

# Special Report

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## Commissions, Corruption and State Capture: Charting the Way Forward for South Africa

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African perspectives  
Global insights

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# Executive summary

Since the dawn of South African democracy, state commissions have been a regular fixture in responding to public scandals and controversies. The State Capture Commission (SCC) was the largest and longest-running commission since the Truth and Reconciliation Commission had completed its investigation into apartheid-era violence and human rights abuses.

As its name suggests, the SCC was established to investigate allegations of serious maladministration, malfeasance and corruption in South Africa's public sector. Beyond mere acts of self-enrichment by the political elite, state capture entails a deliberate and sustained dismantling of democratic institutions.

This report aims to provide a detailed account of the events that led to the establishment of the SCC and to unpack some of the key findings made in relation to certain state parastatals. In doing so, the report offers a contextual understanding of 'state capture' vis-à-vis contemporary international definitions of corruption.

Uniquely, the report considers various other post-democratic South African commissions that predated and coincided with the SCC. This helps to frame a wider illustration of what transpired in South Africa leading up to and during the course of state capture. By drawing on Kenyan experiences through the Bosire Commission, the report seeks to demonstrate both the opportunities and the limitations that commissions have in advancing the fight against corruption.

Apart from reaching a number of damning findings, the SCC also made a wide range of recommendations for the state to implement moving forward. In its final chapter, the report unpacks and explores these, suggesting feasible and pragmatic approaches in tackling the spectre of state capture.

# Abbreviations & acronyms

ANC	African National Congress
BADC	Board Acquisitions and Disposals Committee
BEE	black economic empowerment
CNR	China North Rail Corporation Ltd
CSR	China South Rail Corporation Ltd
DoJ	Department of Justice and Constitutional Development
DPCI	Directorate for Priority Crimes Investigations / the Hawks
EACC	Ethics and Anti-Corruption Commission (Kenya)
FATF	Financial Action Task Force
GIL	Goldenberg International Ltd
HVTs	high-value tenders
IMF	International Monetary Fund
INMSA	Independent News and Media South Africa (Pty) Ltd
JSC	Judicial Services Commission
MDS	Market Demand Strategy
MK	uMkhonto we Sizwe
Mokgoro Enquiry	Enquiry Under Section 12(6) of the National Prosecuting Authority Act 32 of 1998 into the Fitness of Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to Hold Office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions Respectively
MP	Member of Parliament
MSA	Master Service Agreement
NACAC	National Anti-Corruption Advisory Council
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
Nugent Commission	Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service
OCH	Optimum Coal Holdings
OCM	Optimum Coal Mine
PIC	Public Investment Corporation

SAPS	South African Police Service
SARS	South African Revenue Service
SCC	Commission of Inquiry in Allegations of State Capture / Zondo Commission
Seriti Commission	Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package / Arms Deal Commission
SIH	Sekunjalo Investment Holdings (Pty) Ltd
SIM	Sekunjalo Independent Media
SOE	state-owned enterprise
SSA	State Security Agency
TRC	Truth and Reconciliation Commission

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### Cover image

Pretoria, South Africa: President Cyril Ramaphosa receives the fifth and final Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State Report at Union Buildings on June 22, 2022. (Gallo Images/Alet Pretorius)

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# Introduction

South Africa's fledgling democracy has seen its fair share of commissions over a period of nearly three decades. At the outset, they were used as an instrument in society's attempts to come to grips with the realities and horrors of its apartheid past through the Truth and Reconciliation Commission (TRC). However, addressing apartheid's legacy of unparalleled social and political exclusion and marginalisation has proven to be a far more arduous and perilous journey. The historical legacy of racialised marginalisation and exclusion has been compounded by inappropriate policy, poor governance, state capture (a systematic dismantling of democratic state institutions to further private interests) and endemic corruption. This has and continues to test the very democratic foundations upon which South African society is built.

The debilitating decade that characterised Jacob Zuma's presidency (2009–2018) saw increased rates of poverty, economic stagnation, rampant criminality and corruption by both public and private actors, as well as a proliferation of service delivery failures. The African National Congress (ANC) recalled Zuma just short of his second term coming to an end and replaced him with Cyril Ramaphosa in 2018.

As the nation's deputy president during Zuma's rule, Ramaphosa entered office on an anti-corruption ticket. Determined to repair and reinvent the ANC's image, he made some credible appointments to key law enforcement agencies and instituted a number of commissions of inquiry. While not initiated by Ramaphosa himself, the largest and most renowned commission was the Commission of Inquiry into Allegations of State Capture (SCC), more popularly known as the Zondo Commission. It was established on the strength of then Public Protector Thuli Madonsela's report and remedial action.

It is now time to reflect on the work that the commission has done and consider how those findings and recommendations can be used to bring about substantive accountability and social change. This report seeks to contribute to the important public discourse on this issue.

It will do so by first exploring the theoretical questions relating to state commissions and enquiries. These include examining what they are and how they function, as well as the role that the judiciary should play in them, if any; and providing a definition of state capture that is suitable in the South African context. Second, the report will briefly consider various state commissions in South Africa over the years to contextualise the extent and impact of the state capture project.

The primary focus will be on the Zondo Commission. Its creation, as well as several of its key findings and recommendations, will be unpacked to determine how they can contribute

to workable policy and legislative outcomes in South Africa. Finally, the report will include a comparative element, using the experiences of Kenya and its own anti-corruption commissions, such as the Bosire Commission of Inquiry, to help identify best practices.

## Background to the Zondo Commission

The genesis of the SCC cannot be explained without referring to the former public protector, Madonsela. It was her November 2016 report titled *State of Capture*, and the accompanying recommendations, that set the Zondo Commission in motion.<sup>1</sup> This section considers two seminal events that culminated in the SCC's being established. The first was the Constitutional Court's finding that the public protector's remedial actions are binding and cannot be ignored unless properly set aside by a court of law.<sup>2</sup> The second was the public protector's decision to investigate complaints relating to state capture.

### *Nkandla and the public protector's new powers*

The Office of the Public Protector is known as a 'Chapter 9 institution' in South Africa. The reason is self-explanatory: chapter 9 of the Constitution creates six independent state institutions that support constitutional democracy. These range from the supreme audit institution, the Auditor-General of South Africa, to the South African Human Rights Commission and the Independent Electoral Commission.

Commentators such as Corder et al. note that Chapter 9 institutions may be seen as complementary to Parliament's oversight functions. The complex demands and nature of modern government result in Members of Parliament (MPs) often not having the time and resources to conduct in-depth investigations. Party discipline might also inhibit political independence, which is required to arrive at an impartial decision on a complaint. Therefore, state institutions supporting constitutional democracy have been created to assist Parliament in its traditional functions.<sup>3</sup>

Apart from establishing these independent Chapter 9 institutions, the Constitution also describes the institutional functions, appointments and removals of heads of these entities<sup>4</sup> and, in some instances, sets limits around tenure.<sup>5</sup>

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- 1 Public Protector of South Africa, *State of Capture: Report on an Investigation into 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 Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses*, Report 6 of 2016/17 (Pretoria: Public Protector of South Africa, 2016).
  - 2 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).
  - 3 Hugh Corder, Saras Jagwanth and Fred Soltau, *Report on Parliamentary Oversight and Accountability* (Cape Town: Council for the Advancement of the South African Constitution, 1999), par. 7.1.2, as cited in Loammi Wolf, "The Remedial Action of the 'State of Capture' Report in Perspective", *Potchefstroom Electronic Law Journal* 20 (2017): 1–45.
  - 4 South African Constitution, 1996, s. 193–194.
  - 5 See, for example, section 183 of the Constitution, which provides that the public protector serves for a non-renewable fixed term of seven years, and section 189, which states that the auditor-general serves for a non-renewable term of between five and 10 years.

The Office of the Public Protector is comparable to a state ombudsman or ombuds abroad. Generally, state ombuds are officials appointed to investigate complaints of maladministration and malfeasance within public authorities. Upon completing their investigations, state ombuds compile reports and propose remedial action through recommendations. The general expectation is that the executive arm of the state will examine the reports and abide by the recommendations unless there are cogent reasons not to do so.<sup>6</sup>

This is not to say that the executive should slavishly follow the ombud's recommendations. As with any actor, individual or state, there is always a possibility that the procedures and laws governing the investigation were not correctly adhered to. It is possible that the evidentiary underpinnings of the ombud's investigations that give rise to proposed remedial actions could be found wanting.<sup>7</sup> In other instances, the remedial action itself could be seen as exceeding the bounds of what might be regarded as permissible under the Constitution.<sup>8</sup>

While there were already large-scale and ongoing corruption controversies stemming from events such as the Strategic Defence Package, or the 'Arms Deal' as it is popularly known (discussed in detail later),<sup>9</sup> there were arguably two seminal incidents that drew widespread public ire. These marked the country's early attempts at unravelling the burgeoning state capture project.

The first incident was known as 'Guptagate', a scandal in which the wealthy and influential Gupta family appeared on the public radar and swiftly gained notoriety. Propped up by 'Number One' (Zuma), they were able to illegally land a civilian aeroplane carrying 200 wedding guests at a military airbase in Waterkloof, a national key point, in April 2013.<sup>10</sup> The guests were attending an extravagant double wedding in the country's luxurious Sun City resort for Rajesh 'Tony' and Atul Gupta's children and their partners.

This plane-landing took place without any authorisation from the military but was ostensibly sanctioned by Zuma (then president) himself – a claim he vehemently denied before Parliament. Instead, an in-house investigation by the South African National Defence Force placed the blame on the president's chief of protocol and two air force officials. Charges against the officials were quietly dropped and the president's chief of protocol was spirited away to serve as South Africa's ambassador to the Netherlands.<sup>11</sup> Notwithstanding

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6 Naomi Creutzfeldt, Nick O'Brien and Marek Nowicki, *A Comparative Review on Ombuds: Recommendations of Action for the Turkish Ombudsman and Guidelines for the Ombudsman and Public Authorities*, Report (Strasbourg: Council of Europe, Project on Improving the Effectiveness of Administrative Judiciary and Strengthening the Institutional Capacity of the Council of State, 2021), 53–60.

7 See, for example, *ABSA Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP).

8 See, for example, *South African Reserve Bank v Public Protector and Others* [2017] (6) SA 198 (GP).

9 Natasha Marrian, "SA's 'Original Sin': The Arms Deal", *Financial Mail*, July 15, 2021.

10 Nico Gous, "Six Years on and the Guptas Still Owe Sun City Money for Lavish Wedding", *Times Live*, February 27, 2019.

11 Andrew Harding, "Guptagate: The Scandal South Africa's Zuma Can't Shake", *BBC*, January 21, 2015.

the incident being whitewashed, there was widespread suspicion around the uncharacteristically close relationship between the Gupta and Zuma families.

The second incident concerned purported 'security upgrades' at Zuma's home in Nkandla, a predominantly rural area in KwaZulu-Natal. Despite the government's insisting that the upgrades were purely security related, the evidence suggested otherwise. Media reports revealed that the upgrades included an amphitheatre, clinic, gymnasium, playground, visitors' centre, helicopter pad, cattle enclosure and swimming pool.<sup>12</sup> When the *Mail & Guardian* newspaper first raised concerns about excessive expenditure at the president's private residence in December 2009, the Presidency's response was to deny that government was footing the bill. Two years later, in November 2011, the *Mail & Guardian* published an article titled: 'Bunker Bunker Time: Zuma's Lavish Nkandla Upgrade'.<sup>13</sup> A media frenzy ensued.<sup>14</sup>

## The government's response to the revelations and ensuing moral outrage was tenuous

The government's response to the revelations and ensuing moral outrage was tenuous. Mac Maharaj, then spokesperson for the Presidency, and the public works minister at the time, Thulas Nxesi, reverted to what would become an all-too-common strategy of deflection – referring to an ongoing investigation within the Department of Public Works that would be made public once completed. It never was made public.<sup>15</sup>

The furore surrounding Nkandla prompted seven members of the public, including an MP who alleged a violation of the Executive Ethics Code,<sup>16</sup> to lodge complaints with the public protector.<sup>17</sup>

Following her investigation, the public protector released her report, titled *Secure in Comfort*, in March 2014.<sup>18</sup> Her conclusion was that several improvements made at Nkandla

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12 "How President Zuma's Nkandla Home Has Grown", *BBC*, March 19, 2014.

13 Matuma Letsoala and Charles Molele, "Bunker Bunker Time: Zuma's Lavish Nkandla Upgrade", *Mail & Guardian*, November 11, 2011.

14 Jeanne Prinsloo, *Nkandlagate: A Critical Textual Analysis of the Press Coverage* (Pretoria: Media Policy and Democracy Project, 2013).

15 Prinsloo, *Nkandlagate*, 7-8.

16 "Executive Ethics Code: Regulation 6853", Government Gazette No. 21399, Notice 41 (July 28, 2000).

17 Public Protector of South Africa, *Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province*, Report 25 of 2013/14 (Pretoria: Public Protector of South Africa, 2014), 6.

18 Public Protector of South Africa, *Secure in Comfort*.

were not security features and constituted undue benefit or unlawful enrichment.<sup>19</sup> Her remedial action was that, to the extent that the president and his family unduly benefited from the non-security upgrades, he should consult with National Treasury and the police to determine a reasonable amount to repay the State.<sup>20</sup> The public protector also recommended that the president reprimand the ministers involved and report to Parliament on his comments and actions within 14 days of the report's being released.<sup>21</sup>

Parliament's response to the public protector's remedial action was to establish two ad hoc committees. The first committee considered several reports that began swirling around, including from the Joint Standing Committee on Intelligence, the Task Team and the Special Investigating Unit. The second committee considered yet another report by the minister of police. The latter report absolved the president of all liability.<sup>22</sup>

Needless to say, the minister's report was met with public incredulity and drew international notoriety

The minister's justification for the expenses included that the swimming pool was in fact a 'fire pool' – a strategic asset useful in firefighting and therefore a security feature.<sup>23</sup> Needless to say, the minister's report was met with public incredulity and drew international notoriety.<sup>24</sup> Yet, however implausible the minister's logic was, a strong ANC majority in Parliament meant that his report was accepted over the others and for all intents and purposes the matter was closed.

Except it wasn't. The second- and third-largest political parties, the Democratic Alliance and the Economic Freedom Fighters, launched a direct access application to the Constitutional Court to determine whether Parliament was constitutionally permitted to second-guess the public protector's remedial action.<sup>25</sup>

19 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11, par. 6.

20 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*. "Pay back the money" became a popular slogan in Parliament for the Economic Freedom Fighters, a left-wing to far-left-wing political party that had the third-largest support base in South Africa at the time. "South African Lawmakers Chant 'Pay Back the Money' at Zuma", *Reuters*, August 21, 2014.

21 Public Protector of South Africa, *Secure in Comfort*, 438.

22 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, par. 12.

23 Parliament of the Republic of South Africa, Ad Hoc Committee on Police Minister's Report on Nkandla, *Minister of Police and Minister of Public Works on Nkandla Security Upgrades* (Pretoria: Ad Hoc Committee on Police Minister's Report on Nkandla, 2015).

24 Aislinn Laing, "'Security' Swimming Pool Lands South Africa's Zuma in Hot Water", *The Telegraph*, November 29, 2013; Peroshni Govender, "South Africa Defends Zuma's Security Upgrade, Including Chicken Coop", *Reuters*, December 19, 2013.

25 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, par. 3.

At the heart of the matter was whether the public protector's remedial action was merely a recommendation or whether it constituted administrative action that needed to be adhered to, unless set aside by a court of law. In other words, the question was whether the public protector's findings and remedies were binding.<sup>26</sup>

The president's actions, or rather lack thereof, and Parliament's second-guessing were held to be inconsistent with their respective constitutional obligations and invalid

The Constitutional Court found that the remedial action was, in fact, binding. Unlike state ombuds in other jurisdictions who merely make recommendations, it was held that the public protector, by virtue of the powers conferred on her by the Constitution, could not be second-guessed by the president, the minister or even Parliament. What they ought to have done was to apply to court to have her remedial action set aside, and they had failed to do so.<sup>27</sup> As a result, the president's actions, or rather lack thereof, and Parliament's second-guessing were held to be inconsistent with their respective constitutional obligations and invalid.<sup>28</sup>

This was a seminal moment. The president was no longer immune from the repercussions of his actions and there was now a courageous public watchdog in town who was willing to stand up to the most powerful person in the country. The decision also laid the foundation for the public protector's next explosive report, *State of Capture*.

### ***The public protector's recommendation for the president to establish the SCC***

As her term drew to a close,<sup>29</sup> Madonsela, likely emboldened by the Constitutional Court's decision confirming her binding remedial powers, released what was perhaps the most wide-reaching report of her tenure. *State of Capture* was published on 14 October 2016.<sup>30</sup> Not passing up an opportunity to capitalise on the emotive rhetoric of then Chief Justice

26 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, par. 73–74.

27 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, par. 81.

28 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, par. 105.

29 Section 183 of the Constitution states that "[t]he Public Protector is appointed for a non-renewable period of seven years".

30 Public Protector of South Africa, *State of Capture*.

Mogoeng Mogoeng's judgment, the public protector's swansong report opens with the first two paragraphs of the Constitutional Court's judgment:<sup>31</sup>

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, 'public office bearers ignore their constitutional obligations at their peril.' This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.

It is against this backdrop that the following remarks must be understood: 'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.' And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.

The public protector's investigation was prompted by media reports alleging that the then deputy minister of finance, Mcebisi Jonas, was offered the position of minister of finance by the Gupta family in exchange for a ZAR<sup>32</sup> 600 million (\$32 million) bribe.<sup>33</sup> Jonas was alleged to have received this offer in the presence of Zuma's son, Duduzane, at the Gupta family's infamous Saxonwold residence in Johannesburg.<sup>34</sup> Media reports also alleged that Vytjie Mentor was offered the post of minister of public enterprises. In exchange, she was expected to cancel the South African Airways route to India. Zuma himself was alleged to have been present at the Gupta family residence when the offer was made.<sup>35</sup>

The public protector's *State of Capture* report was initially intended to be a preliminary report on the first phase of the investigation. Owing to time, resource and capacity constraints, as well as the fact that Madonsela's successor, Advocate Busisiwe Mkwhebane, had publicly stated that the state capture probe would not be her priority once she took up the office, Madonsela decided to declare the report final. Zuma unsuccessfully applied for

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31 Public Protector of South Africa, *State of Capture*, 3; *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others*, par. 1, 2.

32 Currency code for the South African rand.

33 *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP), par. 9.

34 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 9.

35 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 10.

an urgent interdict to prevent the report from being published. On 2 November 2016 the High Court ordered the report's release.<sup>36</sup>

Shortly after the publication of the public protector's report, a group of academics released an independent report explaining how a Zuma-aligned power elite had managed to take over key state institutions and repurpose them – in the process subverting the country's constitutional, legal and regulatory framework. The report referred to the phenomenon we now call state capture as a 'silent coup'.<sup>37</sup>

The report referred to the phenomenon we now call state capture as a 'silent coup'

Noting the limitations of the office and acknowledging that her investigation had barely scratched the surface of state capture, Madonsela made three legally binding recommendations. The first required that Zuma, as the sitting president, exercise his exclusive constitutional power to institute a commission of inquiry to fully investigate state capture. The public protector recommended that the commission complete its enquiry within 180 days and be adequately funded by the National Treasury. The president would then be required to submit a copy to Parliament within 14 days of receiving the report and inform Parliament about his intentions on how the recommendations would be implemented.<sup>38</sup>

This responsibility would fall on the shoulders of one of the Constitutional Court justices, Raymond Mnyamezeli Mlungisi Zondo

As Zuma himself was implicated in the investigation, the choice of appointing an appropriate chairperson was assigned to Mogoeng. He was required to appoint an active member of the judiciary to chair the commission. This responsibility would fall on the shoulders of one of the Constitutional Court justices, Raymond Mnyamezeli Mlungisi Zondo.<sup>39</sup>

36 Safura Abdool Karim, "State Capture Report Explained", *GroundUp*, November 3, 2016.

37 Mark Swilling et al., *Betrayal of the Promise: How South Africa Is Being Stolen*, Report (Stellenbosch: State Capacity Research Project, Centre for Complex Systems in Transition, 2017); Wolf, "The Remedial Action".

