act as a tool that "will save our democracy". The idea is that this act will prevent party funding via procurement processes and its associated gratitude donations. When quizzed about the Bosasa donations to the ANC (an example of informal relations of the shadow state), Ramaphosa described this relationship as "anomalous" (Zondo Commission, 2021a, p. 142). The bulk of evidence presented to the Zondo Commission suggests otherwise.

19.1.1 Radical Reforms and Reframing

If we were to think of the evolution of South Africa's democracy, the pre- and immediate post-1994 political transition cohort were well-versed in the structural transformation agenda, while the cohort that tried to 'implement' democracy added the language of process and compliance. These languages and frameworks are inadequate for the current moment. Currently, there are several proposals to establish new institutions and programmes to specifically "deal with corruption", like as outlined in the National Anti-corruption Strategy (South African Government, 2020). The challenge is that many of the plans are thin on details. Establishing new institutions to do the work of hollowed out institutions that had been repurposed does not appear on the face of it to make much sense. The challenge is to restore purpose to the public sector and ensure that the values and logics of state functionally are carried out by competent civil servants.

New literature on building state capacity and institutional change suggests that pre-occupation with 'good governance' has come about because many thought-leaders in the global multi-lateral system whose job it is to punt the notion of 'good governance' are mesmerised by the belief that structural conditions guarantee intended outcomes, a now outdated and disproven formula (Andrews, Pritchett & Woolcock, 2017). The invitation is to focus on the institutional work inside of structures, the relational set of actors who are performance orientated around a clear mandate to deliver results. Key to this strategy is the nurturing of leaders and individuals who can drive an emergent institutional environment through their disruptions and provocations to reimagine

new configurations that can respond to new opportunities. One could even say that State Capture actors were indeed these kinds of catalysing agents willing and able to figure out creative 'solutions' to their specific problems. Now we need a new generation motivated by a sense of justice and developmental intent. They will have to respect those systems that hold them to account. This is a scenario of institutional change where form follows function, buoyed by the momentum of successes and learning in tackling prioritised problems. Institutional work is an iterative, long haul, context-specific undertaking. There are no options for quick-fix remedies or imitations of best-practice from elsewhere.

Corruption (and State Capture) is opportunistic, resilient and unrestrained by the constraints of bureaucracy or the formal-rational restrictions of "good governance". Programmes that seek to minimise opportunities for corruption should focus on improving the integrity of particular processes and should be designed to enable continuous learning and adaptation of the systems over time. The aim should not be to establish perfect systems that then require a compliance culture (or 'consequence management' systems) to ensure implementation. Instead, a resilient system that balances agency and process with strategic objectives is what will enable government to become an assemblage of institutions that reflects the aims values and provisions of the Constitution. Rackets are executed by those who care little about the impact their actions will have on the integrity and vitality of the wider set of complex systems they are part of. Indeed, some of them will engage in rackets, and bemoan the hollowing out of state institutions. Failing to link their own actions with state failure is caused by an absence of systems thinking. Although most will have sat through presentations by consultants of business school lecturers on complexity and systems thinking where they are told everything relates to everything else which is why one small negative action can switch a virtuous cycle into a vicious cycle; in practice, they instigate or get enrolled in rackets that have the opposite effect. By depicting the state as a complex system, we are effectively establishing the foundations for a relational ethics of co-responsibility. This is what will disrupt the current predatory logics and related rackets that enable State Capture.

19.1.2 Private Sector Untruths

As evident in the various chapters, the predatory logics or rackets that underpin State Capture extend beyond the state to most (if not all) institutions and sectors in society. This is particularly relevant in relation to the role of the private sector and private sector actors.

For example, there are inherent contradictions and conflicts of interest that are embedded in the business model of auditing firms. Auditors are supposed to provide unbiased

and objective analysis of the financial reporting of an organisation. However, at the same time, they offer tax advisory and consultancy services, which is undoubtedly aimed at maximising corporate returns (which in some instances entails gaming the system). They act as booth referee and coach. Another example is the practice of consulting firms being brought in to diagnose problems within an institution, inevitably leading to them finding 'problems' which will require their services.

Increasingly, companies and corporations are starting to acknowledge that a purely extractive logic is unsustainable. This resulted in the now widely used notion of 'corporate citizenship' and the related shift from 'shareholder value' to 'stakeholder value' (with consumers, employees and citizens as the stakeholders). However, the most recent shift entails conceiving the corporation as an organisation that must have a defined purpose, specifically a financial, social and environmental purpose. Though this presents a potentially positive transition away from the predatory logics of the 'way we do business', some scepticism should be reserved. The ready deployment of public relations spin and secrecy assigned to minimising corporate risks are all logics that seek to absolve companies from responsibility for their malfeasance (example Bain in the SARS chapter).

Many corporates in South Africa have been vocal in speaking out against State Capture. However, these cries ring hollow when one considers what has happened to whistle-blowers most of whom cannot find employment.

19.2 A PROVOCATION: IMAGING ALTERNATIVES

19.2.1 Reflecting on our Relationships with Power and the State

One question that the State Capture narrative raises, but seldom addresses, is from whom has the state been captured? From the perspective of the 'ideal' democracy – the democracy envisaged by the Constitution – the answer would be 'from the people'. But from the perspective of empirical reality, 'the people' were never in control of the state understood as an assemblage of a multiplicity of actually existing institutions. The liberal ideal that we had a neutral constitutional state to start off with that was then captured by a specific power elite has never existed in South Africa, including after 1994. As Bob Jessop (2015) argues, 'the state' as such does not exist. It exists only as an ideal, a specific political project. In our case, the political project was a non-racial, non-sexist, democratic state. The actually existing state is a vast ramshackle affair of a multiplicity of institutions constituted in different ways for different purposes and shot through by numerous vested interests.

So, when we refer to 'State Capture', captured from whom by whom? Admittedly, we too have not adequately addressed this question as part of this book. The values and

principles of democracy, as a system of governance, imply the perpetual peaceful contestation of interests and ideas within a framework that strives to ensure all voices are heard, solutions debated, and outcomes negotiated. As such democracy is not an end in itself, but rather a way of engaging our various collective formations in the constant process of reviewing the past, renewing the present and re-imagining futures. The purpose of this book is to inform this process of ongoing deliberation.

The question we address is not about how State Capture deviated from the liberal ideal, but how specific networks organise themselves to capture particular state institutions in order to repurpose them to achieve strategic ends, ranging from basic looting through to political power. For those committed to aligning state institutions with the democratic ideals of the Constitutions, it is essential that they understand how State Capture works in practice.

It is important to acknowledge the various institutions and individuals that exposed and curtailed the advancement of the State Capture project. As evident throughout the book, the role of the media and civil society in holding those in power to account should be applauded. Similarly, the independence of the judiciary often proved a bulwark against the machinations of the shadow state. The various investigations and inquiries that have followed set new precedents in terms of increased transparency and accountability, revealing several flaws in our democratic design.

The Political Party Funding Act has recently been signed into law (2021), though yet to be implemented. And though this is a major leap forward in terms of increasing the transparency of money in our politics, it will undoubtedly need further development. Related to this, there is also a call for reviewing the party-political system which we currently have in place.

Many have observed over the years that the ANC suffers a crisis of identity – it continues to carry its legacy of liberation movement and is yet to fully embrace the logics and constraints of the democratic system of government that the liberation movement made possible. As ANC President Cyril Ramaphosa admitted to the Zondo Commission, political cultures of patronage and patrimonialism are still prominent in South Africa's body politic (Zondo Commission, 2021b). A politics of personalities prevails, not a politics of purpose.

As rightfully raised by Adv. Pretorius, the purpose of the Zondo Commission is to understand how was it that State Capture was allowed to happen? It is a question that still needs to be answered by the political elite of this country. There are many people within the governing party that remain in key positions of power, both within the party and the state, which have been implicated in serious corruption and maleficence

that go way beyond mere 'misdemeanours' (Madisa, 2021). The deafening silence from all quarters, reveals their disconnect from the realities of the current moment.