38 Public Protector of South Africa, *State of Capture*, 353–354.

39 Public Protector of South Africa, *State of Capture*, 353–354.



The second recommendation was that Parliament had to undertake a legislative review examining executive powers and privileges. The third recommendation instructed the National Prosecuting Authority (NPA) to look into certain investigations and determine whether criminal prosecutions were warranted.<sup>40</sup>

Rather than abiding by the public protector's recommendations and establishing a commission of enquiry, Zuma instead chose, perhaps unsurprisingly, to take her report to the court for review. The basis for his review, among other things, was that the power to appoint a commission of enquiry was an exclusive constitutional competence of the sitting president.<sup>41</sup> Furthermore, Zuma alleged that requiring the chief justice to appoint the judge to head the commission was unlawful because this power was not constitutionally assigned.<sup>42</sup>

In finding against Zuma, the High Court held that there was<sup>43</sup>

compelling prima facie evidence that the relationship between the President and the Gupta family had evolved into 'State Capture', underpinned by the Gupta family having power to influence the appointment of Cabinet Ministers and directors in boards of State Owned Enterprises (SOEs) and leveraging these relationships to get preferential treatment in state contracts, access to state provided business finance and the award of business licences.

The court itself recognised that the issue of 'state capture' had become a matter of great public concern. Madonsela's investigation had unearthed evidence of serious malfeasance and corruption. A commission of inquiry was thus the most appropriate remedial action in light of her findings and resource constraints.<sup>44</sup>

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40 Public Protector of South Africa, *State of Capture*, 438–443.

41 In terms of section 84 of the Constitution.

42 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 59.

43 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 128.

44 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 129.

## CHAPTER 2

# The Zondo Commission

The SCC was officially established and began its investigations in January 2018. There were 430 days of hearings, which took place between August 2018 and December 2021. After applying for and receiving eight separate extensions to complete the process, Zondo handed the 5 437-page report over in six parts, divided into 16 volumes, over the course of the first half of 2022. Nearly ZAR 1 billion (\$54 million) was spent on the commission, making it the largest, longest and most expensive commission in South Africa since the TRC.<sup>45</sup>

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## What is state capture?

The SCC offered the following definition:<sup>46</sup>

[S]tate capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain. This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services. As just intimated, to a large extent this occurred through strategic appointments and dismissals at public entities and a reorganisation of procurement processes. The process involved the undermining of oversight mechanisms, and the manipulation of the public narrative in favour of those who sought to capture the state.

45 Government of South Africa, State of the Nation Address 2024, [State Capture Inquiry Frequently Asked Questions](#); US Institute for Peace, "Truth Commission: South Africa", December 1, 1995.

46 Judicial Commission of Inquiry into State Capture, [State Capture Report](#) (Johannesburg: Judicial Commission of Inquiry into State Capture, 2023), Part 6, Vol. 2, 298.

Hoffman explains that '[s]tate capture is the corrupt process according to which the state is repurposed to serve the interests of those who capture it instead of the public interest'.<sup>47</sup> Elsewhere, he states that '[s]tate capture is a type of systemic political corruption in which private interests significantly influence a state's decision-making processes to their own advantage'.<sup>48</sup>

Alluding to the years of state capture, Chipkin describes the phenomenon as a 'silent coup' with three material impacts. It resulted, firstly, in the displacement of power from elected bodies into shadowy, increasingly criminal, networks; secondly, in the deliberate weakening and corruption of key state institutions; and, thirdly, in economic turmoil.<sup>49</sup>

State capture also embodies a subversion of democratic values and institutions in favour of an authoritarian system that operates behind a thinly veiled democratic facade

We would argue that there is an added, perhaps more geopolitically and ideologically slanted aspect to state capture. Beyond a mere manipulation of state institutions to further private interests, state capture also embodies a subversion of democratic values and institutions in favour of an authoritarian system that operates behind a thinly veiled democratic facade. There are several examples of this type of system operating in the world – particularly in countries that do not have a strong record in terms of holding free and fair elections.<sup>50</sup>

However, where those countries may always have had only a superficial form of democracy (or, indeed, what arguably could be described as no democracy at all), state capture could be argued to represent the seeds of transforming a functioning democracy into dysfunction. Where Chipkin would describe this as a descent into a shadowy, criminal state, we would add that it is also a descent into authoritarianism.

### *Distinguishing state capture from grand corruption*

According to Transparency International, grand corruption is the 'abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread

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47 Paul Hoffman, *Countering the Corrupt* (Cape Town: Siber Ink, 2021), 17.

48 Hoffman, *Countering the Corrupt*, 131.

49 Ivor Chipkin, "Phala Phala Is Not a Crisis for South Africa; It Is a Crisis for Cyril Ramaphosa and the ANC", *Daily Maverick*, December 4, 2022.

50 See, for example, Our World in Data, "Free and Fair Elections Index", <https://ourworldindata.org/grapher/free-and-fair-elections-index>.

harm to individuals and society'.<sup>51</sup> Three common characteristics can be identified: a well-organised plan of action; the involvement of high-level public officials; and serious harm, such as human rights violations.<sup>52</sup>

State capture, on the other hand, has been described as<sup>53</sup>

the process of obtaining, or capturing, state regulatory authority without democratic authorisation. The persons capturing state powers can be private or – as in South Africa – a mix of politicians and private actors who have gained influence over regulatory processes to serve private interests. State capture of the South African government under the Zuma regime proceeded in large part through control of the contracting authorities for lucrative [SOEs]. More recently, the power elite also consolidated state control by capturing the prosecuting authorities responsible for pursuing redress for criminal corruption within [SOEs].

## The world is seeing the increasing prevalence of state capture-type scenarios

The world is seeing the increasing prevalence of state capture-type scenarios. Chayes estimates that there are over 60 countries in which the public no longer associate corruption with iniquitous and individualistic opportunism but rather see it as the 'operating system of sophisticated networks' that enables transnational kleptocracy.<sup>54</sup>

## State capture poses an existential threat to democratic societies whose people have embraced the principles of social, economic and political freedom

The project of state capture in South Africa featured several defining characteristics that this research has attempted to identify. In the current global climate, where young and growing democracies abound, state capture poses an existential threat to democratic societies whose people have embraced the principles of social, economic and political freedom.

51 Transparency International, "What Is Grand Corruption and How Can We Stop It?", September 21, 2016.

52 Transparency International, "Grand Corruption", <https://www.transparency.org/en/our-priorities/grand-corruption>.

53 Sarah Bracking, "Corruption & State Capture: What Can Citizens Do?", *Daedalus* 147, no. 3 (2018): 170.

54 Sarah Chayes, *When Corruption Is the Operating System: The Case of Honduras*, Policy Research Report (Washington DC: Carnegie Endowment for International Peace, 2017).

These characteristics and factors include:

- The existence of political and private actors who exert significant influence over the state. Nascent postcolonial democracies that exist as de facto one-party-dominant states are particularly vulnerable, as their electorate is less likely to hold implicated actors accountable. This could be owing to a sense of historical fealty to the liberating organisation or perhaps an inherent mistrust of the wider political establishment, which is often inherited from a colonial past.
- A centralisation of power and reporting structures within organs of state.
- A systematic and deliberate dismantling of democratic institutions that serve as a bulwark for the rule of law, particularly law enforcement.
- A focus on easy extraction points for state resources. In most modern governments this would be public-private-type SOEs or other state departments that are involved in large infrastructure or otherwise high-cost projects.
- An enabling private sector that is incentivised to maximise profits above all other considerations, such as ethical business practices or loyalty to the state.
- Opaque ownership structures that disguise the ultimate beneficiaries and therefore do not automatically raise red flags.
- A system whereby loyalty, incompetence and/or apathy are all preferred characteristics within the public service, as this makes it less onerous to flout processes, secure contracts and extract resources with minimal resistance.
- A persistent discrediting and politicisation of mainstream media, combined with concerted efforts to establish or acquire control of a separate media vehicle for purposes of disseminating information aligned to certain political interests.

Support for the state capture project, which masquerades as a social and economic transformation project, is garnered and maintained through an increasingly populist, antagonistic and scapegoating rhetoric

The geopolitical implications of state capture are not the focus of this research, nor is the ideological conflict between neo-authoritarian regimes and liberal democracy.<sup>55</sup> It is nonetheless worth highlighting the striking similarities, particularly the focus on

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55 See, for example, He Li, *Political Thought and China's Transformation: Ideas Shaping Reform in Post-Mao China* (London: Palgrave Macmillan, 2015), 31.

centralising power structures and dismantling democratic structures – all premised upon a purported desire to galvanise economic development or, in the case of South Africa, economic redistribution. In practice, however, rather than redistribution benefitting broader society through investment and employment creation, support for the state capture project, which masquerades as a social and economic transformation project, is garnered and maintained through an increasingly populist, antagonistic and scapegoating rhetoric.

Grand corruption typically involves political elites and their affiliates orchestrating and executing an elaborate plan for purposes of self-enrichment. State capture, however, is perhaps distinguishable through the presence of an additional motivator – the deliberate dismantling and erosion of democratic institutions (especially independent oversight institutions and regulatory bodies) through centralised restructuring and the embedding of networks of patronage. It could also involve outright institutional and regulatory manipulation or flagrant non-compliance with laws and regulations. State capture also embodies geopolitical and ideological aspects but, as stated earlier, these do not fall within the scope of this discussion.

### ***Spy craft and conspiracy: Eroding the rule of law and collapsing state institutions***

To understand what transpired within the state security sector, and how Zondo's recommendations relate to it, the history of Zuma's credentials within the ANC should be considered. In 1959, at the age of 17, Zuma joined the ANC Youth League. Just one year later, in 1960, the apartheid government banned the ANC. By 1963 Zuma had become an active member of uMkhonto we Sizwe (MK), the armed wing of the party.<sup>56</sup>

A plan for a group of MK operatives, including Zuma, to attend military training in Zambia was intercepted by the security police. Zuma was arrested and sentenced for conspiring to overthrow the government. Ten years later, after his release, Zuma went into exile, spending time in places such as Mozambique, Zambia and Swaziland (now eSwatini). It was during this time that he did a three-month military training course in the Soviet Union. Having worked in the ANC intelligence branches in the mid-80s, Zuma was appointed chief of the ANC's Intelligence Department in 1986.<sup>57</sup>

At the time of Zuma's ascension to the presidency of the Republic of South Africa (via the presidency of the ANC) in 2009, the architecture of the South African civilian intelligence service had a more traditional decentralised structure, as seen in other jurisdictions around the world. The National Intelligence Agency was responsible for domestic intelligence and the South African Secret Service was responsible for non-military foreign intelligence. The National Communications Centre, Electronic Communications Security (Pty) Ltd was a state-owned company that dealt with the safety of government communications and

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56 South African History Online, "Jacob Gedleyihlekisa Zuma", <https://www.sahistory.org.za/people/jacob-gedleyihlekisa-zuma>.

57 South African History Online, "Jacob Gedleyihlekisa Zuma".

the South African National Academy of Intelligence dealt with the training of intelligence officers.<sup>58</sup>

On 11 September 2009, just four months after becoming president, Zuma issued a presidential proclamation establishing a single State Security Agency (SSA). The SSA was an amalgamation of its predecessors falling under a single director general and subject to the oversight of the newly created Ministry of State Security.<sup>59</sup> The amalgamation was initially rationalised as a means to promote enhanced intelligence integration and coordinate intelligence and security-related functions.<sup>60</sup>

A similar thought process unfolded in the wake of the 9/11 Commission in the US. The 9/11 Commission (to investigate the terror attacks on the US on 11 September 2001) held that unifying various intelligence agencies would improve information sharing and coordination, leading to better intelligence. However, O'Connell highlights the risks inherent in this approach, suggesting that there is a higher risk of 'group think', politicisation and 'capture' by particular special-interest groups. Furthermore, she contends that healthy competition may in some instances produce better outcomes than coordination.<sup>61</sup>

### The creation of the SSA saw a marked increase in the politicisation of South Africa's civilian intelligence structures, mirroring factional lines within the ANC

True to O'Connell's theory, the creation of the SSA saw a marked increase in the politicisation of South Africa's civilian intelligence structures, mirroring factional lines within the ANC.<sup>62</sup> The new regulatory framework placed political responsibility for the SSA at the feet of the newly created minister of state security. This allowed, at least initially, for a significant shift in operational doctrine within the security service that focused more on 'state security'<sup>63</sup> than 'national security'.<sup>64</sup> The disproportionate classification of projects and resources within the SSA as state secrets<sup>65</sup> reduced the application of effective oversight and accountability measures – particularly with respect to several controversial intelligence projects.<sup>66</sup>

58 Judicial Commission of Inquiry into Allegations of State Capture, *Loyiso Jafta: Witness Statement (Exhibit YY3)*, SSA-02-034 (Johannesburg: Judicial Commission of Inquiry into State Capture, 2020), par. 11.

59 Judicial Commission of Inquiry into State Capture, *Loyiso Jafta*, 38–39.

60 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 7.

61 Anne Joseph O'Connell, "The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World", *California Law Review* 94, no. 6 (2006): 1676–1677.

62 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 10–11.

63 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 8.

64 Judicial Commission of Inquiry into State Capture, *Mr Y, Witness Statement (Exhibit YY4)*, SSA02 083-084, par. 5.

65 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 4.

66 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 3.

After allegations emerged that there were potential national security breaches by members of the Gupta family, Jeff Maqetuka (the director general of the SSA), together with Mo Shaik and Gibson Njenje (then heads of the SSA foreign and domestic branches), reportedly attempted to initiate investigations into the family.<sup>67</sup> The main concern was that the Guptas had allegedly informed Fikile Mbalula that he would be appointed minister of sports, arts and culture ahead of his official appointment in 2010. However, these concerns would receive short shrift.

The commission found that the then minister of state security, Siyabonga Cwele, had interfered irregularly in operational matters and had halted the investigation. In the commission's view, if the investigation into the Guptas in 2011 had been permitted to continue, the capture of SOEs could have been partially prevented. While Cwele interfered in the Gupta investigation, his successor, David Mahlobo, got his hands dirty, involving himself in directing operational matters.<sup>68</sup>

There was also evidence to suggest that the SSA's financial resources were withdrawn irregularly to provide transportation, accommodation and meals to ANC MK veterans at an ANC rally in Rustenburg on 8 January 2016.<sup>69</sup> Covert operations undertaken by members of the SSA were understood to have been used to improve the political fortunes of the ANC in the Western Cape, Eastern Cape and Northern Cape.<sup>70</sup>

The commission found that there were no clear criteria<sup>71</sup> in terms of which civilian operatives were recruited into the SSA.<sup>72</sup> Ministers were involved in the recruitment of family members and known associates through a parallel vetting structure within the Office of the Deputy Director-General of Counterintelligence between 2013 and 2018.<sup>73</sup> An example of this was the involvement of former minister of intelligence Bongani Bongo<sup>74</sup> in appointing a known associate to a senior position within the National Intelligence Coordinating Committee prior to promoting that same individual to a more senior position.<sup>75</sup>

Before the SCC even had a chance to fully grapple with these issues, it had become patently clear that the country's civilian intelligence structure was in a complete state of disarray and required urgent reform. In June 2018, Ramaphosa established a High-Level Review Panel on the State Security Agency. Its report was released to the public.<sup>76</sup> The panel found, in unambiguous terms, that the SSA had established a parallel intelligence structure, called

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67 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 25–27.

68 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 27–29.

69 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 29.

70 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 29.

71 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 34–35.

72 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 33–34.

73 Judicial Commission of Inquiry into State Capture, *Mr Y, Witness Statement (Exhibit YY4)*, par. 9, 10.

74 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part V, Vol. 1, 35.

75 Judicial Commission of Inquiry into State Capture, *Dr Dintwe, Transcript of Testimony (Day 379)*, 362–367; Judicial Commission of Inquiry into State Capture, *Dr Dintwe, Witness Statement (Exhibit YY15)* SSA02 811–814, par. 118–124.

76 The Presidency, “President Ramaphosa Releases Review Panel Report on State Security Agency”, Press Release, March 9, 2019.



the Special Operations Unit. The unit's purpose was aimed at 'serving a faction of the [ANC] and, in particular, the personal political interests of [Zuma]'.<sup>77</sup>

Before the SCC even had a chance to fully grapple with these issues, it had become patently clear that the country's civilian intelligence structure was in a complete state of disarray and required urgent reform

State intelligence and its mechanisms served as the linchpin in the project of state capture. Through it, the architects could access and gain unfettered control of many of the state's institutions under the pretence of 'state security'. Naturally, owing to the clandestine modus operandi of intelligence operations, details in the public domain are scant. However, the various commissions under consideration do provide glimpses and highlight the role that intelligence played in executing the project of state capture. Intelligence activities run as a golden thread through the various actions carried out in furtherance of state capture.

It is fitting then that, given Zuma's own history and credentials in intelligence, this would be a relevant factor to consider.

## Zondo Commission findings and recommendations: The systematic targeting of state economic centres

According to the Zondo Commission,<sup>78</sup>

President Cyril Ramaphosa did not state outright who would have removed him from his position had he opted to be 'more confrontational' but only one person had the power to dismiss him: former President Jacob Zuma... The implications of President Ramaphosa's remarks are profound. They imply that state capture involved a political project and not isolated, opportunistic acts of corruption. They also imply the project enjoyed powerful support in the state and the party. President Ramaphosa was forced to 'resist' within government, choosing his battles, and could not challenge state capture outright. President Ramaphosa had to tread carefully because he was in the minority or did not have enough power to prevail. The natural conclusion is that, during this period, the most dominant political faction – the ANC under President Zuma – permitted, supported and enabled

<sup>77</sup> High-Level Review Panel on the State Security Agency and Related Matters, *Report of the High-Level Review Panel on the State Security Agency* (Pretoria: Government Printer, December 2018), 66.

<sup>78</sup> Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part VI, Vol. 2, 82, 84, 86.

corruption and state capture... He did not dispute the contention that this proves that the ruling party and the executive were firmly controlled by those complicit in state capture.

Weak procurement processes served as a key enabler of state capture. SOEs proved to be a particularly attractive target for extracting resources. There are at least two reasons for this. The first is that the unique public–private nature of a state-owned entity means that its structure and operation resembles more of a corporation than it does a government department – the latter has more inherent checks and balances, as well as greater oversight. As a result, it is inherently easier to unduly influence and control decisions made by SOEs. Second, the influence and control that could be exercised over commercial transactions by board members mean that there is a convenient and central place through which decisions could be taken.

**Weak procurement processes served as a key enabler of state capture. SOEs proved to be a particularly attractive target for extracting resources**

Paul Holden, the director of investigations at Shadow World Investigations, presented evidence that more than ZAR 57 billion (\$3 billion) was spent by organs of state on contracts that had links to state capture and the Gupta family.<sup>79</sup> There are perhaps too many examples that can be drawn out of the SCC report. For the purposes of this discussion, our focus is on two of the largest state parastatals, responsible for the bulk of the tainted contracts that were identified: Transnet and Eskom.

### ***Transnet***

Transnet is an SOE that is responsible for all government rail, port and pipeline infrastructure in the country. In 2011, under the direction of Anoj Singh, the chief financial officer (CFO), and Brian Molefe, the chief executive officer (CEO), Transnet embarked upon its Market Demand Strategy (MDS).<sup>80</sup> The MDS was described as a counter-cyclical investment strategy involving an investment of ZAR 300 billion (\$16 billion) in Transnet ahead of a modelled increase in the volume of freight demand. The largest allocation of capital was to the accelerated procurement of locomotives to allow for modelled growth volumes from 208 million tonnes of freight to 350 million tonnes.<sup>81</sup>

79 Jeanette Chabalala, "Over R49bn Spent on Contracts 'Tainted by State Capture', Zondo Commission Hears", *News24*, May 24, 2021; Zen Mathe, "Unaccountable 00036: T Systems- German IT Giant and State Capture Profiteer", *Open Secrets*, October 11, 2022.