What makes a democratic state legitimate is the extent to which it is believed to be legitimate by the majority of the population. The state of our democracy is not only contingent on the capability of the state, but also the manner in which the society engages and contributes to its formation. In South Africa, as outlined in our Constitution, this occurs through political participation in voting and ongoing engagement with the state institutions.

Though some may question the value of the Zondo Commission and other investigations and inquiries that serve as the basis for this book, they are all crucial for the development of our democratic values. The people of South Africa have a right to know in whose interests decisions were made and why. The culture of secrecy, impunity and petty patrimonial politics must come to an end if our democracy is to thrive. Transparency and accountability are non-negotiable, as too are the requirements for transformative actions to be implemented to address the injustices that remain embedded in our social, economic and political systems. Our constitution is revolutionary in its design, but the values and vision that it prescribes can only materialise if embraced by those who have been elected to govern and by those with a duty to manage state institutions.

19.2.2 Rebuilding Broken Trust: Time for a New Story

What promise was betrayed in the fallout of State Capture? The possibility of a story, one where time moves forward, a narrative that is not mired in an eternal present where racketeers have free reign. State Capture stole a narrative that carried the hopes, ambitions and urgent developmental needs of a grossly unequal country. The danger we face is not that the story was stolen, but rather the possibility that such a fractious nation could have a story at all may have also been stolen.

The dawn of democracy in South Africa was buoyed by a story – that of a reconciled nation poised to address the spectre of injustices across all spheres of life. The new democracy, the Rainbow Nation – however remote or real to citizens – lived in our imaginations. It carried in its sweep institutional reforms, new policy, and reconfigured rules for implementation. Beset with all manner of teething problems the fledgling Mzansi continued to hold on to the idea that its social welfarism and developmental agenda could deliver jobs, greater economic and social prosperity, "a better life for all". Even when poverty increased and economic growth rates refused to improve, there was still a story – a place to put one's faith, a goal to move towards, even when the function of the state did not follow its form.

The predatory state capitalised on the citizen's enrolment in this early story, manipulating narratives that duped many of us, for a while, into the belief that transformation was well within reach. The ruse of State Capture has cannibalised the traditional story of hope, and in the process decimated all faith that state institutions and its private sector partners are holding the other end of the social contract. We are called to stop being mesmerised by the mess we are in, by the immensity of betrayal, by the ineffectiveness of the ANC, by the hijack of race issues. We are called to seek those places where we can thrive and succeed supported by the ethics that our starkly unjust reality demands.

So where do we start with this new story in the detritus of State Capture? With a paradigm shift of prioritising specific problems and solving them for our context, bracing for a long haul of reflective practice that reaches not only into the halls of power, but into our businesses, places of learning and into our very homes to re-examine the cultures we nurture there. Instead of focusing on fear and compliance, can we build capability to succeed, the ability to implement the lauded policies we have on paper? Can we imbue this paradigm with purpose, with creating public value that is driven by performance and not self-interest? If the answer is yes, then we have started a new story – one we can own, and that the future deserves.

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APPENDIX

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
The *State of Capture* report – focuses on Guptas' relationship with Jacob Zuma and their alleged influence on the affairs of state	First complaint was received in March 2016 and the report was released in November 2016.	Investigation into complaints of alleged improper and unethical conduct by the President and other State Functionaries, relating to alleged improper relationships and involvement of the Gupta Family in the removal and appointment of Ministers and Directors of State-Owned Enterprises (SOEs), resulting in improper and possibly corrupt award of State Contracts and Benefits to the Gupta Family's Businesses. The report details numerous allegations of the Guptas' involvement in affairs of the state and their irregular activities that enable rent extraction. The findings were not conclusive and the remedial action was to establish a commission of inquiry into state capture (to be appointed by the President, but with a judge selected by the Chief Justice). Litigation endeavoured to delay or prohibit the report's release and implementation of remedial actions, but failed, and the commission was established in 2018.	▪ Public Protector, followed by litigation	▪ GCIS (*The New Age*) ▪ Eskom (Optimum) ▪ Transnet (Regiments/ Trillian) ▪ Denel ▪ SAA (*The New Age*) ▪ SABC (*The New Age*) ▪ Department of Finance ▪ Transport (SAA) ▪ Communica-tions (SABC & GCIS)
Zondo Commission	Established in 2018, with anticipated conclusion being the end of 2021.	Formally titled the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, the Commission was promulgated by then President Zuma in response to the remedial actions as outlined in the Public Protector's *State of Capture* report. As of June 2021, the Commission that started in August 2018 has held more than 418 days of hearings of over 330 testimonies (generating over 71 000 pages of transcript). The inquiry's terms of reference were expansive and, as such, the scope of investigations went beyond merely looking into the Gupta-related cases, covering other networks (e.g., Bosasa) as well as other government institutions (e.g., role of Parliament).	▪ Zondo Commission	Various work-streams covering *inter alia*: ▪ SOEs (Eskom, Transnet, Denel, SAA) ▪ Free State Provincial Government ▪ Bosasa ▪ SARS ▪ Law enforcement ▪ State Security Agency (SSA) ▪ *The New Age* & ANN7 ▪ Role of Parliament and ANC

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
Bosasa	Dating back to a 2009 SIU report. Investigations and various litigations are ongoing.	In 2019, former Bosasa COO, Anglo Agrizzi, testified at the Zondo Commission, detailing the acts and long history of corruption between various Bosasa companies predominantly owned by Gavin Watson, and numerous government entities/departments. The testimony of Agrizzi (and other former Bosasa employees) corroborated the findings of a 2009 SIU investigation that alleged corruption in several contracts Bosasa had with the Department of Correctional Services. Criminal court proceedings have been initiated based on the 2009 SIU investigation, along with new investigations initiated by SARS and other law enforcement entities.	▪ Special Investigation Unit (SIU) ▪ Zondo Commission	▪ Department of Correctional Services ▪ Department of Justice ▪ Department of Home Affairs ▪ Department of Transport ▪ Various SOEs (e.g., SAPO, ACSA) ▪ National Prosecuting Authority (NPA) ▪ Members of Parliament
Arms Deal	Various investigations and sources, dating back to 1990s. Most significant source being through Seriti Commission. Corruption case against Zuma is ongoing.	Commission of Inquiry into allegations of fraud, corruption, impropriety, or irregularity in the Strategic Defence Procurement Packages (SDPP). Various court cases related to allegations of corruption against Jacob Zuma. On Monday, 24 October 2011, the President announced the Commission chaired by Judge Seriti. The findings of the Commission were that there was "no evidence" of corruption, but this is seen by many to have been a whitewash. The report was taken on review and set aside in August 2019. The corruption case against Zuma is ongoing before the courts.	▪ Seriti Commission ▪ Various court cases	Initially: ▪ South African National Defence Force ▪ Members of Parliament Allegations also involve: ▪ NPA ▪ SSA
Nkandla Security Upgrades	Investigation started in November 2012. Report on investigation was released in March 2014.	Report on security upgrades to President Zuma's homestead in Nkandla. The investigation found that the President unduly benefited from the upgrades and as part of remedial actions the President was required to pay back a portion of the costs of the upgrades. Zuma instructed that SAPS undertake their own investigation, which sought to rationalise the expenses (fire-pool report). Parliament accepted this alternative report, but major court cases followed, ultimately declaring that the Public Protector's remedial actions are binding. President and Parliament failed to uphold the Constitution. President ordered to "pay back the money".	▪ Public Protector's *Secured in Comfort* report, followed by litigation	▪ Department of Public Works ▪ South African Police Service