80 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 8.

81 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 8.

The commission found that there was compelling evidence of state capture at Transnet between 2009 and 2018. It involved securing irregular and corrupt influence or control over the strategic decision-making bodies within Transnet. Contracts worth approximately ZAR 41.2 billion (\$2.2 billion) were irregularly awarded for the benefit of entities and persons linked to the Guptas or their associate Salim Essa, accounting for 72.2%<sup>82</sup> of the value of all SOE contracts that have been determined to have been linked to state capture.<sup>83</sup> Essa was described in the media as a 'chief lieutenant' for the Gupta family and was a central figure in many of the Guptas' dealings with the state.<sup>84</sup>

## There was compelling evidence of state capture at Transnet between 2009 and 2018

Corrupt individuals linked to the Guptas gained control of staff appointments and internal governance bodies within Transnet in order to irregularly influence and take advantage of procurement opportunities. They altered procurement policies and bid criteria to favour identified suppliers, often at inflated costs, and made illegal advance payments.<sup>85</sup>

Centralising the approval authority that dealt with high-value tenders (HVTs) and intentionally weakening internal control measures allowed the extraction to continue unabated.<sup>86</sup> Consultancy services also proved to be an easy path for extracting value from the state. Regiments, Trillian (both Gupta-linked companies) and the international conglomerate McKinsey benefited greatly from these contracts, in return often providing little to no value at significantly inflated prices.

Between 2009 and 2018, Transnet procured 1 259 locomotives through three separate procurement contracts<sup>87</sup> with a combined tender value of ZAR 60 billion (\$3.2 billion). The commission found that significant procurement irregularities favoured bidders with links to the Guptas. Such irregularities included the alteration of evaluation criteria, improper engagement with successful bidders, the overuse of the confinement mechanism (a non-competitive procedure in state contracts that is used only in limited circumstances) and a concerning escalation of acquisition costs. There were also non-compliance with local production and content thresholds and the improper awarding of tenders to bidders that did not meet the thresholds.<sup>88</sup>

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82 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 9.

83 Judicial Commission of Inquiry into State Capture, *Flow of Funds: State Capture Flow of Funds Analysis*, Exhibit VV 10, 155, par. 196.

84 Jessica Bezuidenhout, "Gupta Chief Lieutenant Salim Essa Emerges from the Dubai Shadows to Challenge State Capture Report", *Daily Maverick*, August 4, 2022.

85 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 462.

86 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 8.

87 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 10.

88 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 475.

The commission found that Essa, using two shell companies<sup>89</sup> – Regiments Asia (Pty) Ltd and Tequesta (Pty) Ltd<sup>90</sup> – engaged in business development service agreements that were found to be a mechanism for kickback agreements with China South Rail Corporation Ltd (CSR) and China North Rail Corporation Ltd (CNR) (these merged in 2015 to form the China Railway Rolling Stock Corporation Ltd).<sup>91</sup> Essa, through his companies, secured ‘commissions’ of approximately 21% (valued at over ZAR 7 billion / \$376 million) from both CSR and CNR for supposedly providing advisory services on Transnet procurement. Essa’s companies kept 15% of the value while the remaining 85% was diverted to various Gupta-affiliated enterprises.<sup>92</sup>

In October 2012 McKinsey agreed to appoint Regiments as its supplier development partner. Regiments, in turn, would pay Essa and Kuben Moodley (described as a ‘fixer’ for the Gupta family)<sup>93</sup> a percentage of all income received from Transnet. This arrangement allowed the implicated parties to extract significant resources from Transnet, sharing the spoils among themselves. Approximately ZAR 1 billion (\$54 million) was laundered through several shell companies used by Essa and Moodley.<sup>94</sup>

Centralisation of approval authority at board and senior management levels played a key role in the success of state capture at Transnet. Through the restructuring of governance and internal accountability mechanisms, corrupt activities within Transnet could be concealed from Transnet officials who might have otherwise detected and reported irregularities earlier.<sup>95</sup> Prior to 2011, the Transnet board did not have the delegation of authority for procurement-related activities. This was changed in 2011 through the creation of the Board Acquisitions and Disposals Committee (BADC) as a sub-committee of the board.<sup>96</sup>

The BADC was empowered to approve approaches to the open market and to conclude contracts for HVTs exceeding ZAR 500 million (\$27 million).<sup>97</sup> The creation of the BADC in February 2011 was noted to have coincided with the appointment of Molefe as CEO on 16 February 2011. The BADC’s approval authority was increased in 2012 to cover tenders valued at up to ZAR 2 billion (\$108 million), with the authority to approve tenders exceeding ZAR 2 billion vesting in the board itself.

Just four years later, by 2016, the approval authority of the BADC increased to ZAR 3 billion (\$161 million) and was accompanied by the effective neutering of Transnet’s individual

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89 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 11.

90 Paul Holden, *Gupta Enterprise and the Capture of Transnet: Submission to Zondo Commission* (London: Shadow World Investigations, September 2020), 7.

91 David Briginshaw, “CNR and CSR Finalise Merger to Become CRRC”, *International Railway Journal*, June 2, 2015.

92 Judicial Commission of Inquiry into State Capture, *Flow of Funds*, Exhibit VV10A-Exec Sum 032, par. 41–45; Judicial Commission of Inquiry into State Capture, *Flow of Funds*, Exhibit VV 5.2 Paul Edward Holden 1189, 103, par. 269–270.

93 “Gupta Fixer Kuben Moodley Appears in Court After Being Nabbed on His Way to Dubai”, *News24*, September 29, 2021.

94 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 13.

95 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 9.

96 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 464.

97 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part II, Vol. 1, 19.

operating divisions. Instead, procurement decisions were concentrated in the hands of a small number of compromised senior and executive members at Transnet. The majority of all irregularities in HVT procurements between 2011 and 2017 occurred within the BADDC or at the specific insistence of the CFO and CEO, who additionally had their own delegation of authority expanded to allow for the approval of tenders of up to ZAR 750 million (\$40 million) and ZAR 1 billion (\$54 million) respectively.

Procurement decisions were concentrated in the hands of a small number of compromised senior and executive members at Transnet

## *Eskom*

Eskom is South Africa's state-owned electric utility. Eskom has a monopoly over the provision of electricity and other energy-related services such as generation, transmission, distribution and retail sales in the country.<sup>98</sup> The minister of public enterprises has the sole authority to appoint Eskom directors.<sup>99</sup> The SCC found that this authority was abused to facilitate the capture of Eskom for the benefit of the Guptas and their associates.

The following key factors contributed to the significant deterioration in performance at Eskom: political interference and malfeasance, gross corporate governance failures, misguided policies and a lack of oversight and accountability mechanisms

In the SCC's view, the following key factors contributed to the significant deterioration in performance at Eskom: political interference and malfeasance, gross corporate governance failures, misguided policies and a lack of oversight and accountability mechanisms. The Guptas successfully started to make progress in their efforts to capture Eskom in 2014. They did this by installing compromised officials in strategic positions within the utility. Aided by Zuma, specific emphasis was placed on controlling appointments of members of the board, board committees and other senior executives to divert large sums of money to Gupta-affiliated companies or individuals.

98 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 556.

99 Companies Act, Section 66(4)(a)(i), read with Section 63(2) of the Public Finance Management Act.

The then minister of public enterprises, Barbara Hogan, received short shrift from Zuma after she had proven to be a hindrance to the Guptas owing to her unwillingness to obey instructions. Malusi Gigaba was appointed as minister of public enterprises on 1 November 2010. The SCC found that Gigaba initially followed the Guptas' instructions, but their relationship cooled off towards the end of 2014. Gigaba was replaced as minister of public enterprises by Lynne Brown following the May 2014 general elections. Evidence revealed that phone calls between the Gupta associate implicated in the Transnet scandals, Essa, and Brown from November 2014 to March 2015 often preceded alterations to Eskom's board.<sup>100</sup>

Eskom's leadership had previously resisted state capture beneficiaries in their attempts to secure lucrative coal supply contracts, consulting tenders and media supply awards. However, the resistance came to an end once the board was reconstituted by Brown in May 2014. This paved the way for Singh and Molefe to be redeployed from Transnet to Eskom at the behest of the Guptas, facilitated by Zuma, as CFO and CEO of Eskom respectively.<sup>101</sup>

In the SCC's findings, Brown's reconstitution of the Eskom board in 2014 removed any potential obstacles for the Guptas to access lucrative contracts at the entity.<sup>102</sup> The appointment of Matshela Koko as acting CEO from November 2016 to May 2017 was also significant. During his short stint as CEO, Koko was a key facilitator for Gupta-affiliated enterprises, removing obstacles and ensuring a steady flow of contracts. Koko has since been pursued for charges relating to the construction of the coal-fired Kusile Power Station.<sup>103</sup>

The Eskom board consisted predominantly of individuals with either direct or indirect business or personal relationships with Zuma's son, Duduzane, members of the Gupta family or their affiliates such as Essa. Contracts flowed from Eskom to entities that had the Guptas' blessing into private financial institutions, shortly before being laundered through international financial institutions. Much like at Transnet, lucrative and grossly inflated consultancy contracts were awarded to external suppliers in order to justify irregular or irrational decisions to award tenders.<sup>104</sup>

Complaints and concerns raised by some senior staff were all but ignored by Brown, who promptly appointed her preferred individuals in an irregular manner that did not comply with industry best practices.<sup>105</sup>

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100 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 561–562.

101 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 561.

102 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 611.

103 Vincent Cruywagen, "Ex-Eskom Chief Matshela Koko, His Wife and Stepdaughters Among 8 Arrested for Corruption", *Daily Maverick*, October 27, 2022; Emsie Ferreira, "Case Against Koko and Eskom Co-Accused Removed from Roll", *Mail & Guardian*, November 21, 2023.

104 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1060–1064.

105 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 568.

There was a coordinated series of targeted removals of Eskom executives who occupied positions deemed to be strategic in ensuring the complete capture of the SOE.<sup>106</sup> A revolving door of appointments to senior leadership positions ensured that the organisation was kept in a state of perpetual disarray, resulting in a poverty of institutional knowledge. This was, of course, the preferred state of affairs for state capture beneficiaries as it ensured that their wanton looting could proceed uninhibited and unabated.

With an energy infrastructure that is primarily coal-dependent, Eskom procures significant quantities of coal from the private sector. Two businesses centrally involved in the supply of coal to Eskom were Optimum Coal Holdings (OCH) and Optimum Coal Mine (OCM). Both OCH and OCM, which was owned by Glencore, were placed in business rescue on 4 August 2015. Molefe had refused to amend Eskom's coal supply agreement with Glencore, forcing OCM to sell its coal to Eskom at prices below the price of production.<sup>107</sup> In these circumstances, Glencore opted to sell its stake in OCM. Tegeta, a Gupta investment vehicle, made unsolicited approaches to OCM through its auditor KPMG<sup>108</sup> prior to and during the business rescue process.

Glencore agreed to sell OCM to Tegeta in December 2015 under irregular circumstances.<sup>109</sup> The full acquisition amount of ZAR 2.15 billion (\$115 million) was due in April 2016. However, Tegeta was short of approximately ZAR 600 million (\$32 million)<sup>110</sup> and the acquisition was in danger of falling through.<sup>111</sup> On 11 April 2016 the Eskom board tender committee held a meeting and decided to make a prepayment of ZAR 659 million (\$35 million) to the 'proposed owners' of OCM.<sup>112</sup>

The SCC found that Koko, Molefe and Singh were instrumental in facilitating the prepayment that contributed to the final acquisition of OCM. The 'prepayment' was couched as a contract for the delivery of 1.2 million tonnes of coal over six months at a significantly inflated price of ZAR 580 (\$31) per tonne. This was more than double the average price.<sup>113</sup>

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106 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1044.

107 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 720.

108 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 735.

109 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 741.

110 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 776.

111 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 775.

112 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 3, 793–794.

113 Parliamentary Monitoring Group, "Questions & Replies: Public Enterprises B", July 9, 2015.



Singh, prior to his secondment from Transnet to Eskom in August 2015, had held several meetings with representatives of both McKinsey and Regiments Capital in June and July 2015. The engagements were aimed at creating a so-called 'turnaround strategy' for Eskom. In reality it was a resource-extraction exercise that benefitted Gupta enterprises.<sup>114</sup>

Previously a well-regarded black-owned financial advisory firm, Regiments became embroiled in state capture allegations after amaBhungane (an investigative journalism and media outlet) figured out that Regiments had been paying considerable kickbacks to Gupta-linked front companies in exchange for state contracts.<sup>115</sup> McKinsey appointed Regiments as its black economic empowerment (BEE) partner. While the contract between Eskom and McKinsey was formally signed in May 2016, work had already begun in September 2015.

Four principal workstreams were created in the Master Service Agreement (MSA)/ Turnaround Programme at Eskom, namely primary energy, generation, procurement and claims. Neither Regiments nor its eventual replacement Trillian Capital Partners (another Gupta-linked company) provided any discernible value to the projects, despite extracting significant fees. McKinsey undertook most of the project delivery but the work itself was something Eskom already had sufficient internal expertise to manage.<sup>116</sup>

Irregular audit findings prompted closer scrutiny by National Treasury, resulting in Eskom executives terminating the contract with McKinsey prior to completion.<sup>117</sup> Owing to early termination, Eskom had to pay approximately ZAR 1.6 billion (\$86 million) to both McKinsey and Trillian. The MSA contract was irregularly backdated after the termination to inflate costs.<sup>118</sup>

Today, South Africa faces considerable challenges around energy security. The SCC findings in relation to the Gupta-affiliated entities offered but a small glimpse into ubiquitous allegations of corruption and malfeasance at Eskom

Today, South Africa faces considerable challenges around energy security. Rolling blackouts, colloquially referred to as 'load-shedding', are regularly implemented by Eskom in an effort to prevent a complete collapse of the energy grid. Eskom has implemented rolling

114 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1060–1061.

115 Jessica Bezuidenhout, "Regiments Capital – It's a Case of Racketeering, Fraud and Corruption", *Daily Maverick*, February 1, 2022.

116 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1055–1056.

117 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1054.

118 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part IV, Vol. 4, 1059–1060.



blackouts since 2007.<sup>119</sup> While various factors have been blamed for the energy crisis, including ageing infrastructure, unabating corruption at Eskom has ensured that the challenges persist. The SCC findings in relation to the Gupta-affiliated entities offered but a small glimpse into ubiquitous allegations of corruption and malfeasance at Eskom. In 2023 Andre de Ruyter, Eskom's former CEO, suggested that up to ZAR 1 billion (\$52 million) is stolen from the entity every month.<sup>120</sup>

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119 Anusha Rathi, "Why South Africa Is in the Dark, Again", *Foreign Policy*, July 8, 2022.

120 Andrew Harding, "South Africa Load-Shedding: The Roots of Eskom's Power Problem", *BBC*, May 24, 2023.

## CHAPTER 3

# State commissions: What they are and how they work

Formally, commissions are typically ad hoc advisory bodies set up by a government to investigate or advise on matters of significant public concern. These include crises, disasters, scandals or when the usual administrative mechanisms are unable to adequately address an issue.

In principle, a commission's findings establish an official, factual position for the state. The accompanying recommendations are used to help reshape policies and laws to prevent a recurrence and provide a stimulus for law enforcement agencies to initiate criminal prosecutions and civil recoveries.

Citing the Canadian Supreme Court, the Constitutional Court has described the purpose of commissions of inquiry as follows:<sup>121</sup>

In addition to advising the Executive, a commission of inquiry serves a deeper public purpose, particularly at times of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in *Phillips v Nova Scotia*:

One of the primary functions of public enquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover the truth... In times of public question, stress and concern they provide the means for Canadians to be appraised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public.

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<sup>121</sup> *Minister of Police & Others v Premier of the Western Cape & Others* 2014 (1) SA 1 (CC), par. 45.

The ‘truth-finding’ function was explained in the Madigwana decision:<sup>122</sup>

It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission’s search for the truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those affected need to know the truth, the country at large does, too.

The standard of proof applied by commissions in making findings of fact differ in some respects from the approaches followed by courts of law. Guilt does not need to be established in terms of the criminal law standard of ‘beyond reasonable doubt’.<sup>123</sup> Instead, commissions typically adopt an approach of finding a ‘reasonable suspicion’ or having ‘reasonable grounds to believe’ a certain state of affairs. The civil law ‘balance of probabilities’ standard is also used at times to make a finding of fact.<sup>124</sup> The SCC, while not always expressing the standard it applied, appeared to have largely followed a combination of reasonable suspicion and a balance of probabilities in its factual determinations.<sup>125</sup>

Another feature is that commissions are inquisitorial in nature, as opposed to adversarial.<sup>126</sup> The adversarial approach is applied in the country’s court system, where two sides present facts and submit arguments, testing one another’s evidence through cross-examination, in an attempt to persuade an arbiter to find in their favour.<sup>127</sup> The arbiter observes the proceedings, is confined to the facts presented by the parties, and must make a decision based on that evidence.<sup>128</sup>

Inquisitorial processes, on the other hand, involve the arbiter taking a far more activist role in proceedings. Evidence is presented before the inquiry by evidence leaders, who are expected to take a non-partisan approach and to present an objective account of the facts.<sup>129</sup> The arbiter may require that specific information be presented before the inquiry that has not yet been presented by the parties. In so doing, any individual may be legally compelled to produce a document or evidence that is believed to be in their possession.<sup>130</sup>

The SCC, while inquisitorial on paper, followed an interesting approach. The rules of the SCC allowed for cross-examination to take place. Cross-examination is a distinctively adversarial feature. Consequently, one may conclude that the SCC proceedings resembled more of a hybrid system than an inquisitorial one.

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122 *Magidiwana and Others v President of the Republic of South Africa and Others* [2013] ZACC 7, par. 15.

123 UN Office of the High Commissioner of Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice* (New York and Geneva: UN, 2015), 62.

124 OHCHR, *Commissions of Inquiry*.

125 See, for example, Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part VI Vol. 2, par. 142.2, 142.3.

126 Cathleen Powell, “Commissions of Inquiry vs Courts of Law”, *University of Cape Town News*, November 8, 2018.

127 Powell, “Commissions of Inquiry”.

128 Powell, “Commissions of Inquiry”.

129 Jacqueline S Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account* (New York: Oxford Academic, April 2020).

130 Hodgson, *The Metamorphosis of Criminal Justice*.

Peté underscores the profound impact of public commissions of inquiry within constitutional democracies such as South Africa. He argues that their significance extends beyond the final report's effects on government officials. Instead, their influence hinges on the narrative constructed and disseminated by the media, particularly the free press, throughout the commission's duration. While this point may seem obvious, the article contends that the creation of prolonged public awareness regarding significant societal issues, such as widespread corruption in vital social institutions, is an essential yet often underestimated outcome of establishing a public inquiry during crises.<sup>131</sup> He goes on to say:<sup>132</sup>

South Africa's very survival as a liberal democracy depends upon the determination of the public at large to root out corruption... While clearly not a panacea, the proceedings of a public commission of inquiry within a liberal constitutional democracy – when properly handled and working in tandem with a free and vibrant press – may serve to educate and inform the public, creating an important bulwark against corruption forces that seek to subvert that democracy. This is particularly the case in times of existential crisis, such as the present threat posed by corruption and 'state capture'...

In Peté's view, the appointment of a public commission of inquiry provides official validation for the challenging process of bringing a severe social issue, especially one as intractable as corruption, into the public eye. It serves as a reminder of the continuous threats to constitutional democracy, acting as an intangible but crucial safeguard against those forces seeking to undermine democratic principles.<sup>133</sup>

Scholars often emphasise the value of judicial commissions as vital government instruments reserved for addressing matters of great public concern, such as nationwide crises of confidence

Scholars often emphasise the value of judicial commissions as vital government instruments reserved for addressing matters of great public concern, such as nationwide crises of confidence. While some view commissions positively as democratic tools aiding rational policy responses, others see them as distinct political institutions deploying forensic procedures to legitimise state actions. Ashforth, for example, suggests that public inquiries should be seen rather as symbolic rituals that signify the government's commitment to

131 Stephen Allister Peté, "Commissions of Inquiry as a Response to Crisis: The Role of the Jali Commission in Creating Public Awareness of Corruption (Part 1)", *Obiter* 41, no. 4 (2020): 903, 905–906.

132 Stephen Allister Peté, "Commissions of Inquiry as a Response to Crisis: the Role of the Jali Commission in Creating Public Awareness of Corruption (Part 2)", *Obiter* 42, no. 2 (2021): 267.

133 Peté, "Commissions of Inquiry (Part 1)", 903, 906.

serving the common interest rationally. He aptly describes them as ‘reckoning schemes of legitimation’.<sup>134</sup>

Despite these critiques, Peté suggests that commissions of inquiry have prosaic arguments against them. Some claim that they allow corrupt or incompetent politicians to divert attention from their actions, hoping that investigative delays will make the public forget their wrongdoing. There are also concerns about the high costs associated with commissions.<sup>135</sup>

While acknowledging the validity of the critiques, Peté chooses to focus on what he considers to be the positive aspect: the ‘public narrative’ accompanying major public commissions of inquiry is essential in combating corruption and abuse of power. It is not just the commission’s final report but also the public narrative during hearings and in the media that counters these corrosive effects.<sup>136</sup>

Given the complex and intricate nature of corruption, often involving numerous commercial transactions and arrangements, journalists are left to their own devices in disentangling the evidence and breaking the story

Given South Africa’s extensive problems caused by corruption, commissions of inquiry can play a pivotal role in garnering public support for necessary reforms and renewal, according to Peté. This article argues that, when conducted expertly and in collaboration with a responsible free press, such commissions can serve as powerful tools to secure vital public buy-in for addressing complex challenges.<sup>137</sup>

There is an inextricable link between the functional fact-finding purpose of commissions of inquiry and the role that the media plays in informing the public. Given the complex and intricate nature of corruption, often involving numerous commercial transactions and arrangements, journalists are left to their own devices in disentangling the evidence and breaking the story. Haffajee, in her book *Days of Zondo*, illustrates this challenge and points to the practical benefit that commissions have.<sup>138</sup>

As a newsroom, we were inadequately resourced to help blow the whistle on the first big schemes. We had hundreds of files of corruption that good people wanted exposed.

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134 Adam Ashforth, “Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms”, *Journal of Historical Sociology* 3, no. 1 (1990): 1.

135 Peté, “Commissions of Inquiry (Part 1)”, 908–909.

136 Peté, “Commissions of Inquiry (Part 1)”, 908–909.

137 Peté, “Commissions of Inquiry (Part 1)”, 908–909.

138 Ferial Haffajee and Ivor Chipkin, *Days of Zondo: The Fight for Freedom from Corruption* (Cape Town: Maverick 451, 2022), 229.

What I learnt then was that expectations of investigative newsrooms are vastly super-sized versus the abilities of well-meaning journalists to expose. The *Daily Maverick*, amaBhungane and News 24 partnership to report the #CuptaLeaks email leaks gave us better insight into why local and global partnerships are important to undertake forensic investigative journalism. At the time, we did not understand what the whistle-blowers were pointing to, and that still haunts me. What the [SCC] reports have done is clarify patterns and classify wrongdoing in ways that will be beneficial to both whistle-blowers and journalists who work together against corruption.

## Types of commissions and their legal foundations

### *Statutorily mandated commissions*

As the heading suggests, commissions of this nature must be established as a matter of law. Such commissions have a predetermined purpose that will normally be set out in the legislation where it appears. Perhaps the most well-known example is the TRC. It was established early in South Africa's democracy to unearth the human rights abuses and atrocities that had taken place during apartheid, to extend amnesty to those individuals who made full and frank disclosure and to extend reparations to victims who testified.<sup>139</sup>

Another example of this type of commission can be found in the National Prosecuting Authority Act. The Act states that the president cannot remove a national director or a special director of public prosecutions from office unless that decision is preceded by an enquiry into their fitness to hold office.<sup>140</sup> This requirement might be seen as an institutional safeguard to preserve prosecutorial independence against the president's unfettered discretionary authority.

### *Commissions mandated by the executive (president)*

The Constitution grants the president the power to institute commissions of inquiry.<sup>141</sup> This power is given effect through the Commissions Act,<sup>142</sup> which describes the functions of a commission and details the various powers assigned to them by the law. Commissions themselves are quasi-judicial bodies; however, they are not courts of law. They fall squarely within the state's executive branch.

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139 Established in terms of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. This is the Act that governs the TRC. It underwent eight amendments between 1995 and 2003. See Department of Justice, "Legal Background to the TRC", <https://www.justice.gov.za/trc/legal/index.htm>; USIP, "Truth Commission: South Africa".

140 National Prosecuting Authority Act 32 of 1998, s. 12.

141 Constitution, s. 84(2)(f).

142 Commissions Act 8 of 1947.

Commissions themselves are quasi-judicial bodies; however, they are not courts of law. They fall squarely within the state's executive branch

A president can establish a commission through a presidential proclamation, which is published in the Government Gazette.<sup>143</sup> The proclamation will also contain terms of reference. These set out the scope and purpose of the commission and usually pose a series of questions that the commission is called upon to answer by the end of its investigation.

Of the powers that are assigned to a commission of enquiry, perhaps the most important is the power to subpoena individuals or entities to appear before it and present evidence or otherwise disclose information that is within their possession. Failure to adhere to a subpoena that has been duly issued is a criminal offence.<sup>144</sup>

As explained by the Gauteng High Court:<sup>145</sup>

A commission of inquiry has a number of important advantages. A commissioner would be able to subpoena witnesses and documentation. The documents produced at a commission of inquiry are generally publicly available. Commissions are generally provided with adequate financial resources and often appoint specialists in the subject areas under investigation; the reports they produce are publicly available and they are expected to justify their findings and recommendations. The commissioner is permitted to obtain submissions from any interested party.

The premiers of South Africa's nine provinces are also constitutionally empowered to institute commissions of enquiry at their discretion. Furthermore, provinces may institute commissions of enquiry in order to look into police and efficiencies in local communities, as was done in the case of the Khayelitsha Commission in 2012.<sup>146</sup>

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143 See, for example, the proclamation that initiated the State Capture Commission: "Proclamation No. 3 of 2018, President of the Republic of South Africa, Judicial Commission of Inquiry to Inquire into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State", *Government Gazette* 41403 (January 23, 2018).

144 The Commissions Act, s. 6(1).

145 *President of the Republic of South Africa v Office of the Public Protector and Others*, par. 137.

146 The Khayelitsha Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations between the Community and Police in Khayelitsha, *The Khayelitsha Commission of Inquiry into Allegations of Police Inefficiency in Khayelitsha and a Breakdown in Relations between the Community and Police in Khayelitsha*, Report (Pretoria: Khayelitsha Commission of Inquiry, August 2014).

## *Contempt and the Zuma debacle*

7 July 2021 was a watershed moment in South Africa's nascent democracy. It marked the date that former president Zuma began his custodial sentence for contempt of court. It was a victory for the rule of law, demonstrating that no person, not even the president of the republic, could escape the repercussions of their actions. The period that followed, however, was one of its darkest. A total of 354 people lost their lives following mass unrest and public violence at levels not witnessed since the end of apartheid. Billions of rands worth of property damage was inflicted, destroying businesses, jobs and critical infrastructure in the two most populous provinces of the country.<sup>147</sup>

### 7 July 2021 was a watershed moment in South Africa's nascent democracy

Zuma had been summonsed to appear before the SCC in October 2020.<sup>148</sup> Having made two appearances initially, he refused to submit himself to cross-examination.<sup>149</sup> His new strategy would be to question the legitimacy of the SCC and of Zondo. Zuma accused Zondo of bias owing to the fact that they knew one another personally and demanded that the chairperson recuse himself.

However, Zondo remained resolute. After issuing several summons and directives for Zuma to appear before the SCC, and having had those instructions wilfully ignored, Zondo made a direct application to the Constitutional Court for an order compelling Zuma to do so. Once again Zuma was defiant. A series of public statements were issued on Zuma's behalf by the Jacob Zuma Foundation. Through these statements, the integrity and motives of the Constitutional Court, the judiciary and the SCC were questioned, and an immovable intention not to comply with court orders was declared.<sup>150</sup>

Over the years Zuma and his legal team have exposed and taken advantage of a glaring vulnerability in the country's justice system. Fuelled by what seemed like unending resources, Zuma skilfully deployed a 'Stalingrad tactic' in relation to litigation. 'Stalingrad tactics' could be considered litigation through attrition. It involves frustrating legal processes by raising objections and instituting interlocutory proceedings, regardless of the

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147 South African Human Rights Commission, "Media Statement: The South African Human Rights Commission Reflects on the Year Since the July 2021 Unrest", July 8, 2022.

148 Alexander Winning, "South Africa Corruption Inquiry to Summon Zuma to Appear Next Month", *Reuters*, October 9, 2020.

149 Haffajee and Chipkin, *Days of Zondo*, 130.

150 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28, par. 6.



merits (and often bereft of them), for the sole purpose of forestalling the administration of justice.<sup>151</sup>

The tactic has been described follows:<sup>152</sup>

This is a strategy of wearing down the plaintiff by tenaciously fighting anything the plaintiff presents by whatever means possible and appealing every ruling favourable to the plaintiff. Here, the defendant does not present a meritorious case. This tactic or strategy is named for the Russian city besieged by the Germans in World War II.

What he had not anticipated, however, was that Zondo would institute contempt proceedings in the Constitutional Court directly. By doing so, Zondo removed the possibility of appealing or instituting interlocutory proceedings (a vital tool in the Stalingrad-tactic arsenal) in order to delay an outcome from being determined.<sup>153</sup>

After considering the contempt application, the Constitutional Court was unanimous in finding that Zuma had been in contempt of its previous order. The court engaged in a thorough exercise to determine an appropriate sanction. The majority found that Zuma ought to be sentenced to imprisonment for a period of 15 months.<sup>154</sup> In a last-ditch attempt, Zuma unsuccessfully applied to the Constitutional Court for a rescission order.<sup>155</sup>

The public waited with bated breath to see whether the rule of law would prevail. On 7 July 2021, Zuma handed himself over to the authorities to begin his custodial sentence. Two days later widespread looting gripped the country.<sup>156</sup> Chaos ensued: vigilantes and private security companies sought to protect shopping centres and malls from masses of looters. There were numerous reports that the police and the security cluster of the state – demobilised and politicised – were ill-equipped and simply stood by and watched as the havoc unfolded.<sup>157</sup>

Ramaphosa would later describe these events as a failed insurrection, claiming that criminal elements had sought to destabilise the country by spreading seditious statements

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151 Judges Matter, "[Using Stalingrad Tactics to Delay Justice](#)", June 19, 2018.

152 Judges Matter, "[Using Stalingrad Tactics](#)".

153 Emsie Ferreira, "[Zondo: Lock Zuma Up for Contempt](#)", *Mail & Guardian*, March 18, 2021.

154 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC).

155 *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC). A rescission order is an extraordinary measure that can be taken by an aggrieved litigant in circumstances where it can be proven that a court order was defective on the basis of certain narrowly defined legal grounds. It is an exception to the legal principle of finality and permits a court to effectively revisit its own decision after having made it. In order to succeed with an application for rescission, a litigant must set out clear and compelling grounds that meet strict legal criteria.

156 "Jacob Zuma: South Africa's Former President Hands Himself Over to Police", *BBC News*, July 8, 2021.

157 Flora Drury, "[South Africa Riots: Looting and Shooting in Durban](#)", *BBC News*, July 14, 2021; "[South Africa Failed to Foresee, Disrupt Deadly Unrest, Report Says](#)", *Reuters*, February 7, 2022.

through social media channels.<sup>158</sup> In a country with the highest level of inequality in the world and widespread poverty, it was not a difficult situation for criminal elements to exploit.<sup>159</sup>

Ramaphosa would later describe these events as a failed insurrection, claiming that criminal elements had sought to destabilise the country by spreading seditious statements through social media channels

On 5 September 2021, just two months into his 15-month custodial sentence, Zuma was released on medical parole.<sup>160</sup> The decision was taken by Arthur Fraser, a former director-general of the SSA and one-time key associate of Zuma, who was the national commissioner of correctional services at the time.<sup>161</sup> Fraser's decision to grant medical parole was taken on review and set aside by the High Court in December 2021.<sup>162</sup> Fraser and Zuma attempted to appeal the High Court decision all the way to the Constitutional Court.<sup>163</sup> The appeal was dismissed on 13 July 2023.<sup>164</sup>

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158 "President Ramaphosa: Attempted Insurrection Failed to Gain Popular Support", *SA News*, July 16, 2021.

159 "President Ramaphosa: Attempted Insurrection"; also see International Monetary Fund, "Six Charts Explain South Africa's Inequality", January 30, 2020.

160 Des Erasmus, "Fraser's Decision to Grant Zuma Parole Was an Unlawful Intervention that Undermined Respect for SA's Courts", *Daily Maverick*, December 15, 2021.

161 Erasmus, "Fraser's Decision to Grant".

162 *Democratic Alliance v National Commissioner of Correctional Services and Others and Two Similar Cases* [2022] 2 All SA 134 (GP).

163 There was also an appeal heard in the Supreme Court of Appeal in *National Commissioner of Correctional Services and Another v Democratic Alliance and Others (with South African Institute of Race Relations intervening as Amicus Curiae)* 2023 (2) SA 530 (SCA), where the court ruled that the period during which Zuma had been on medical parole (unlawfully) would not be counted in the term of his sentence (see par. 61–64).

164 Siphokhe Kekana, "Breaking: ConCourt Upholds SCA Ruling that Zuma's Medical Parole Was Unlawful", *SABC News*, July 13, 2023.

# Pre-Ramaphosa commissions

## Farlam and Marikana

On 16 August 2012 South Africa witnessed the most brutal display of lethal force against citizens by the police since the Soweto uprising in 1976. A total of 34 miners who had been involved in a wildcat strike at Lonmin Platinum Mine died. The media dubbed it the 'Marikana Massacre', named after the small mining town in the North West province where the mine is situated. The purpose of the strike was not uncommon – two large trade unions had initiated it to obtain wage increases for the miners. In the preceding week, 10 people had died – two police officers, two private security guards and six mine workers.

**On 16 August 2012 South Africa witnessed the most brutal display of lethal force against citizens by the police since the Soweto uprising in 1976**

Two days after the massacre a collective wage agreement was signed that brought the six weeks of protest to an end. At Lonmin, 270 mine workers were arrested and charged with murder under the common purpose doctrine. However, a strong public outcry resulted in those charges being dropped by the prosecuting authority. As the president at the time, Zuma initiated an official commission of enquiry at the end of August 2012. The inquiry was chaired by Ian Farlam, a retired judge of the Supreme Court of Appeal.

Initially planned to run for four months, the Farlam Commission received several extensions and submitted its report to the president in March 2015. However, the report was only released to the public three months later, in June.

In the commission's view, the miners' deaths were primarily caused by a decision taken by the South African Police Service (SAPS) to enter what was dubbed a tactical phase, which entailed an attempt to disarm and disperse the miners. The commission found that the initial deaths were caused by police officers who were genuinely acting in self-defence. However, it noted that at least some of the individuals who had been killed clearly presented no threat.

One of the main controversies surrounding the massacre was the allegation that senior politicians had intervened and instructed the SAPS to bring the protest to an end. In 2012,

Ramaphosa, an ANC stalwart and former leader of one of the trade unions engaged in the protest, was a member of the Lonmin board. He drew criticism for emails he had sent to Lonmin's chief commercial director, suggesting that he had advocated police intervention.<sup>165</sup>

One of the main controversies surrounding the massacre was the allegation that senior politicians had intervened and instructed the SAPS to bring the protest to an end

However, in its report the commission did not implicate political figures such as the then police minister, Nathi Mthethwa. Furthermore, the commission found that there was nothing untoward in Ramaphosa's emails, which sought to get the police to do their job by stabilising the situation and arresting strikers who were committing serious offences.<sup>166</sup> The commission was, however, critical of leaders within the police and the trade unions, with Lonmin also drawing criticism for not having done enough to protect its employees.

Bracking, citing von Holdt and Khan, suggests that this is a fitting example of 'violent democracy' at play. The concept denotes that democracy and violence, instead of being mutually exclusive, are in fact configured into a symbiotic relationship to the extent that violence plays a key role in social disputes and re-orderings. In this type of democracy, violence is a vehicle for the systematic deployment of power, with democratisation processes often accommodating patron-client relationships rather than replacing them. She points out that this concept maps well onto South Africa's democratic transition, where protests regarding ordinary issues such as service delivery failures or student fees often contain an element of violence and repression.<sup>167</sup>

In Bracking's view, Marikana illustrated that law-enforcement agents are willing and able to kill large numbers of demonstrators in order to maintain, challenge or change the distribution of power in an unequal society. Once a regime has proven its willingness to resort to violence, citizens live in fear of a credible threat of violence should they stray from the party line. Effectively, disobedience to the ruling party is accompanied by the threat of potentially lethal retaliation.<sup>168</sup>

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165 Farlam Commission, *Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (Marikana Report)* (Pretoria: South African Human Rights Council, March 31, 2015), 163-168.

166 Farlam Commission, *Marikana Report*, 509.

167 Bracking, "Corruption & State Capture", 173.

168 Bracking, "Corruption & State Capture".

The commission recommended reparations for victims' families and rebuked leaders involved in the protests – some of whom had long since been removed from their positions. However, of the 72 dockets that the Independent Police Investigative Directorate handed over to the NPA for prosecution, only a handful of police officers have been charged and not a single prosecution has been completed.<sup>169</sup>

**Of the 72 dockets that the Independent Police Investigative Directorate handed over to the NPA for prosecution, only a handful of police officers have been charged and not a single prosecution has been completed**

The main effect of this commission was that it served as a forum through which the events that transpired at Marikana could be ventilated in the public eye. However, apart from reparations and reprimands, the fact that no individual accountability has been achieved over a decade later would suggest that it practically served as a vehicle with which to assuage public ire until public interest in the matter subsided.

## Seriti and the Arms Deal

The Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package (Seriti Commission) was established by Zuma. It was mandated to investigate allegations of corruption relating to a large defence procurement programme named the Strategic Defence Package (popularly known as the 'Arms Deal') that took place in 1999.

The deal gave rise to a protracted saga that involved corruption charges being brought against Zuma, former ANC chief whip Tony Yengeni, several former cabinet ministers and one of Zuma's close affiliates – Shabir Shaik. The corruption charges against Zuma were dropped owing to procedural irregularities arising from the 'spy tapes' saga.<sup>170</sup> This ultimately cleared the way for his ascendancy to the presidency. In April 2018 these charges were reinstated.<sup>171</sup>

At the time, the Department of Defence was growing increasingly concerned over its ageing defence equipment. It resolved to modernise the military through the large-scale procurement of various ships, submarines, helicopters and aircraft that could be used by

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169 Greg Nicolson, "Mine Workers Symbolising SA's Tragic Day: 'We'll Fight Another 10 Years to Taste Justice'", *Daily Maverick*, August 13, 2022.

170 The 'spy tapes' saga is briefly explained in the Mokgoro Enquiry section.

171 Bracking, "Corruption & State Capture", 174.

the South African Navy and the South African Air Force. In 1999, the government signed a series of contracts with various European countries and companies in order to revitalise its armaments.

Within a short space of time, however, the deal began to draw sharp criticism for its incredibly high cost. Questions were raised about whether the acquisitions were being made on a prudent footing. At the heart of the public concern, however, were allegations that the government had undertaken highly irregular procurement processes – to the benefit of some high-profile ANC politicians.<sup>172</sup> Among those who were accused of personally profiting from the transactions were Thabo Mbeki, the incumbent president at the time, and Zuma, his eventual successor.