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
Private Aircraft Landing at Waterkloof Airforce Base and Gupta Sun City Wedding	May 2013.	In 2013, justice, crime prevention, and security cluster (JCPS) – a cabinet structure composed of various ministries – undertook an investigation into the Landing of a Commercial aircraft at Air Force Base Waterkloof (report titled the same). The investigation revealed that the Guptas initially tried to organise a special landing at OR Tambo International Airport, but was turned down. They then approached the Indian High Commission who re-designated the wedding entourage as an official delegation to secure a landing at the Waterkloof base. The wedding held at Sun City was attended by a number of high-profile ANC politicians and was paid for in part by moneys looted from the Vrede Dairy Farm project.	▪ Report by JPCS ▪ Zondo Commission	▪ Department of International Relations and Cooperation (DIRCO) ▪ Department of Defence ▪ Department of Transport
Free State Provincial Capture, includes Vrede Dairy Farm and Asbestos Contracts	Ongoing.	The Vrede Dairy Farm project was initiated by the Free State Provincial Government as a development project, however, in partnering with a Gupta-linked company Estina, government funds were looted. In 2018, the Public Protector released a report on their 2018 investigation, but it was taken on review and set aside by the courts. The second part of the investigation is yet to be finalised. The NPA laid criminal charges against Gupta associates and implicated government officials. Court proceedings are ongoing. Significant testimony and evidence have been presented at the Zondo Commission regarding the Vrede Farm case, as well as the asbestos inspection project (criminal proceedings are also underway). Both projects implicate high-profile politicians and senior officials manipulating government process.	▪ Public Protector reports ▪ Zondo Commission ▪ Various court cases	▪ Free State Provincial Government
Irregular removal of National Director of Public Prosecutions (NDPP), Mxolisi Nxasana	Inquiry instituted in February 2015, but was cancelled in May 2015. This triggers the Constitutional Court cases that followed.	Inquiry into the fitness of Mxolisi Nxasana to hold office as NDPP. The Inquiry was cancelled after Zuma "agreed to let Nxasana resign". He was paid R17m – the balance of his ten-year contract. Court cases followed detailing the abuse of the presidency powers by Zuma. Ultimately, Nxasana was ordered to repay R17m and Zuma's appointed replacement, Shawn Abrahams, was ordered to vacate office. Constitutional Court found Zuma's actions to be an abuse of power and in breach of his constitutional obligations.	▪ Cassim Inquiry into fitness of Mxolisi Nxasana to hold office of NDPP initiated by Zuma, followed by litigation	▪ National Prosecution Authority
Political killings in KZN	Established in October 2016. The report was released in May 2018.	On 28 October 2016, the Premier of the Province of KwaZulu-Natal established a Commission of Enquiry into the Underlying Causes of the Murder of Politicians in KwaZulu-Natal (KZN).	▪ Moerane Commission of Enquiry	▪ KZN Provincial Government ▪ KZN Local Governments