At the heart of the public concern, however, were allegations that the government had undertaken highly irregular procurement processes – to the benefit of some high-profile ANC politicians

Some have argued that the Arms Deal served as a catalyst for divisions within the ruling party. Dissent began with the departure of Andrew Feinstein, a senior ANC MP who grew despondent after his efforts to institute an independent enquiry into the deal had been blocked by the ANC government.<sup>173</sup> Feinstein had attempted to ensure that there was parliamentary oversight over the Arms Deal – a fairly routine exercise – but he was thwarted by his own party and disciplined.

The Seriti Commission sat for four years, receiving copious volumes of technical evidence. At its conclusion, in 2016, Judge Willie Seriti found that there was no evidence of corruption and that the various transactions all appeared to have been above board. To many, this came as a shock. At that point, the public had largely come to believe that the Arms Deal involved some level of foul play. The most damning indictment had already been a matter of public record for some time. Ten years prior to the Seriti Commission report, Shaik had been convicted for corruption relating to, among other things, peddling political influence for French arms company Thales.<sup>174</sup>

On the back of public disquiet following the report's release, several non-governmental organisations took the report on review. The High Court found that the Seriti Commission had 'failed manifestly to enquire into key issues as is to be expected of a reasonable

172 Paul Holden, Shadow World Investigations, "The R142bn Bomb: Revising the Cost of the Arms Deal, Twenty Years On", *Daily Maverick*, August 18, 2020.

173 Corruption Watch, "The Arms Deal: What You Need to Know", January 22, 2014.

174 *S v Shaik and Others (Criminal Appeal)* 2007 (1) SA 240 (SCA).

Commission'.<sup>175</sup> In the court's view, the commission and its evidence leaders had been too lenient on the witnesses and had failed to interrogate the testimonies presented before it in light of the records that had been available at the time.<sup>176</sup>

While perhaps not of interest to the general public, the 2019 decision raised an important question for many lawyers who continue to grapple with the question: should the findings of a commission of enquiry be reviewable and, if so, on what basis? In the case of the Seriti Commission, the High Court appeared to suggest that this was possible – even if undesirable.<sup>177</sup>

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<sup>175</sup> *Corruption Watch and Another v Arms Procurement Commission and Others* 2020 (2) SA 165 (GP), par. 69.

<sup>176</sup> *Corruption Watch and Another v Arms Procurement Commission and Others*, par. 53–57.

<sup>177</sup> *Corruption Watch and Another v Arms Procurement Commission and Others*, par. 70.

# A ‘new dawn’ for state commissions

As Sulitzeanu-Kenan observes:<sup>178</sup>

Commissions of inquiry play an important role in the aftermath of crisis in many countries, by serving as instruments of accountability and policy learning. Yet crises also involve a high-stake game of political survival, in which such accountability and learning rituals pose a serious threat to incumbent politicians. Blame avoidance motivation on their part is thus likely to play a central role under such circumstances, as the appointing of an inquiry into a crisis not only sets in motion a learning process, but also embodies a series of explicit and implicit messages and moves in the ensuing blame game. Hence the political decision of whether to appoint a commission of inquiry after a crisis provides a unique prism for studying intense conflict between politics, accountability and policy learning.

It is worth considering the political dimension of the various commissions of inquiry that took place during Ramaphosa’s term in office and how this devolved into what the media have described as an internal factional ‘war’ within the party.<sup>179</sup>

After having failed to challenge the public protector’s report into state capture in the courts, Zuma was forced to establish the SCC on the terms that had been set out in the public protector’s recommendation. Owing to overwhelming evidence that was already in the public domain at the time, there could be no doubt that the SCC findings would be incriminating and reputationally damaging to the ruling party – even before the formal proceedings had begun.

At the same time, unemployment in South Africa was at an all-time high, business confidence was at its lowest level since 1994 and economic growth had practically flatlined. Local election results in urban centres were starting to show that the strong support that the ruling party had enjoyed since the dawn of democracy was experiencing a rapid decline.<sup>180</sup>

Commentators such as Farell and Murphy agree that the decision to create a commission of inquiry was inherently a political one.<sup>181</sup> However, South Africa was faced with a unique

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178 Raanan Sulitzeanu-Kenan, “Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?”, *British Journal of Political Science* 40, no. 3 (2010): 613–614.

179 Thanduxolo Jika, “The ANC Is at War with Itself”, *Mail & Guardian*, June 7, 2019; Stef Terblanche, “Understanding the ANC Factional Battles”, *Politicsweb*, April 8, 2021; Joseph Cotterill, “ANC Factions Stir ‘Dangerous Politics’ in South Africa’s Towns”, *Financial Times*, August 1, 2021.

180 David Pilling and Joseph Cotterill, “The Zuma Years: The Fall From Grace of South Africa’s ANC”, *Financial Times*, December 5, 2017.

181 Michael A Becker, “Review of ‘Christian Henderson (ed.), *Commissions of Inquiry: Problems and Prospects*’”, *European Journal of International Law* 28, no. 4 (2017): 1421.



set of circumstances: the decision had been made on behalf of the political establishment through the binding power of the public protector's recommendation, rather than by the establishment itself. Nevertheless, and as suggested by Elliott and McGuinness, the scenario presented an attractive opportunity to the ANC as the ruling party: it facilitated non-engagement on its part despite the significant public attention the matter was receiving.<sup>182</sup>

In an effort to re-establish its own agency, the ANC took several decisive steps. The first was to remove Zuma from office just one year and several months short of his second five-year term coming to an end. This was a necessary step if the ANC were to have any hope of taking back control of the narrative that had been playing out in the public eye. By making that decision, it could claim that it was now fixing its own house rather than the credit going to wider external pressures, or indeed to the democratic instruments of the state, all of which functioned outside of the party.

**In 2018 Ramaphosa ... found himself in the invidious position of having to reinvent a political party whose senior leadership had been embroiled in various corruption scandals**

In 2018 Ramaphosa, formerly Zuma's deputy president and now the new incumbent, found himself in the invidious position of having to reinvent a political party whose senior leadership had been embroiled in various corruption scandals. While the decision had not been his own, the SCC presented a unique opportunity to re-establish political legitimacy. State capture could be neatly packaged into an event or fixed period of time that had both a start and a finish. The far less attractive alternative would be to acquiesce to the damaging allegations that state capture was a description of the status quo in South Africa rather than a circumscribed anomaly. While Ramaphosa could not take credit for establishing the SCC, he prudently established several commissions of inquiry for which he could.

**State capture could be neatly packaged into an event or fixed period of time that had both a start and a finish**

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<sup>182</sup> Sulitzeanu-Kenan, "Reflection in the Shadow", 617, citing Dominic Elliott and Martina McGuinness, "Public Inquiry: Panacea or Placebo?", *Journal of Contingencies and Crisis Management* 10, no. 1 (December 2002).

The ambitious political objective was thus positioning the ANC as the rehabilitator of the wrongdoings it itself enabled and facilitated – now playing the role of protagonist, having been the antagonist before. In order to succeed, Ramaphosa had to follow a markedly different approach to his predecessor. He did this in at least four ways.

First, decisions had to be made based on evidence. Commissions ensured that every decision was made based on factual findings rather than on grand conspiracies – for which Zuma had been known to have shown a proclivity.

Second, decisions were to be based on the recommendations of reputable or at least credible external parties. In this way, Ramaphosa's decisions would have public legitimacy – a feat that the ANC would struggle to achieve if it had to rely solely on its own reputation at the time. While the SCC revealed that Zuma also relied on the advice of his confidants, the advisors in his case were the Gupta family, who lacked both credibility and legitimacy.

## Ramaphosa's process of ANC reinvention had to play out before the public eye

Third, Ramaphosa's process of ANC reinvention had to play out before the public eye. Zuma had all but ignored established media channels during his tenure. In what could perhaps be described as an afterthought, Zuma's administration had seen efforts to establish a new Fourth Estate. This was done through Gupta-owned media networks, as well as a somewhat poorly timed acquisition of the Independent Online. The acquisition of the latter was funded by irregular Public Investment Corporation (PIC) investments, Sekunjalo Investment Holdings (whose subsidiary AYO Technology Solutions was another beneficiary of irregular PIC investment) and the Chinese state-owned media enterprise China International Television Corp. Instead, Ramaphosa put established media houses at centre-stage. Terms of reference for the commissions frequently required investigating allegations that had been circulating in the media and that had previously been ignored by Zuma. A common feature in commissions established by Ramaphosa was that the proceedings were televised.

Fourth, as a billionaire, Ramaphosa would also have an easier time convincing the public that there were no financial incentives motivating his political ambitions. Zuma had quickly garnered a reputation that suggested self-enrichment was his and his affiliates' highest priority during his time in office. That said, Ramaphosa has struggled convincing the public that, although he has no financial incentives, his administration is immune from the trappings of crony capitalism (where a network of connected and preferred companies take up the bulk of lucrative projects through regular means).

As a billionaire, Ramaphosa would also have an easier time convincing the public that there were no financial incentives motivating his political ambitions

The public nature of Ramaphosa's decision-making also stood in stark contrast to Zuma's process, which involved making decisions behind closed doors. SCC evidence pointed out that those closed doors were typically situated on the Gupta family's Saxonwold estate.

## The Nugent Commission

The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (Nugent Commission) was established by Ramaphosa on 24 May 2018 through presidential proclamation and chaired by retired Supreme Court of Appeal Judge Robert Nugent.<sup>183</sup> The South African Revenue Service (SARS) had been mired in a series of public scandals over the years.<sup>184</sup> The surrounding media furore had raised government's concerns that these swirling controversies would affect the confidence of investors, rating agencies, international financial institutions and the wider taxpaying public.

SARS had been mired in a series of public scandals over the years

Linked to the various scandals that plagued the institution was its former commissioner, Tom Moyane. Zuma appointed Moyane to the position in September 2014. In his controversial book *The President's Keepers*, Jacques Pauw alleges that, during Moyane's time as the head of SARS, Moyane's actions were politically motivated and directly triggered a mass exodus of highly skilled civil servants – leaving the institution debilitated.<sup>185</sup>

The dysfunction at SARS was not merely a product of maladministration and ineptitude but also a necessary cog in the state capture project. Apart from its being yet another extraction site for state funds, debilitating the tax authority meant that the tax affairs of

183 President of the Republic of South Africa, "Presidential Proclamation No.17 of 2018: Commission of Inquiry into Tax Administration and Governance", *Government Gazette* 41562 (May 24, 2018).

184 See, for example, controversies surrounding the alleged illegal creation of a SARS 'rogue unit': Jacques Pauw, "Public Protector & 'Rogue Unit': How a Big Lie Became a Bigger and Bigger Lie", *Daily Maverick*, December 8, 2020.

185 Jacques Pauw, *The President's Keeper* (Cape Town: Tafelberg, 2017), ch. 5.

state capture beneficiaries would not be probed. Naturally, the dysfunction also created suitable conditions for the mushrooming of organised crime – a separate topic but one worth mentioning.

## The dysfunction at SARS was not merely a product of maladministration and ineptitude but also a necessary cog in the state capture project

While the Nugent Commission was a commission in the conventional sense (ie, one that was established by the president through presidential proclamation in terms of the Commissions Act in order to investigate an issue and establish facts in accordance with its terms of reference), the question is why SARS required specific attention. In the wake of the previous administration, certain institutions were in a state of dysfunction and required urgent attention. In this sense, the Nugent Commission's recommendations provided Ramaphosa with the evidence base from which he made decisions to restructure the leadership of SARS and begin its rehabilitation.<sup>186</sup>

Despite the Nugent Commission's being established at the behest of the president, it was also a pragmatic way in which to demonstrate a commitment to democratic processes. The commission provided Ramaphosa with an external opinion and recommendation that justified his decision to restructure and reform SARS. The commission thus resembled what could be described as decision-making underpinned by democratic processes. This was a stark departure from the autocratic decision-making approaches followed by Zuma.

### The Mokgoro Enquiry

Another enquiry, which focused on the country's single prosecutorial authority,<sup>187</sup> was established by Presidential Proclamation on 29 November 2018. Aptly, if long-windedly, it was titled "Enquiry Under Section 12(6) of the National Prosecuting Authority Act 32 of 1998 into the Fitness of Advocate Nomgcobo Jiba and Advocate Lawrence Sithembiso Mrwebi to Hold Office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions Respectively".<sup>188</sup> With retired Constitutional Court Justice Yvonne Mokgoro

186 "Ramaphosa: Why I Fired Moyane from SARS", *News24*, November 1, 2018.

187 Section 179(1) of the Constitution states: "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament."

188 Department of Justice and Constitutional Development, "Enquiry Under Section 12(6) of the National Prosecuting Authority Act 32 of 1998 into the Fitness of Advocate Nomgcobo Jiba and Adv Lawrence Sithembiso Mrwebi to Hold Office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions Respectively, Notice 763 of 2018", *Government Gazette* 42072 (November 29, 2018). Forgiveably, the final report adopted the shorter title "Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998".

as its chair, the media coined a more palatable moniker: the Mokgoro Commission of Enquiry (Mokgoro Enquiry).

Unlike other commissions that had been initiated in terms of the Commissions Act, the Mokgoro Enquiry, as the long title suggests, had a different legal basis. Fact-finding served more as a means than as an end in itself. The reason for this was that the Mokgoro Enquiry was a formal and legally required procedural step that had to be taken before the president could decide to remove a senior member of the NPA.<sup>189</sup>

**The Mokgoro Enquiry was a formal and legally required procedural step that had to be taken before the president could decide to remove a senior member of the NPA**

South Africa's Constitution states that national legislation must ensure that the 'prosecuting authority exercises its functions without fear, favour or prejudice'.<sup>190</sup> Institutional independence for the NPA is a constitutional guarantee. The Constitutional Court, citing its previous decisions, stated as much in its *Nxasana* decision:<sup>191</sup>

This Court has said of the NPA's independence '[t]here is... a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'. The reason why this guarantee of independence exists is not far to seek. The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds. Equally, functionaries within that prosecuting authority may – as [the Council for the Advancement of the South African Constitution] submitted – 'be pressured... into pursuing prosecutions to advance a political agenda'. All this is antithetical to the rule of law, a founding value of the Republic. Also, malleability, corruption and dysfunctionality are at odds

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189 Section 12 of the NPA Act provides:

"(6) (a) The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office-

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or

(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned."

190 Section 174(4) of the Constitution.

191 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC), par. 19.

with the constitutional injunction of prosecuting without fear, favour or prejudice. They are thus at variance with the constitutional requirement of the independence of the NPA.

The basis for requiring that an enquiry be held before a senior prosecutor may be removed, as provided for in the NPA Act,<sup>192</sup> serves as an important safeguard for institutional independence and the rule of law. It ensures that a sitting president cannot simply remove senior prosecutors on a whim. That is not to say that a South African president does not have significant influence over the NPA's leadership. Decisions to appoint or remove are ultimately made at the president's behest.<sup>193</sup>

During their time at the NPA, Jiba and Mrwebi were rebuked by the courts in several separate rulings.<sup>194</sup> Jiba was a deputy national director of public prosecutions and acted as the national director of public prosecutions (NDPP) for a period. Mrwebi was a special director responsible for the Specialised Commercial Crimes Unit, a division within the NPA that focuses on, among other things, prosecuting corruption-related offences.

On the strength of comments made by the courts and noting the loss of public confidence in the NPA that Jiba and Mrwebi's actions had brought about, the Mokgoro Enquiry concluded that neither was fit or proper to hold their respective offices. It recommended that the president remove them, which he did.<sup>195</sup>

The Mokgoro Enquiry itself did not delve into the wider question of state capture. However, evidence presented before it, particularly in the wake of the SCC report, paints an interesting picture. The decisions made by Jiba and Mrwebi involved matters that had a discernible political dimension.<sup>196</sup>

The first example was the decision to withdraw criminal charges against Richard Mdluli, a former police crime intelligence boss with links to Zuma, who stood accused of kidnapping and assaulting his wife's former lover. He also faced corruption charges relating to the gross abuse of the police crime intelligence 'slush fund'.<sup>197</sup>

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192 Section 12(6)(a) of the NPA Act.

193 Section 11(1) and section 13(1) of the NPA Act.

194 *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (1) SA 254 (GNP); *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA); *Booyesen v Acting National Director of Public Prosecutions and Others* (2) All SA 319 (KZD); *Zuma v Democratic Alliance* 2014 (4) All SA 35 (SCA); *General Council of the Bar of South Africa v Jiba and Others* 2017 (2) SA 122 (GP); *Jiba and Another v General Council of the Bar of South Africa and Another; Mrwebi v General Council of the Bar of South Africa* 2019 (1) SA 130 (SCA); *Freedom Under Law v National Director of Public Prosecutions and Others* 2018 (1) SACR 436 (GP).

195 Yvonne Mokgoro, *Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998 Abridged Version*, Report (Pretoria: The Presidency, April 1, 2019), par. 486–487.

196 Mokgoro, *Enquiry Report*, par. 107–151.

197 Greg Nicolson, "Richard Mdluli Gets Jail Time and Leave to Appeal Denied", *Daily Maverick*, September 29, 2020.

Media reports speculated that Mdluli was intrinsically linked to Zuma's ascendancy to power.<sup>198</sup> It was believed that Mdluli had provided Zuma with a series of leaked recordings describing a political conspiracy by senior law enforcement officials against Zuma (known as the 'spy tapes'). These recordings led to the 783 charges of fraud and corruption that loomed over Zuma ahead of the election in 2009 being dropped – paving his way to becoming president of South Africa.<sup>199</sup>

It was believed that Mdluli had provided Zuma with a series of leaked recordings describing a political conspiracy by senior law enforcement officials against Zuma (known as the 'spy tapes')

Freedom Under Law successfully argued that Mrwebi's decision to drop charges against Mdluli was unlawful, but his reasons for doing so were never examined.<sup>200</sup> During the course of the Mokgoro Enquiry, it was revealed that Mrwebi had in fact received secretive letters from police crime intelligence officials imploring him to make a 'security conscious decision on the matter to avoid state secrets being uncovered to the embarrassment of South Africa'.<sup>201</sup> This revelation was significant. It provided concrete evidence that the state's intelligence apparatus had been used in an attempt to interfere in and influence the NPA's functions.

Mrwebi had in fact received secretive letters from police crime intelligence officials

Another matter concerned Johan Booysen, a senior police officer in the Hawks.<sup>202</sup> Booysen had uncovered a flow of corrupt tenders relating to accommodation for police officers during the 2010 FIFA World Cup. The key suspect was a wealthy businessman named Thoshan Panday, who had direct business links to the former president's nephew Edward Zuma.<sup>203</sup>

198 Stephen Grootes, "Analysis: The Rise and Fall of Richard Mdluli, a Man Who Damaged Our Society", January 17, 2018.

199 Kameel Premhid, "Understanding the Spy Tapes Saga", Helen Suzman Foundation, <https://hsf.org.za/publications/hsf-briefs/understanding-the-spy-tapes-saga>.

200 *National Director of Public Prosecutions and Others v Freedom Under Law*, par. 38–42.

201 Mokgoro, *Enquiry Report*, par. 276.

202 Mokgoro, *Enquiry Report*, 51.

203 Mokgoro, *Enquiry Report*, par. 169–172. See also Marianne Thamm, "The 2010 Soccer World Cup Led to Massive Fraud and Corruption Within Law Enforcement Agencies – Johan Booysen", *Daily Maverick*, April 18, 2019.

## The state's intelligence apparatus had been used in an attempt to interfere in and influence the NPA's functions

Shortly afterwards, on the heels of a controversial news article by the *Sunday Times*, Booyesen suddenly found himself facing racketeering charges authorised by Jiba.<sup>204</sup> The news article implicated Booyesen in a police brutality scandal that allegedly took place in Cato Manor, a working-class neighbourhood near Durban.<sup>205</sup> The explosive allegations resulted in Booyesen being promptly suspended from the Hawks and facing serious criminal charges. Conveniently, his investigation into Panday and his silent partner Edward Zuma was stalled in the process.<sup>206</sup>

The *Sunday Times* would later recant its story and apologise, stating:<sup>207</sup>

While we were interrogating, investigating and reporting these stories, there was clearly a parallel political project aimed at undermining our democratic values and destroying state institutions, and removing individuals who were seen as obstacles to this project. We admit that our stories may have been used for this purpose.