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
State Capture of State-Owned Enterprises and Government Departments				
Interference in operations at the SABC	The Ad Hoc Committee was established in November 2016 and final report was tabled on 24 February 2017.	Parliamentary Ad Hoc Committee on the SABC Board Inquiry into mismanagement and interference in SABC operations. Findings include evidence of Minister Faith Muthambi's interference in the organisation and editorial interference, in the firing of SABC 8 who protested censorship of the national broadcaster (on instruction from COO Hlaudi Motsoeneng). It should be noted that the inquiry was preceded by an investigation by the Public Protector. Details are contained in the 2014 report titled *When Governance and Ethics Fail*.	▪ Parliamentary Inquiry ▪ Preceded by an investigation by the Public Protector	▪ SABC (Department of Communication)
Passenger Rail Agency of South Africa (PRASA)	Complaints were lodged in 2012 and the report was released in August 2015.	Several cases of "mismanagement and irregularities" regarding various contracts. Lucky Montana was CEO at the time. One of the remedial actions stipulated that National Treasury was to investigate all PRASA contracts from 2012 onwards with a value of R10 million or more. National Treasury implemented the remedial action which resulted in several investigations, the details of which were leaked to the public.	▪ Public Protector's *Derailed* report on PRASA ▪ Numerous investigations	▪ PRASA ▪ Department of Transport
	In June 2017, Parliament directed 4 committees to investigate state capture. Committee hearings were not completed.	In terms of the parliamentary directive, the Portfolio Committee on Transport was requested to establish an Inquiry into State Capture at PRASA. However, the Portfolio Committee noted that PRASA was not mentioned in the Public Protector's *State of Capture* report and decided they would focus on the various investigation reports produced for National Treasury (as recommended in *Derailed* report).	▪ Portfolio Committee on Transport	▪ PRASA ▪ Department of Transport
Eskom Inquiry into State Capture	In June 2017, Parliament directed 4 committees to investigate state capture. Public Enterprises Committee report on Eskom was released in November 2018.	Extensive hearings were held by the Committee detailing much of the evidence presented in the Public Protector's report. The Committee presented recommendations and compiled a final report detailing their findings. These included findings that Ministers Lynne Brown and Malusi Gigaba were negligent and had to be held accountable. Also recommended that criminal investigations be undertaken against the relevant Eskom executives.	▪ Parliamentary Inquiry	▪ Eskom ▪ Department of Public Enterprises
Nugent Commission – SARS Inquiry	The Inquiry was constituted on 24 May 2018 and the final report was released in December 2018.	Commission of Inquiry into tax administration and governance by South African Revenue Service (SARS). Tom Moyane was fired based on the interim report released in September 2018. The inquiry found that Moyane, with the help of consultancy company Bain, had implemented restructuring of the organisation, resulting in gross mismanagement and erosion of SARS. Moyane motivated the restructuring based on the "rogue unit" narrative that has been the subject of several other debunked investigations and the subject of much litigation.	▪ Judicial Commission of Inquiry ▪ Court cases around the "rogue unit" narrative	▪ SARS (National Treasury)

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
State Capture of State-Owned Enterprises and Government Departments				
Commission of Inquiry into Public Investment Corporation (PIC)	In October 2018, the Commission was constituted, and the final report was released in March 2020.	Commission of Inquiry into allegations of impropriety regarding Public Investment Corporation (PIC). There were extensive hearings on various 'dodgy' deals the PIC entered into and details of political and executive interference in the operations and decision-making processes of the investment agency.	▪ Judicial Commission of Inquiry	▪ PIC (National Treasury)
South African Social Security Agency (SASSA)	Various Constitutional Court cases from 2011 to 2018 resulted in removal of CPS as service provider to SASSA.	In 2014, South African Social Security Agency's (SASSA) 2012 contract with CPS was found to be irregular and invalid, however, due to the importance of ensuring beneficiaries received grants, CPS continued to be the service providers until 2018. Following a March 2017 ruling, the Constitutional Court instituted a Section 38 Inquiry into Minister Bathabile Dlamini's personal liability for the narrowly averted grant payment crisis.	Primary sources: ▪ AllPay court case ▪ Black Sash court case	▪ SASSA
South African Airways (SAA) and SAA Technical	Court case to have Dudu Myeni declared a delinquent director was launched in 2017.	Court case was launched in 2017 by Outa and the SAA Pilots' Association (SAAPA) to declare Myeni a delinquent director in terms of the Companies Act, based on her actions while she was chairperson of the SAA Board. In 2020, the High Court declared Myeni a delinquent director for life. A significant amount of new evidence also emerged through the Zondo Commission, outlining how the operations at SAA were undermined and how Myeni and others abused their positions of authority.	▪ Court papers ▪ Zondo Commission	▪ SAA ▪ SAA Technical
Gupta Family Naturalisation	In June 2017, Parliament directed 4 committees to investigate state capture. Final report was tabled 14 March 2019.	Portfolio Committee on Home Affairs Inquiry into the Gupta Family Naturalisation was established in terms of the Parliamentary directive. Hearings formally started on 12 September 2018. Final report was tabled on 14 March 2019. Questions were raised around contracts with Visa Facilitation Services. This matter is ongoing as of December 2020.	▪ Portfolio Committee on Home Affairs	▪ Department of Home Affairs
Inquiry into State Capture related to Gupta-owned mines	In June 2017, Parliament directed 4 committees to investigate state capture.	Though the Committee drafted a term of reference for the Inquiry, the activities of holding hearings and consolidating the evidence never materialised beyond questions being put to then Minister Zwane.	▪ Portfolio Committee on Mineral Resources	▪ Department of Mineral Resources