Outside the Mokgoro Enquiry, evidence presented at the SCC by whistle-blower Angelo Agrizzi suggested that both Jiba and Mrwebi had received monthly payments from Bosasa – a private company that had benefited from lucrative contracts with the Department of Correctional Services.<sup>208</sup> While acknowledging the 'hearsay nature of the evidence', the SCC suggested that shortcomings in the evidence could be addressed through further investigation.<sup>209</sup>

In keeping with his approach followed in the Nugent Commission, Ramaphosa sought to demonstrate that he favoured democratic approaches in decision-making when he appointed an interview panel to recommend the new NDPP, Shamila Batohi.<sup>210</sup> Despite being legally empowered to unilaterally appoint his preferred candidate, Ramaphosa followed the recommendation of the panel.<sup>211</sup> There have since been calls for this process to be formalised in law.<sup>212</sup> This helped Ramaphosa to establish credibility following the more autocratic behaviour demonstrated by his predecessor.

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204 Mokgoro, *Enquiry Report*, par. 124–129. See also *Booyesen v Acting National Director of Public Prosecutions and Others*.

205 *Booyesen v Acting National Director of Public Prosecutions and Others*.

206 Franny Rabkin, "Booyesen: 'I Was Prosecuted Because I Got in Edward Zuma's Way'", *Mail & Guardian*, February 4, 2019.

207 Bongani Siqoko, "We Got It Wrong, and For That We Apologise", *Sunday Times*, October 14, 2018.

208 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part III, Vol. 4, 766.

209 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part III, Vol. 4, 770.

210 Barry Bateman and Clement Manyathela, "President Appoints Shamila Batohi as New NPA Head", *EWN*, December 4, 2018.

211 Bateman and Manyathela, "President Appoints Shamila Batohi".

212 Helen Suzman Foundation, *Delivery of Justice, Independence and Accountability*, Report (Johannesburg: Helen Suzman Foundation, August 2019).



Despite being legally empowered to unilaterally appoint his preferred candidate, Ramaphosa followed the recommendation of the panel

## The Mpati Commission

The commission of inquiry into allegations of impropriety regarding the PIC was established by Presidential Proclamation on 4 October 2018.<sup>213</sup> It was chaired by retired Supreme Court of Appeal Judge President Lex Mpati and commonly referred to as the Mpati Commission. The PIC is a state-owned entity responsible for managing the state's assets. It is the largest single investor in the country and is responsible for managing public servant pension funds.<sup>214</sup>

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Over the course of 2017 and 2018, numerous media reports alleged that there were significant irregularities taking place at the PIC.<sup>215</sup> The Mpati Commission's terms of reference involved looking into the veracity of the media reports to determine whether there was any impropriety regarding investment decisions or governance within the organisation. Secondly, the commission had to determine whether a PIC director or employee had used his/her position, privileges or confidential information to improperly benefit another person. Finally, it had to investigate whether there was a failure to comply with any legislation or PIC policies concerning the reporting of corruption or protection of whistle-blowers.<sup>216</sup>

The companies forming the subject of the investigation are many in number and will not all be detailed in this report. They range from those involved in private sector scandals, such as

213 President of the Republic of South Africa, "Proclamation No. 30 of 2018: Commission of Inquiry into Allegations of Impropriety Regarding Public Investment Corporation (PIC ToR)", *Government Gazette* 41979 (October 17, 2018).

214 PIC Commission, *Report of the Judicial Commission of Inquiry into Allegations of Impropriety at the Public Investment Corporation* (Pretoria: Department of Justice and Constitutional Development), par. 2–6.

215 For example, see Dave Chambers, "Another PIC Head Rolls Over Serious Impropriety on Board of VBS Bank", *Sowetan Live*, July 14, 2018; Joseph Cotterill, "South Africa Fund Manager PIC Referred to Corruption Inquiry", *Financial Times*, May 31, 2018; "PIC to Exit Investment in Independent Media", *Mail & Guardian*, July 4, 2018.

216 President of the Republic of South Africa, *PIC ToR*.

the massive fraud that took place at South African conglomerate Steinhoff, to the wanton looting of VBS Mutual Bank by politically exposed individuals.<sup>217</sup> However, in exploring the broader state capture issue, it is worth considering two particular investments at the centre of controversy: a loan extended by the PIC to Sekunjalo Independent Media (SIM) in its acquisition of Independent News and Media South Africa (Pty) Ltd (INMSA) and the PIC's purchase of grossly overvalued shares in AYO Technology Solutions. Both companies are closely linked to politically connected businessman and media mogul Iqbal Survé.<sup>218</sup>

Dan Matjila, the chief executive officer of the PIC, was a recurring character throughout the findings. Allegations included that Matjila had abused his position, bypassing investment procedures and governance processes, to invest PIC funds in suspicious and otherwise imprudent ventures.<sup>219</sup>

During 2013 the PIC advanced a number of loans to SIM and INMSA. The PIC also directly acquired a 25% equity stake in INMSA. The total value of the deal was ZAR 1.44 billion (\$77 million). The loan, together with interest, was meant to be repaid in August 2018.<sup>220</sup> However, by 2017 it had become clear that INMSA and SIM would not be able to repay the loans when they fell due. Sekunjalo Investment Holdings (Pty) Ltd (SIH), the holding company of both INMSA and SIM and wholly owned by Survé and his family trusts, offered a share-swap deal. In terms of the agreement, the shares in one of SIH's subsidiaries, Sagarmatha, were offered in exchange for settling the outstanding debts to the PIC.

At the time, Sagarmatha had not been publicly listed and the PIC's internal team had reported that the shares could not be valued above ZAR 7.06 (\$0.38) each. However, through Matjila's direct intervention, and without the knowledge of the PIC team involved in the deal, the PIC ended up valuing the company at ZAR 39.62 (\$2.13) per share instead. Ultimately, and perhaps fortunately, the Johannesburg Stock Exchange refused to list Sagarmatha and the transaction did not go through.<sup>221</sup>

The same could not be said for the PIC's ZAR 4.3 billion (\$230 million) investment in AYO Technology Solutions. In return for the sizable sum, the PIC acquired just 29% of AYO, meaning that the company had been valued at ZAR 13 billion (\$697 million). This, despite the fact that the PIC's internal teams had found AYO's assets to only be worth an estimated ZAR 292 million (\$15 million) at the time.<sup>222</sup>

The commission also raised concerns around David Mahlobo, the then minister of state security, and his interactions with Matjila.

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217 PIC Commission, *PIC Report*, 414, 416.

218 PIC Commission, *PIC Report*, 712.

219 PIC Commission, *PIC Report*, 25.

220 PIC Commission, *PIC Report*, 302.

221 PIC Commission, *PIC Report*, 306–307.

222 PIC Commission, *PIC Report*, 316.

The commission concluded that the proposed Sagarmatha transaction, including suspicions of share price manipulation, effectively amounted to using the PIC's own investment to pay back the debt that INMSA owed it. This demonstrated not only a severe lack of ethics and compliance with laws and regulations but also a wanton disregard for the best interests of the PIC and its clients.<sup>223</sup>

Following the release of the report, South African banks opted to close the bank accounts or otherwise refuse services to any entities affiliated with Survé.<sup>224</sup> The reason was that they feared the reputational risk of engaging with Survé's businesses on the back of the Mpati Commission's findings. Survé has since been engaged in protracted litigation to review the findings of the commission<sup>225</sup> and with Nedbank. He managed to obtain an interim interdict preventing Nedbank from closing his bank account.

Although the purpose of a commission is fact-finding in nature, the events that followed the release of the Mpati Commission's report demonstrated the real-world effects of those findings.

Attempts to attain greater control over the media and the public narrative were not limited to Sekunjalo's activities with INMSA. The Guptas, through their companies TNA Media (Pty) Ltd (TNA) and Infinity Media (Pty) Ltd, had created two media outlets, the *New Age* newspaper and African News Network 7, a TV news channel. The declared purpose of these entities was to establish a media empire that was 'extra friendly' to the ruling ANC.<sup>226</sup>

In order to fund this burgeoning enterprise, the Guptas unsuccessfully attempted to exert influence over the CEO of the Government Communication and Information System turned whistle-blower, Themba Maseko, to gain access to its annual ZAR 600 million (\$32 million) budget.<sup>227</sup> When Maseko refused to budge, he was promptly replaced by Mzwanele Manyi. The SCC determined that Maseko's removal was done on Zuma's instruction.<sup>228</sup> Shortly afterwards, TNA started receiving considerable funding in the form of subscriptions, sponsorships and advertising expenditure from the State despite having no discernible readership or viewership figures.<sup>229</sup> As it would turn out, TNA's primary subscriber base would consist of government departments and SOEs.<sup>230</sup>

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223 PIC Commission, *PIC Report*, 413.

224 Dewald van Rensburg, "amaBhungane | Strike 3: Is Iqbal Survé Finally Unbankable?", *News24*, February 19, 2022.

225 Jan Cronje, "Iqbal Survé in Bid to Review Mpati Commission as Banks Bail on His Companies", *News24*, July 27, 2022.

226 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part I, Vol. 1, 457–458.

227 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part I, Vol. 1, 28.

228 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part I, Vol. 1, 497.

229 Corruption Watch, "Zondo Report: Maseko One of First Casualties of Capture, Says Zondo", January 12, 2022.

230 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part I, Vol. 1, 458.

# Trias politica and the commission's role

## The importance of separation of powers

In the mid-1700s the French philosopher Montesquieu published *De l'esprit des lois* (*The Spirit of the Laws*). It would go on to have a profound impact on the earliest iterations of democratic constitutionalism – including on the founding fathers of the US Constitution.<sup>231</sup> He explains that political liberty is not possible without the separation of powers and appropriate laws that ensure personal security for the individual.<sup>232</sup>

Political liberty is not possible without the separation of powers and appropriate laws that ensure personal security for the individual

The concept of separation of powers has been around since antiquity. It proposes that a free and democratic state is composed of three branches: the executive; the judiciary; and the legislature. Each branch has its own purpose and functions and is constituted as a separate and independent body. The division ensures that the branches can exercise checks and balances over one another to ensure that no single branch of government can infringe upon political liberty.<sup>233</sup>

The executive is responsible for making decisions and formulating policies in the day-to-day running of government. The legislature, composed of the elected representatives of the people, creates laws and has mechanisms to hold the executive accountable. The judiciary, as the custodian of the laws of the state, ensures that the rules are adhered to and applied equally to every individual without fear, favour or prejudice. The notion of *trias politica* lies at the heart of the rule of law and is a cornerstone of the modern democratic social contract. A failure in any one of the branches can have severe consequences for the system and society at large.<sup>234</sup>

This architecture of political institutions is sometimes described as the constitutional design of a country.

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231 Montesquieu, *The Spirit of the Laws*, 1748.

232 Montesquieu, *The Spirit of the Laws*.

233 Montesquieu, *The Spirit of the Laws*.

234 Montesquieu, *The Spirit of the Laws*.

The notion of *trias politica* lies at the heart of the rule of law and is a cornerstone of the modern democratic social contract. A failure in any one of the branches can have severe consequences for the system and society at large

## Should judges be involved? Preserving the judiciary's legitimacy and ultimately public trust in the courts

Having established that commissions fall within the executive function of the state, the question is whether it is appropriate for active members of the judiciary to be involved. It has been a long-standing practice for retired judges to chair commissions of inquiry. Having a figure from the judicial arm of the state helps to enhance the credibility of the process in the eyes of the public and to assuage potential suspicions that the process is not independent or has otherwise been politicised.

Having a figure from the judicial arm of the state helps to enhance the credibility of the process in the eyes of the public and to assuage potential suspicions that the process is not independent or has otherwise been politicised

The decision to appoint a judge as a chairperson for the SCC was not, however, one that was made by the executive. The public protector's remedial action required that the president institute a commission of enquiry within 30 days of her report being released and specifically instructed that the chief justice be responsible for appointing the chairperson.<sup>235</sup> It should be noted that there is nothing in the Constitution or the Commissions Act that expressly prohibits the president from appointing an active member of the bench. Although, given that the president was adhering to the public protector's detailed remedial action, this principle did not appear to be relevant in establishing the SCC.<sup>236</sup>

Regardless of its origins, there may be legitimate concerns in terms of separation of powers, particularly regarding how a judicial officer's involvement is perceived by the public. South African courts have recognised public perception as a constitutive element of institutional independence.

<sup>235</sup> Public Protector of South Africa, *State of Capture*, 353.

<sup>236</sup> Section 84(2)(f) of the Constitution.

## South African courts have recognised public perception as a constitutive element of institutional independence

As the Constitutional Court observed in its *Glenister* decision:<sup>237</sup>

The appearance or perception of independence plays an important role in evaluating whether independence in fact exists... We say merely that public confidence in mechanisms that are designed to secure independence is indispensable. Whether a reasonably informed and reasonable member of the public will have confidence in an entity's autonomy-protecting features is important to determining whether it has the requisite degree of independence... This is because public confidence that an institution is independent is a component of, or is constitutive of, its independence.

In the *Jaipal* decision, the court explained that the test is objective and that the relevant standard is whether there is an apprehension of bias rather than a suspicion.<sup>238</sup> The Mokgoro Commission report recognised that 'whether or not there was actual bias, our Courts have recognised that the perception of bias plays an equally important role when it comes to assessing impartiality for judicial officers'.<sup>239</sup>

So, it is clear that perception matters. It is against this backdrop that the following sequence of events should be considered: just over a year after taking up the mantle as deputy chief justice, Zondo was appointed to chair the SCC, in August 2018. The SCC process would unfold through a rather cumbersome adversarial process that lasted until June 2022. It required no fewer than eight extension requests.<sup>240</sup> The year 2022 also coincided with a need to fill the chief justice vacancy in the country's apex Constitutional Court.

Freedom Under Law has conducted extensive research on the proceedings of the Judicial Services Commission (JSC). In terms of appointments for chief justice of the Constitutional Court, the president receives a list of recommendations from the JSC but exercises his own discretion in appointing his preferred candidate.<sup>241</sup>

The JSC had recommended Judge President of the Supreme Court of Appeal Mandisa Maya for elevation. Contrary to how one might imagine a shortlist of candidates being

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237 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), par. 207.

238 *S v Jaipal* 2005 (4) SA 581 (CC), par. 41.

239 Mokgoro, *Enquiry Report*, 118.

240 Emsie Ferreira, "Zondo Granted Eighth Extension as Part Four of State Capture Report Is Awaited", *Mail & Guardian*, April 28, 2022; South African Government, "President Cyril Ramaphosa: Handover of the Final Part of the State Capture Commission Report", June 22, 2022.

241 Constitution, s. 174(3).

submitted, the JSC did not put forward more than a single name. In departing from his usual approach of following recommendations, Ramaphosa decided to ignore the JSC's single recommendation and appointed Zondo as South Africa's new chief justice on 1 April 2022. Zondo released the SCC report in six volumes over the first half of 2022.

There can be no suggestion that Zondo's SCC findings could in any way have influenced Ramaphosa's decision to appoint him as chief justice or, indeed, that Zondo had an eye on the top position of the judiciary when he had made his findings. However, the timing created a situation whereby a judge who stood to be elevated to the highest office at the president's discretion was seized with a fact-finding exercise that implicated the ruling party and its most senior leaders.

The moment came and passed, and the public appears to have accepted and even welcomed Ramaphosa's decision to appoint Zondo. However, the real question is whether scenarios such as these, where public perception could be influenced, might have a diminishing effect on the perceived nonpartisan nature and independence of the judiciary. In principle, such moments can and should be avoided. However, given the curious and unconventional nature of how the SCC came into being, this outcome may have been inescapable.

# A comparative perspective on state commissions

## The Kenyan experience: The Judicial Commission of Enquiry into the Goldenberg Affair

The ‘Goldenberg Affair’ was a public scandal in Kenya that involved various high-ranking government officials in a scheme that defrauded the state through false export compensation claims.

Between 1991 and 1992, Kenya underwent a foreign exchange crunch. The country experienced a significant drop in hard currency reserves owing to the poor export performance of its top foreign exchange earners: tea, coffee and tourism.<sup>242</sup>

Decades prior, the government had implemented the Export Compensation Scheme (1974) to encourage export manufacturing. The scheme made it possible for exporters bringing in foreign currency to receive cash compensation on taxes paid in order to facilitate those exports, usually at 20% of the export value. In 1983, the finance minister suspended the scheme during his budget speech, claiming that it was being used as a vehicle for fraud.<sup>243</sup>

In 1990, then vice-president George Saitoti reinstated the scheme and expanded its terms, ostensibly to promote and incentivise exports. Goldenberg International Ltd (GIL) was registered on 17 July 1990 by 25-year-old Kamlesh Pattni and James Kanyotu, the then director of the Directorate of Security Intelligence. GIL conceived a plan to claim compensation for exporting gold and diamonds from Kenya to Dubai and Switzerland.

Just three months later, in October 1990, Saitoti granted GIL the exclusive right to export gold and diamond jewellery. This was problematic for three main reasons: Kenya did not mine or beneficiate gold or diamonds; gold and diamonds were not covered by the Export Compensation Act; and GIL was receiving 35% of the export value of fictitious exports.<sup>244</sup>

Despite export compensation usually being paid at 20% of export value, GIL received 35% of export value – 15% termed *ex gratia* by then finance permanent secretary Charles Mbindyo and disguised in the budget report as a ‘customs refund’. This method was used to extract significant funds from the Central Bank of Kenya.

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242 Wachira Maina, *State Capture: Inside Kenya's Inability to Fight Corruption*, Report (Nairobi: Africa Centre for Open Governance, May 2019), 15.

243 Francis M Mweha and Njuguna S Ndung'u, “Kenya’s Recent Exchange-Rate Policy and Manufactured Export Performance”, in *Policies to Promote Competitiveness in Manufacturing in sub-Saharan Africa*, eds. Augustin Kwasi Fosu, Saleh M Nsouli and Aristomene Varoudakis (Paris: OECD and IMF, 2001), 33.

244 Wachira Maina, “Tales of State Capture: Goldenberg, Anglo Leasing, and Eurobond”, *The Elephant*, September 5, 2019, 2–3.



At the start of GIL's plan, gold was initially smuggled out of the Democratic Republic of Congo. Later the company stopped smuggling gold altogether. Instead, it simply completed export declaration forms, produced fraudulent currency deposit slips and received the refund on taxes paid to facilitate the fictitious gold and diamond exports.<sup>245</sup>

A number of high-ranking politicians in then president Daniel Arap Moi's cabinet were involved in the scheme. It was alleged that Moi himself had ordered at least two payments worth \$76 million to GIL.<sup>246</sup>

In 1992, a whistle-blower at the Central Bank of Kenya alerted opposition MPs to GIL's operations. He was subsequently fired. However, the outcry following his disclosures prompted the Law Society of Kenya, led by Willy Mutunga, to file a private prosecution petition in the High Court. The attorney general at the time terminated the private prosecution. The matter was left until 1997, when the attorney general, under pressure from the International Monetary Fund (IMF) to curb corruption, began legal proceedings to indict Pattni and his known associates. This process became drawn out and not much remedial action was taken until a new government came into power.

On 24 February 2003 the newly appointed president, Mwai Kibaki, set up a commission of inquiry, chaired by Justice Samuel Bosire, to investigate the exploitation of the Export Compensation Scheme by GIL. Bosire was also tasked with determining which individuals and entities were responsible for defrauding the scheme.

The exact amount that the Goldenberg Affair cost the Kenyan public has never been established. However, estimates suggest that up to 10% of Kenya's gross domestic product was lost. Furthermore, KES<sup>247</sup> 5.8 billion (\$47.25 million) was stolen through fictitious claims. A total of 487 companies and individuals, including many high-ranking officials, transacted with Goldenberg to the tune of KES 158.3 billion (\$1.29 billion).<sup>248</sup>

The commission recommended reforms with regard to the formation, supervision, lending and liquidation of banks, as well as new laws for the recovery of proceeds of crime in foreign banks and additional protections for whistle-blowers. It also advised that the auditor general audit the Central Bank of Kenya.<sup>249</sup>

In addition, the commission identified several individuals who it found were either directly implicated or whose involvement warranted further investigation by the appropriate law

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245 Maina, "State Capture: Inside Kenya's", 5.

246 Republic of Kenya, *Report of the Judicial Commission of Inquiry into The Goldenberg Affair* (Nairobi: Government Printer, October 2005), 206–217.

247 Currency code for the Kenyan shilling.

248 Ezra Chiloba Simiyu, "An Inquiry into Commissions of Inquiry: A Case Study of the Bosire Commission of Inquiry in Kenya" (MA diss., Central European University, 2008), 23–24.

249 Government of Kenya, *Report of the Judicial Commission*, 293–299.

enforcement bodies. Notably, the former president and his vice, Moi and Saitoti, and the masterminds, Pattni and Kanyotu, were included.<sup>250</sup>

Similar to the SCC, the Bosire Commission recommendations comprised reforms and referrals for further investigation. However, commentators such as Simiyu point out that while there have been several law reforms in the country, such as new laws governing witness protection, proceeds of crime and money laundering and amendments to anti-corruption legislation, individual accountability remains an elusive ambition nearly two decades later. Since the Goldenberg Affair, Kenya has been rocked by two further scandals relating to Anglo Leasing and Eurobonds.<sup>251</sup>

Individuals implicated in the scandal turned to the courts to avoid civil and criminal prosecution. Nation News reported that,<sup>252</sup>

in a further threat to the Goldenberg investigations, only one day after the Constitutional Court ruled that former Education Minister George Saitoti could not be prosecuted over the scandal, another former top Government official, Dr Karunga Koinange, asked the court to quash the team's findings about him.

Saitoti managed to obtain a court order effectively removing him from the list of implicated individuals. The former central bank governor also managed to prevent his arrest over his role in the Goldenberg Affair by successfully reviewing the commission's findings in the High Court.

The tables turned on Bosire instead, with him being accused of failing to protect national interests. He was subsequently removed from office in 2012 over a court order to interview Moi, Saitoti and Kanyotu.<sup>253</sup>

The charges against several implicated individuals were quashed by High Court Judge Joseph Mutava on the grounds that justice had been delayed. The judge questioned the long delay in concluding the matter, stating that the prosecution had to come to an end after 20 years and that Pattni was not likely to get a fair hearing.<sup>254</sup>

Maina suggests that corruption has been a persistent problem in Kenya since 1992:<sup>255</sup>

Corruption cases are routinely reported in the press, in the Auditor General's reports and to the Ethics and Anti-Corruption Commission (EACC) but these are rarely fully investigated, let alone resolved satisfactorily. Commissions of Inquiry, such as the Goldenberg Affair... have achieved little.

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250 Government of Kenya, *Report of the Judicial Commission*, 300–301.

251 Simiyu, "An Inquiry into Commissions", 23–24.

252 "Revealed: Goldenberg Inquiry Team Paid Sh350 Million", *Nation News*, July 3, 2020.

253 M Michira, "Vetting Board Finds Four Judges Unfit for Office", *Business Daily Africa*, April 25, 2012.

254 Sam Kiplagat, "Neither Guilty Nor Innocent: Men Who Died Before Their Cases Were Determined", *The Nation*, June 28, 2020.

255 Maina, "State Capture: Inside Kenya's", 2–3.

Citing Transparency International's national chapter report, Maina goes on to state:<sup>256</sup>

[t]he problem is two-fold: the nature of the corruption problem that Kenya faces; and the reform theory behind the anti-corruption measures that donors push a reluctant Kenyan government to implement. Mostly, the government embraces 'appearances' of reform, rather than the fact of reform... this is so because deep reforms would loosen the ruling elite's grip on power and severely subvert politics as played in Kenya.

The prevailing sentiment is that the Bosire Commission did not result in an end to state capture. Various scandals, from Goldenberg and Anglo Leasing to Eurobonds, occurred under successive administrations, suggesting that state capture was never linked to a single regime or a particular set of actors. None of the persons or companies implicated was ever found guilty of a crime and the wealth and assets accumulated through fraud were never forfeited by those who benefitted.

### The Bosire Commission did not result in an end to state capture

This leads to the inescapable conclusion that the Bosire Commission served not so much a vehicle for democratic accountability in Kenya as a political device used to deflect public attention from the implicated political actors and their affiliates. This allowed the political establishment to create the appearance that something was being done about the situation for long enough to allay public and international concern through the prescription of time rather than through actual accountability.

None of the persons or companies implicated was ever found guilty of a crime and the wealth and assets accumulated through fraud were never forfeited by those who benefitted

However, this conclusion does not speak to the functionality of the commission. Ultimately, its purpose was fact-finding, and it fulfilled that purpose. Rather, the systemic failures appear to rest within the relevant state institutions, namely the law enforcement agencies

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<sup>256</sup> Maina, "State Capture: Inside Kenya's", 5.

and the courts that were unable to take the appropriate measures to hold power to account.

Kenya's EACC replaced the Anti-Corruption Commission in 2010, in line with the provisions of the country's constitution. Parliament enacted the relevant legislation establishing the EACC in 2011, whose mandate is to combat corruption and promote sound ethical standards and practices. However, it does not appear that the EACC's establishment was linked to commissions of inquiry – rather, the impression is that it came into effect as a response to pressure from international institutions such as the IMF and World Bank.

In assessing the EACC's performance, Injene and Ngahu suggest that the problems it faces can be ascribed to externalities. These include the slow judicial process; political interference; weaknesses within the legal framework, including the EACC's lack of prosecutorial powers; slowness in implementing the auditor general's reports; and a general lack of seriousness in sentencing corrupt individuals. The latter is often related to a lack of integrity among Kenya's elected leaders.<sup>257</sup>

**A commission is by no means an end in itself but rather the first step in achieving effective reforms and holding implicated individuals accountable**

Kenya's experiences with the Bosire Commission offer valuable lessons for South Africa in the aftermath of the SCC. A commission is by no means an end in itself but rather the first step in achieving effective reforms and holding implicated individuals accountable. The true test will invariably come down to the ability of South Africa's institutions, particularly law enforcement, to re-capacitate themselves after years of being hollowed out. The judiciary demonstrated its strength and resilience during the darkest hours, but it continues to face existential threats from political actors seeking to destabilise the constitutional democratic order and challenge the judiciary's legitimacy.

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257 Grace Kaome Injene and Catherine Ngahu, "Challenges Faced by the Kenya Ethics and Anti-Corruption Commission in Implementing Strategies Recommended by United Nations Convention Against Corruption in Kenya", *European Journal of Business and Strategic Management* 1, No. 1 (2016), 88–99.

## CHAPTER 8

# Finding closure

As Bracking explains, numerous authors have painted a bleak picture describing the collapse and demise of South Africa. However, it is worth acknowledging that the many individuals who opposed corruption remained resilient during the country's most turbulent post-apartheid period. This included members of political parties, civil society actors, the judiciary, the media, and the vast majority of citizens who did not benefit from corruption and predatory networks and who were unwilling to condone it. In addition, many public servants resisted attempts at political interference. There also were actors in the private sector who grew increasingly frustrated by the adverse effects that corruption and nepotism was having on their business and the environment within which they operated.<sup>258</sup>

## Unpacking the Zondo Commission recommendations and what they mean for South Africa

The SCC report's final volume included 200 pages of conclusions and recommendations for the president and law enforcement agencies. After considering the recommendations, the president issued his response towards the end of October 2022.<sup>259</sup> The responses were grouped into three broad categories.

The first dealt with accountability, taking stock of how implicated individuals are being dealt with and the current status of investigations – many of which are ongoing. The second addressed reforms, policy changes and new structuring within government aimed at preventing state capture from occurring in the future. The reforms themselves are wide-ranging: from the creation of new permanent anti-corruption bodies to the creation of new criminal offences. It also included a broader discussion of systemic reforms that arose from the work of the SCC. These primarily focused on looking at the auditing system and professionalisation of the public administration.

The vast majority of the president's responses deferred specific reform actions to various bodies such as the National Anti-Corruption Advisory Council (NACAC), which he appointed on 29 August 2022. The NACAC is composed of members from various sectors across the country. The president announced that the NACAC will interface with a number of

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258 Bracking, "Corruption & State Capture", 175.

259 Government of South Africa, *Response by President Cyril Ramaphosa to the Recommendations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud* (Pretoria: The Presidency, 2022).

coordinating ministers who have significant executive oversight over legislative and policy mandate areas that relate to fighting corruption.<sup>260</sup>

## State reforms: Workable policy and legislative outcomes

### *Building capacity within the criminal justice system and a single anti-corruption body*

It is difficult to explain what an effective anti-corruption body might look like in the future without understanding what they looked like in the past. Previously South Africa had a dedicated anti-corruption unit called the Directorate for Special Operations (or the Scorpions, as they were more commonly known). The unit existed within the NPA and, by association and as guaranteed by the Constitution, was independent and required to uphold the rule of law without fear, favour or prejudice.<sup>261</sup>

The Scorpions closely resembled the UK's Serious Fraud Office in that it made use of the Roskill model. The model involves using teams of specialist investigators and prosecutors working within a singular unit to ensure close coordination and efficiency. Owing to the highly technical forensic expertise required to mount successful prosecutions, Roskill is often considered a more effective model when investigating complex crimes such as corruption.<sup>262</sup>

**The Scorpions had in fact proven to be so effective that their work began to raise concerns among nefarious political elites and their criminal networks**

The Scorpions had in fact proven to be so effective that their work began to raise concerns among nefarious political elites and their criminal networks. One of Zuma's first acts as president was to disband the Scorpions entirely, moving the investigative function over to the Directorate for Priority Crimes Investigations (DPCI, known as the Hawks) within the SAPS. As a division of the SAPS, oversight of the DPCI fell within the remit of the minister of police.<sup>263</sup>

260 "National Anti-Corruption Advisory Council Members Appointed", SA News, August 29, 2022.

261 The unit was established by Presidential Proclamation in terms of section 7(1) of the NPA Act.

262 Hannah von Dadelzen, "The Serious Business of Fighting Fraud", UK Serious Fraud Office, January 19, 2017.

263 It bears mentioning that Zuma's disbanding of the Scorpions was done with the wholesale acquiescence of the ANC, which had made a firm policy resolution at its Polokwane policy conference to do so. Zuma was enabled and emboldened by the ANC as a whole. Because the centre of gravity for policymaking was shifted to the inner sanctum of Luthuli House – the ANC political headquarters – regularising this decision in government was a matter of course. What this means is that, at least in this instance, the impetus might have been a policy and political decision made by the ANC as a whole.

Without effective coordination between the DPCI and the NPA, and a lack of appropriate internal accountability mechanisms, corruption prosecutions under the Zuma administration all but ground to a halt. This created an environment where organised crime could thrive. South Africa quickly started cultivating a reputation as being a haven for international fugitives and criminal syndicates alike.<sup>264</sup>

## Corruption prosecutions under the Zuma administration all but ground to a halt

Hoffman has expressed doubts around the president's law enforcement capacity-building reforms. In his view, there is a need to implement a 'best-practice solution' to address the decade-long backlog in corruption prosecutions. Referring to the framework set out by the Constitutional Court in the various Glenister decisions,<sup>265</sup> Hoffman calls for the creation of an independent anti-corruption entity.

The *Glenister II* case<sup>266</sup> involved a constitutional challenge concerning the disbandment of the Scorpions within the NPA and the establishment of the DPCI within the SAPS. While the court acknowledged that there was no legal barrier to this restructuring, it emphasised the importance of ensuring the independence of anti-corruption agencies, especially with regard to South Africa's international obligations.

The court expressed concerns about the potential interference in law enforcement bodies situated within existing structures such as the NPA and SAPS, primarily owing to their centralised and hierarchical nature. This risk of interference heightened when those within

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264 According to the Organised Crime Index, "Country: South Africa", [https://ocindex.net/country/south\\_africa](https://ocindex.net/country/south_africa)[https://ocindex.net/country/south\\_africa](https://ocindex.net/country/south_africa)),

- South Africa grapples with multifaceted criminal challenges spanning human trafficking, arms trade, environmental crimes, drug trafficking, and organised criminal groups. Human trafficking, both domestic and transnational, is a pervasive issue, with traffickers exploiting vulnerable individuals, especially from poorer rural areas, for various forms of forced labour, including domestic servitude and sex trafficking. Labour exploitation, particularly in the farming sector, is emerging as a significant concern.
- Corruption plays a prominent role, especially concerning the movement of foreign nationals, often involving bribery to bypass immigration controls. Although highly organised criminal networks manage human smuggling, violence remains relatively low compared to other African countries. Unfortunately, corruption is not limited to human trafficking, as it also permeates state institutions, including the police, contributing to various criminal activities.
- The illicit arms trade poses a substantial threat, with firearms primarily used by criminals, leading to violence and intimidation. The origins of these illegal firearms range from imports to historical stockpiles, and corruption within law enforcement agencies exacerbates the issue. Additionally, South Africa struggles with illegal logging and a thriving trade in illegal wildlife products, such as rhino horn, lion bones, ivory and pangolins, with a significant connection to Asian markets.
- In the realm of drugs, South Africa serves as both a destination and transit point for heroin and cocaine trafficking. Organised criminal groups, some with transnational links, control the drug trade, and corruption within the border and police authorities aids distribution. Domestic cannabis production is extensive, while the market for synthetic drugs like crystal methamphetamine, locally known as "tik", has grown.

265 Hoffman, *Countering the Corrupt*, 42.

266 *Glenister v President of the Republic of South Africa and Others*.

these units lacked autonomous decision-making powers and their superiors had discretion to meddle in specific cases. The court stressed the need for legal mechanisms to limit the possibility of abuse of power and interference in operational decisions regarding criminal investigations and prosecutions. These mechanisms should align with the fundamental principles of the legal system as enshrined in its Constitution.

**This risk of interference heightened when those within these units lacked autonomous decision-making powers and their superiors had discretion to meddle in specific cases**

A split majority in *Glenister II* concluded that the statutory structure establishing the DPCI did not meet the constitutional obligation to create an independent anti-corruption entity. They pointed to various factors, including the absence of secured conditions of employment, excessive ministerial control and inadequate mechanisms to protect against interference, as undermining the necessary degree of independence required. This ruling underscored the importance of safeguarding the independence of anti-corruption bodies in South Africa to effectively combat corruption and fulfil international obligations.<sup>267</sup>

As appealing as Hoffman's prospect of a new and independent anti-corruption entity might sound, practically and in our view, it is unlikely that such an undertaking would have impact or effectiveness. The resources required, both human and financial, to capacitate an entity of this nature and to carry a corruption complaint through to investigation and a successful prosecution would be more than the government could afford. Fighting corruption in even the most well-resourced countries is often a protracted and incredibly costly affair.<sup>268</sup>

**Fighting corruption in even the most well-resourced countries is often a protracted and incredibly costly affair**

Rather than build an anti-corruption entity from the ground up, it would be far more instructive to look at successful examples both in South Africa and abroad of effective

<sup>267</sup> *Glenister v President of the Republic of South Africa and Others*, par. 208250.

<sup>268</sup> See, generally, Alexandra Hartwig, "Evaluating the Cost of Anti-Corruption in Political and Economic Terms: A Case Study Approach", *Journal of Financial Crime* (2022).



coordination of existing state resources. COVID-19 saw a proliferation of corruption in emergency procurement processes. In response to this, Ramaphosa quickly established the Fusion Centre, which brought together various law enforcement agencies within the country. These included the Financial Intelligence Centre, the DPCI, the NPA, SARS and the National Treasury. There is no reason why this ad hoc initiative could not be turned into a permanent function. In this sense it would resemble the UK's National Economic Crime Centre, based within the National Crime Agency, and which performs a similar coordination function for the UK's law enforcement agencies.

### *Cadre deployment and professionalisation of the public service*

According to the SCC, 'the essential mechanism of state capture' was the ability to place politically connected persons on boards and key posts within SOEs and the public administration.<sup>269</sup> Corrupt politicians and officials used disciplinary processes, suspensions and dismissals to remove non-compliant officials and replace them with complicit individuals.<sup>270</sup>

**'The essential mechanism of state capture' was the ability to place politically connected persons on boards and key posts within SOEs and the public administration**

It is worth briefly canvassing how this state of affairs came to be.

As with all liberation movements, the dawn of democracy in South Africa meant that the ANC, successful in leading the revolution, was now saddled with having to run a country with a fractious history and beset with social challenges. Importantly, the ANC also inherited a civil service from its predecessor.

There were concerns within the ANC that the 'ideas and influence of the previous ruling classes still predominated in the civil service'.<sup>271</sup> Faced with an overwhelmingly white public service – one that had served as the engine room for the unjust and racist practices of the apartheid regime – the ANC feared that 'counter-revolutionary forces' embedded within the state would actively seek to undermine its transformative ambitions. In effect, the new political establishment simply did not trust its inherited public servants.

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269 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 6, Vol. 2, 8–9.

270 Government of South Africa, *Response by President Cyril Ramaphosa*, 16.

271 Marxists Internet Archive, "ANC Strategy and Tactics, As Amended at the 50th National Conference, December 1997", <https://www.marxists.org/subject/africa/anc/1997/strategy-tactics.htm>.

In an attempt to address this distrust, the ANC embraced the Leninist doctrine of cadre deployment. The main goal was to ensure that the ANC ‘plays a leading role in all centres of power’. In doing so, it would promote a ‘national democratic revolution’ towards a ‘united, non-racial, non-sexist and democratic society’.<sup>272</sup>

Brunette suggests that in many democratic transitions in the world, the composition of the civil service has been deeply influenced by political considerations, regardless of where a particular political party sits within the ‘left-right’ spectrum. Even within South Africa, as Brunette observes,<sup>273</sup>

[p]oliticisation of the public administration has been a recurrent method for disadvantaged groups to reconfigure the state and redirect it toward addressing rightful grievances. The process, however, has simultaneously allowed politicians to place their allies across administrative checks and balances, facilitating privileged access to state resources, opening channels through which the politically-connected could rise more surely and quickly up the class structure than their compatriots, unleashing the spoils of public office into political-economic competition and threatening a descent into corruption.

A contentious and hotly debated topic is whether the ANC’s formal policy of cadre deployment is inimical to constitutional precepts concerning public administration. The Constitution calls for a public administration that is governed by democratic values, is accountable, transparent and provides services fairly, equitably and without bias.<sup>274</sup> More pointedly, the Constitution explicitly states that ‘[n]o employee of the public service may be favoured or prejudiced because that person supports a particular political party or cause’.<sup>275</sup>

For South Africa, perhaps the question ought not be steeped in considerations of political pragmatism but rather in terms of what can be constitutionally countenanced

Brunette’s view is that politicisation in the public administration has occurred and will continue to occur in jurisdictions around the world regardless of whether a formal deployment policy exists or not and irrespective of the identity of the political actor.

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272 Jonathan Klaaren, Florencia Belvedere and Ryan Brunette, *Reforming Public Administration in South Africa: A Path to Professionalisation* (Cape Town: Public Affairs Research Institute, 2021), 18.

273 Klaaren, Belvedere and Brunette, *Reforming Public Administration*, 4.

274 Constitution, s. 195.

275 Constitution, s. 197(3).

However, for South Africa, perhaps the question ought not be steeped in considerations of political pragmatism but rather in terms of what can be constitutionally countenanced.

### *Maslow's hammer and the State Security Agency*

'If the only tool at one's disposal is a hammer, they are tempted to treat everything as if it were a nail.'<sup>276</sup>

Zuma's background in intelligence undoubtedly shaped his approach to governance during his tenure. His experience working within and around intelligence structures, both domestically and abroad, provided him with a unique perspective on the importance of information and strategic control. The consolidation of South Africa's intelligence agencies into the SSA was a strategic move, centralising power and control over intelligence operations. While some may argue that the consolidation allowed for a more streamlined and coordinated operation, it also concentrated a significant amount of power in the hands of the executive.