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
State Capture of State-Owned Enterprises and Government Departments				
Various investigations relating to State Capture at Eskom	2015	In 2015, Dentons produced an interim report on their investigations into Status of Business and Challenges at Eskom. Their investigation was halted.	▪ Eskom	▪ Eskom
	2017	In 2017, PricewaterhouseCoopers (PwC) was appointed by National Treasury to investigate Eskom's Coal Procurement Processes. Damning findings were made in relation to Gupta-owned Tegeta mine contracts and poor coal quality.	▪ Eskom	▪ Eskom
		G9 was contracted by Eskom to investigate the Trillian/McKinsey contracts. Interim report presented to Board of Eskom in August 2017. The investigation remained incomplete, and no report is available in the public domain. Evidence from the investigation was presented in the Parliamentary Inquiry into Eskom State Capture.	▪ National Treasury	▪ Eskom
National Treasury Fundudzi reports, related to Eskom and Transnet (x3)	Final reports compiled in November 2018 and released to the public shortly thereafter.	Investigations requested by National Treasury of alleged corruption at Transnet and Eskom. The three reports focused on Eskom (general), the contracts related to Trillian/McKinsey and Transnet Locomotives.	▪ National Treasury Fundudzi	▪ Eskom ▪ Transnet
Transnet Locomotive Contracts	Investigations commenced in December 2017 and reports on findings submitted during 2018.	Werksmans Attorneys was appointed in December 2017 to undertake an investigation into the 1 064 Transnet Locomotives procurement process, however, the investigation was halted. No report in the public domain.	▪ Werksmans	▪ Transnet
		Mncedisi Ndlovu & Sedumedi (MNS) Attorneys was then appointed to investigate 1 064 locomotives procurement process. The report is not in the public domain, but media indicates that recommendations mirror the Werksmans' findings and recommends that Molefe face criminal charges.	▪ Mncedisi Ndlovu & Sedumedi	▪ Transnet
Inquiry into State Capture at Transnet and Denel	In June 2017, Parliament directed 4 committees to investigate state capture. Committee hearings were not completed.	A detailed information booklet was prepared in relation to Transnet, however, hearings were not held before the end of term of Parliament. Following National elections in 2019, it was decided that outstanding Inquiries into state capture be postponed indefinitely until conclusion of the Zondo Commission.	▪ Portfolio Committee on Public Enterprises	▪ Transnet ▪ Denel

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
Law Enforcement and the Security Cluster				
Enquiry into Jiba and Mrwebi's fitness to hold office at NPA	Established in November 2018. Report was issued in April 2019.	Presidential Enquiry into the fitness to hold office of suspended NPA senior advocates Nomgcobo Jiba and Lawrence Mrwebi. NPA's deputy head Jiba, and Mrwebi, the head of the Specialised Commercial Crimes Unit, were suspended in October 2018 by President Cyril Ramaphosa. The Inquiry was headed by retired Constitutional Court Justice Yvonne Mokgoro. Jiba and Mrwebi were accused of improper conduct in their handling of cases involving former crime intelligence head Richard Mdluli, as well as former KwaZulu-Natal Hawks boss Johan Booysen.	▪ Mokgoro Enquiry	▪ National Prosecuting Authority
High-Level Review Panel on the State Security Agency (SSA)	Established in June 2018 and final report was sent to the President in December 2018.	The High-Level Review Panel into the SSA was established by President Ramaphosa in June 2018. The key finding was a serious politicisation and factionalisation of the intelligence community over the past decade or more. This resulted in "an almost complete disregard for the Constitution, policy, legislation and other prescripts, and [turned] our civilian intelligence community into a private resource to serve the political and personal interests of particular individuals" (High-Level Review Panel on the SSA, 2018, p. ii).	▪ Review Panel established by President Ramaphosa	▪ SSA
Various court cases against persons within law enforcement	Ongoing.	Though testimony and evidence have been presented at the Zondo Commission, it is understood that no definitive findings will be made regarding the capture of law enforcement under the Zuma administration. Since 2012 onwards, there were several court cases that were pursued against individuals in law enforcement, all of which have been either dismissed or withdrawn. Most noteworthy are the cases involved, amongst others: Anwa Dramat and Shadrack Sibiya of the Hawks (and Robert McBride from Independent Police Investigative Directorate [IPID]) for allegations related to the "Zimbabwean rendition" matter; Johan Booysen for alleged racketeering as part of "Cato Manor hit squad"; and the various senior officials accused of being part of the "rogue" intelligence unit at SARS. Other court cases that have provided significant evidence indicating the capture of law enforcement relate to the irregular appointed allies of the Shadow State capture network or the irrational removal of potential opponents holding senior positions in law enforcement. Example is the irregular removal of Mxolisi Nxasana as National Director of Public Prosecutions (NDPP).	▪ Various court cases, proceedings in Parliament ▪ Zondo Commission	▪ NPA ▪ SAPS ▪ Hawks ▪ IPID

Case Study in State Capture	Status	Summary Description	Investigation Body / Source of Evidence	Government Entity Implicated
Scandals Connected to Jacob Zuma, Guptas, Other Key Networks and ANC Politics				
Investigations concerning Private Sector				
Budlender report on Trillian	Released in June 2017.	Trillian Holdings Board appointed Geoff Budlender SC to undertake investigations into State Capture allegations at Trillian Capital. Detailed accounts from whistle-blowers highlighted how information was withheld by senior management at Trillian.	▪ Trillion	▪ Eskom
Collapse of VBS Mutual Bank	Investigation launched in April 2018 and the report was released in October 2018.	Minister of Finance placed VBS under curatorship with effect from 11 March 2018. In April 2018, the Deputy Governor of the South African Reserve Bank instituted an investigation into VBS. The outcomes of the investigation showed blatant fraud and corruption by senior executives/Board and how they extracted money from the bank. Municipal funds were illegally deposited with VBS (senior ANC and EFF politicians have been implicated).	▪ SARB investigation report *VBS Mutual Bank – The Great Bank Heist*	▪ Several Provincial and Municipal Officials (Limpopo Government) ▪ SOEs (particularly PRASA)
SA Institute of Chartered Accountants' (SAICA) investigation into KPMG	Final report was handed to SAICA in December 2018.	SA Institute of Chartered Accountants (SAICA) established an Inquiry to investigate state capture related allegations of misconduct of its members who worked for KPMG. The Inquiry chaired by advocate Dumisa Ntsebeza held public hearings and handed its final report to SAICA in December 2018. Indications are that the final report will not be made public until all investigations and disciplinary hearings have been finalised.	▪ SAICA	▪ Guptas
Bell Pottinger	2017 investigation by PRCA.	In 2016, the Guptas appointed British PR company, Bell Pottinger, who developed and promoted a campaign that underpinned the RET and WMC narratives. In 2017, there was an independent law firm review by Herbert Smith Freehills resulting in Bell Pottinger's expulsion from the Public Relations and Communications Association (PRCA).	▪ PRCA ▪ GuptaLeaks ▪ Ongoing research on disinformation	▪ Guptas

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Following the release of the Public Protector's *State of Capture Report* in November 2016, South Africans have been witness to an explosion of almost daily revelations of corruption, mismanagement and abuses by those entrusted to lead the nation. The extent of this betrayal is overwhelming and it is often difficult to distil what actually happened during the Zuma administration. This book draws on the insights and expertise of 19 contributors from various sectors and disciplines to provide an account of what transpired at strategic sites of the state capture project.

The ongoing threat of state capture demands a response that probes beyond what happened to understanding how it was allowed to happen. The stubborn culture of corruption and misgovernance continue to manifest unabated and the predatory practices which enable state capture have not yet been disrupted. It is our hope that the various case studies and analyses presented in this book will contribute to confronting these shortcomings in current discourse, and open avenues for progressive deliberation on how to collectively reclaim the prospects of a just and prosperous South Africa for all.

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