### During Zuma's administration, intelligence played a discernible role in the manipulation of various state institutions and actors

During Zuma's administration, intelligence played a discernible role in the manipulation of various state institutions and actors. This is apparent in moments when intelligence actors emerged to influence notable events – as evidenced during the Mokgoro Enquiry proceedings – resulting in the SCC specifically including the exploitation of intelligence within its definition of 'state capture'.<sup>277</sup> Intelligence was viewed as Maslow's hammer, being relied upon as a primary instrument to remove obstructions and secure political objectives, which clearly came at the expense of the institutions that underpin a democratic society.

Under Ramaphosa's administration, there was a clear shift in the approach to intelligence governance. The state's intelligence function was moved directly into the presidency in 2021.<sup>278</sup> The introduction of the General Intelligence Laws Amendment Bill seeks to

276 Abraham Harold Maslow, *The Psychology of Science: A Reconnaissance* (London: Harper & Row, 1966), 16.

277 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 6, Vol. 2, 298:

[S]tate capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain. This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services.

278 Junior Khumalo, "Ramaphosa Does Away With Intelligence Ministry, SSA to Report Directly to Him", *News24*, August 5, 2021.

disestablish the SSA and restore the separation of intelligence functions into domestic and foreign branches, as before.<sup>279</sup>

Apart from legislative measures, additional accountability mechanisms were also introduced, including oversight by the Inspector-General of Intelligence, the Joint Standing Committee in Parliament, and the Auditor-General of South Africa.<sup>280</sup> These measures ostensibly seek to establish stronger checks and balances to ensure that intelligence activities align with national interests once again.

## **Public procurement**

Every year, the government spends over ZAR 1 trillion (\$53.6 billion) on procuring various goods and services from the private sector.<sup>281</sup> Globally, governments outstrip any private sector actor in terms of annual spend.<sup>282</sup> South Africa's Constitution creates three spheres of government: national, provincial and local. Local government, comprising 278 municipalities, collectively spend the highest proportion of funds as they are responsible for much of the day-to-day service delivery that affects citizens' lives.

Various pieces of legislation set out the legal framework under which procurement operates.<sup>283</sup> The SCC highlighted that the fractured state of procurement legislation contributed to a state of confusion that allowed procurement officials to make delicate and complex choices by default and with negative repercussions.<sup>284</sup> It recommended up to 24 different reforms within procurement. These include codes of conduct for procurement officials, professionalisation of supply-chain functions, asset registries and regular lifestyle audits for public officials.<sup>285</sup>

Beyond the legal framework, procurement is highly decentralised in South Africa. There are over 1 000 procuring entities in the country, each responsible for running its own procurement processes and allocating tenders to successful bidders. It is no wonder then that the purveyors of state capture preferred the more centralised corporate models offered by SOEs to following the decentralised procurement system found across the spheres of government.

Procurement has long been seen as a vehicle through which to deliver ANC policy priorities – particularly in the party's attempts to address gross socio-economic disparities

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279 Government of South Africa, *Response by President Cyril Ramaphosa*, 47.

280 Government of South Africa, "State of the Nation Address 2023: Reforming Intelligence Agencies", <https://www.stateofthenation.gov.za/state-capture-commission-recommendations/type/reforming-intelligence-agencies>.

281 Parliamentary Monitoring Group, "National Treasury Briefing on the Work of the Office of the Chief Procurement Officer", May 25, 2022.

282 Open Contracting Partnership and Spend Network, "How Governments Spend: Opening Up the Value of Global Public Procurement", August 2020.

283 Public Finance Management Act 1 of 1999, Municipal Finance Management Act 56 of 2003, Public Procurement Policy Framework Act 5 of 2000.

284 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 1, Vol. 3, 796.

285 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 1, Vol. 3, 844–855; Part 6, Vol. 1, 197.

drawn along racial lines owing to the country's history of apartheid. The system – BEE – is reflective of positive discrimination initiatives. Apart from the groups that are targeted, it is not dissimilar to what many countries have recently initiated in an effort to meet their Sustainable Development Goal objectives, particularly around gender equality. The apartheid regime had implemented a similar system in favour of white Afrikaners after the Great Depression of the 1930s.<sup>286</sup>

However, South Africa's experience with BEE has presented its own unique challenges and vulnerabilities. Several issues have arisen in the implementation of BEE. This includes fronting, a phenomenon whereby a company deliberately misrepresents its BEE status through tokenism in order to inflate its status or make its bid look more appealing. Lax policies regarding beneficial ownership disclosure result in opaque ownership structures, which allow for misrepresentations to occur through disclosure of directorship interest but not ownership. This is made worse by poor oversight over the process by tender boards, committees and public officials. Poor oversight means that malpractices in well-meaning policy evade detection.

The second pressing issue is political corruption, in terms of which political actors interfere in the procurement process and insist on having certain preferred suppliers awarded contracts. In larger projects, these preferred suppliers are presented as local partners when contracts are awarded to larger reputable companies. A third issue is the colloquially described 'tenderpreneurship' – a phenomenon whereby a businessperson (often lacking the requisite skill and experience) uses political connections to secure state procurement contracts, often in exchange for reciprocal favours or benefits.<sup>287</sup>

This process results in the state being highly inefficient with its limited resources

The superficial nature of preference based purely on grounds of race results in a proliferation of black-owned companies that may offer an incredible variety of services yet may lack specialisation, internal capacity or capability to deliver those services. Those companies will typically subcontract work to an external provider and quote at a significantly inflated price, amounting to nothing more than rent-seeking or middleman extraction. Effectively, this process results in the state being highly inefficient with its

286 Nkhaba Jantjie Xaba, "A Comparative Study of Afrikaner Economic Empowerment and Black Economic Empowerment: A Case Study of a Former South African Parastatal in Vanderbijlpark" (PhD thesis, University of Stellenbosch, March 2020); Jantjie Xaba, "Why Afrikaner Affirmative Action Was More Effective than BEE", *Mail & Guardian*, June 29, 2020.

287 Laurence Piper and Andrew Charman, "Tenderpreneur (also Tenderpreneurship and Tenderpreneurism)", in *The Global Encyclopaedia of Informality*, ed. A Ledeneva (Cape Town: University of the Western Cape, 2018), 1.

limited resources. The risk is that those connected to political elites absorb the bulk of the public contracting opportunities, completely subverting the policy objective of broad redistribution to those who had been marginalised in the past. Instead, this cultivates highly concentrated wealth within a small cohort of politically connected elites.

Broad-based BEE, which provides tax incentives to the private sector for doing business with companies with higher BEE status, has been considerably more successful in rebalancing demographic distributions of wealth. A UCT study suggests that the black middle class now eclipses the white middle class in South Africa.<sup>288</sup> However, despite this progress, it remains the most unequal country in the world.<sup>289</sup>

**The black middle class now eclipses the white middle class in South Africa. However, despite this progress, it remains the most unequal country in the world**

Perhaps it is time to rethink arbitrarily race-based approaches to economic redistribution, which are, at their core, a less effective rehash of the apartheid government's approach to favouring the white Afrikaner community.<sup>290</sup> Instead, the policy focus could be on addressing inequality – placing emphasis on the socio-economic circumstances of an individual rather than using racial classification. This might be achieved through the adoption of a built-for-purpose means and needs test.<sup>291</sup>

In his response, Ramaphosa acknowledges the policy tension that exists between ensuring value for money in procurement and addressing the government's socio-economic and transformative policy ambitions. However, he does not offer a clear way forward. This is a missed opportunity to devise innovative approaches to transformation, based on the country's experiences, which could also serve as an example for other countries as they embark on their own transformative initiatives.

The Public Procurement Bill – introduced early in Zuma's administration but still not enacted – is the reform in which Ramaphosa has placed his faith. The Bill promises to harmonise the legal framework and imbue the National Treasury's Office of the Chief Procurement Officer with greater powers to oversee, regulate and, where noncompliance is found, sanction procuring entities around the country.

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288 Helen Swingler, "Unprecedented First Wave of Black Middle Class Retirees in 20 Years", *University of Cape Town News*, September 28, 2022.

289 World Bank, "New World Bank Report Assesses Sources of Inequality in Five Countries in Southern Africa", Press Release, March 9, 2022.

290 Xaba, "Why Afrikaner Affirmative Action".

291 Adam Hayes, "Means Test", *Investopedia*, February 10, 2021.

As suggested earlier, the centralisation of powers and functions was a key enabler of state capture. However, when it comes to procurement, there is an exception. There are practical benefits in having greater oversight from a central body such as National Treasury. For one, it is easier to detect irregularities in pricing between different procuring entities or to identify trends in terms of certain suppliers being allocated a disproportionate share of tenders. It is also easier to analyse data to identify red flags or to ensure that blacklisted suppliers cannot win tenders from other parts of government.

The president also explains that the Bill will offer additional protections to accounting officers or authorities from criminal or civil liability for anything that they do in good faith, unless they act negligently. The Bill itself has proven to be quite the political hot potato, often making fleeting appearances in public before disappearing into relative bureaucratic obscurity. It then reappears again months or even years later to a rapturous public that appears to have no knowledge of just how many times the same process has unfolded.<sup>292</sup>

The Bill itself has proven to be quite the political hot potato, often making fleeting appearances in public before disappearing into relative bureaucratic obscurity

While it is difficult to say what the law will look like in its final form, one would hope that it includes security of tenure for procurement officials, as employment security is often a central concern for procurement officials when political actors begin to meddle in their functions.

### *Whistle-blower protection*

Many commentators have noted that three institutional obstacles prevented the project of state capture from succeeding in South Africa. The first was a strong and independent judiciary. The second was a free and independent media. The third was a robust civil society that could apply pressure on the government and advocate for accountability.

However, the unsung heroes who were critical in thwarting the state capture project were undoubtedly the whistle-blowers. The extent of the Gupta family's influence and network across government would never have been understood had it not been for the Gupta Leaks – the exposure of a trove of their email correspondence. The extent to which large

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292 The Procurement Bill was first touted in 2020: see Linda Ensor, “Still a Long Way to Go Before Revamped Procurement Law Is Established”, *Business Live*, October 21, 2020. It subsequently disappeared into NEDLAC and then made a reappearance in 2023: see Khulekani Magubane, “Procurement Bill’s Corruption Safeguards Inadequate, Parliament Told”, *Times Live*, September 14, 2023.

and reputable companies were involved would never have been understood if it had not been for the principled employees who risked their lives and livelihoods to stand by what they believed was right.

The extent to which large and reputable companies were involved would never have been understood if it had not been for the principled employees who risked their lives and livelihoods to stand by what they believed was right

The SCC was at pains to point out the significant contributions that whistle-blowers had made in blowing the lid off rampant corruption. Among them were Mathane Makgatho and Francis Callard (Transnet),<sup>293</sup> Mosilo Mothepu and Bianca Goodson (Trillian),<sup>294</sup> Brian Currin (#GuptaLeaks),<sup>295</sup> the late Mark van der Riet (Eskom),<sup>296</sup> Athol Williams (Bain and Company)<sup>297</sup> and Mcebisi Jonas (the deputy finance minister who was offered ZAR 600 million [\$32 million] and the role of finance minister from the Guptas so long as he did their bidding).<sup>298</sup> The SCC also highlighted the immense safety risk that these individuals have faced and continue to face.

Whistle-blower protection in South Africa is similar to protections offered in many Western democratic jurisdictions.<sup>299</sup> The Protected Disclosures Act is primarily aimed at preserving the employer–employee relationship after an employee has disclosed irregular or unlawful conduct.<sup>300</sup>

Despite its importance, the term ‘whistle-blower’ is widely perceived in a negative light. In South Africa there are many pejorative terms used in reference to whistle-blowers – a legacy inherited from clandestine security operations during apartheid.<sup>301</sup> Upon returning to the workplace, and in spite of the laws that protect their formal employment, they find

293 See generally Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 2 Vol. 1, dealing with Transnet.

294 Platform to Protect Whistleblowers in Africa, “Bianca Goodson: Suspicious Links Between the South Africa’s President and the Powerful Gupta Family”, <https://www.pplaaaf.org/whistleblowers/bianca-goodson.html>; PPLAAF, “Mosilo Mothepu: Suspicious Links Between the South Africa’s President and the Powerful Gupta Family”, <https://www.pplaaaf.org/whistleblowers/mosilo-mothepu.html>.

295 Ferial Haffajee, “Life of Brian: The Courageous Behind-the-Scenes Story Behind the #Guptaleaks Unravels as Lawyer Testifies”, *Daily Maverick*, September 27, 2018.

296 Gia Nicolaidis, “Key Witness Due to Testify at State Capture Inquiry Dies”, *EWN*, January 16, 2019.

297 PPLAAF, “Athol Williams: When an Ethics Lecturer Has to Choose Between His Friends and Mentors and the Country’s Interest”, <https://www.pplaaaf.org/whistleblowers/athol-williams.html>.

298 Sarah Smit, “Jonas Stands by His State Capture Testimony”, *Mail & Guardian*, March 15, 2019.

299 See, for example, the Whistleblower Protection Act of 1989 in the US and the Public Interest Disclosure Act of 1998 in the UK.

300 Protected Disclosures Act 26 of 2000.

301 “Impimpi”, “snitch”, “informer” and “betrayor” are a few examples. Hoffman, *Countering the Corrupt*, 73–74.



themselves ostracised. Moreover, South African whistle-blowers have risked far more than reputational stigma.<sup>302</sup>

## South African whistle-blowers have risked far more than reputational stigma

There was the tragic case of Babita Deokaran, an official at the Department of Health who was executed mob-style in the driveway of her home for uncovering and blowing the whistle on gross procurement abuses at a provincial hospital. This left the country reeling and revealed just how vulnerable these courageous individuals are.<sup>303</sup>

The SCC proposes that the mandate of the Office for Witness Protection be expanded to include whistle-blowers who are not witnesses.<sup>304</sup> Another recommendation is the introduction of a policy that awards a fixed percentage of money recovered from procurement fraud to whistle-blowers who help uncover corruption.<sup>305</sup>

In response, Ramaphosa indicated that the Department of Justice and Constitutional Development (DoJ) would complete a review of the relevant legislation by the end of April 2023.<sup>306</sup> On 29 June 2023, the DoJ issued its recommendations for increased whistle-blower protection for public comment.<sup>307</sup> Bureaucratic processes will undoubtedly be a cold comfort to those who are facing the harsh consequences of doing the right thing. However, if the SCC recommendations are fully taken on board there could be significant improvements in the whistle-blower protection regime in South Africa.

### *Criminal sanctions*

The Financial Action Task Force (FATF) conducted a mutual evaluation of South Africa in 2021. The purpose was to determine the country's ability to detect, investigate and deter illicit financial flows. This spoke to whether South Africa could be relied upon as an international destination and transit point for global financial transactions. Part of the evaluation included considering the robustness of the legal framework and the efficacy of law enforcement in investigating and prosecuting financial crimes such as bribery, fraud, money laundering and corruption.

302 Hoffman, *Countering the Corrupt*, 73–74.

303 Global Initiative Against Transnational Organised Crime, Faces of Assassination, "Babita Deokaran", <https://assassination.globalinitiative.net/face/babita-deokaran/>.

304 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 1, Vol. 2, 851.

305 Judicial Commission of Inquiry into State Capture, *State Capture Report*, Part 1, Vol. 3, 809.

306 Government of South Africa, *Response by President Cyril Ramaphosa*, 54.

307 Department of Justice and Constitutional Development, "Proposed Reforms to Whistleblowing Legislation Released for Public Comments", Press Release, June 29, 2023.

The DPCI's performance in this respect was placed under the spotlight, with the report finding that 'on average, about 15 percent of cases [the DPCI] investigate for [money laundering] result in [money-laundering] prosecutions'.<sup>308</sup>

Ramaphosa's response to the SCC recommendations included creating new criminal offences such as the abuse of power and constitutional or political malpractice.<sup>309</sup> He also introduced new measures to bolster anti-money laundering efforts by the Financial Intelligence Centre.<sup>310</sup>

However, it is clear that a key concern for organisations such as the FATF remains that the implementation of anti-corruption-related legislation by law enforcement is insufficient, in part because the agencies are severely under-capacitated.<sup>311</sup>

As far as criminal investigation and prosecutions go, the SCC made 202 recommendations in respect of individuals, entities and identified groups.<sup>312</sup> Various referrals to relevant law enforcement agencies have been made but progress remains slow. Setbacks have exacerbated delays, including the NPA's failed attempt to extradite the Gupta brothers from Dubai.<sup>313</sup>

Attempts to improve capacity in law enforcement have included filling vacant senior posts and a longer-term strategy of training aspirant prosecutors to enable more experienced prosecutors to focus on complex cases such as corruption. In addition, dedicated task teams and divisions within the NPA have been created and engagements with bilateral partners and the private sector have focused on providing specialised training and collaboration.<sup>314</sup>

Only time will tell whether these interventions are successful over the long term

Only time will tell whether these interventions are successful over the long term. However, in the shorter-term aftermath of the various commissions (including the SCC), there has been a dearth of accountability and discernible action to appease an increasingly disheartened public.

308 Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures South Africa Mutual Evaluation Report* (Pretoria: FATF, October 2021), par. 172.

309 Government of South Africa, *Response by President Cyril Ramaphosa*, 55.

310 Government of South Africa, *Response by President Cyril Ramaphosa*, 44.

311 FATF, *Anti-Money Laundering*, 7.

312 Government of South Africa, *Response by President Cyril Ramaphosa*, 21.

313 "South Africa's Gupta Extradition Bid from UAE Fails", *BBC News*, April 7, 2023.

314 Government of South Africa, *Response by President Cyril Ramaphosa*, 29.

# Conclusion

Authors have taken divergent views on the purpose and utility of commissions of enquiry. This has ranged from a more optimistic view – that commissions serve as beneficial instruments for public participation within a functioning democracy – to a more critical perspective. In the latter, commissions are viewed simply as tools in a risky game of survival between political actors, convenient to deflect public attention until consternation subsides. The reality is that the true purpose of commissions can be explained on a spectrum rather than through dichotomies.

From a social perspective, commissions offer an opportunity for contentious or otherwise traumatic events to be aired before the public eye, allowing the free press to create a narrative to help society come to grips with whatever transpired. There is also an element of participatory democracy in that ordinary members of the public are able to both observe and make contributions or submissions directly to commissions.

From a legal perspective, a benefit is that commissions allow for the ventilation of issues that have a far wider remit than conventional court proceedings. This is owing to the discretionary power that the executive arm of the state has in crafting purpose-built terms of reference. This could not ordinarily be done through the courts, as matters there are confined to resolving specific issues and fact-finding is only relevant insofar as it leads to the resolution of the issue in dispute. Statutory commissions may serve as institutional safeguards, providing a slight buffer from political interference for public officials who are mandated to carry out their functions independently. This is particularly critical for those institutions that are tasked with upholding the rule of law, as can be seen in the case of the NPA.

However, a legal drawback is that any factual information elicited through the commission process does not automatically qualify as evidence before a court of law. That information would still need to be subjected to the adversarial system in court to determine both admissibility and weight. Nevertheless, commissions provide a helpful background and a rudimentary factual foundation upon which law enforcement can conduct investigations with the ultimate goal of holding implicated individuals accountable.

From a policy perspective, commissions provide governments with an official account of a particular event. This may then lead to the enactment of reforms that are clearly targeted and better informed. This can ensure that institutional safeguards are put into place to prevent a recurrence of a particular issue and to address the systemic vulnerabilities that allowed it to occur in the first place.

From a political perspective, commissions may serve as a means through which political actors seek to re-establish legitimacy or otherwise play a protagonist role in instances where the public trust has been shaken. It also serves as a means to credibly defer taking certain decisions where political expediency may require it. More dubiously, a commission might also serve as a vehicle for deflecting accountability – sealing off a particularly contentious issue and giving the public an impression of progress until such time that public interest wanes.

**From a political perspective, commissions may serve as a means through which political actors seek to re-establish legitimacy or otherwise play a protagonist role in instances where the public trust has been shaken**

Regardless of which perspective one chooses to take in understanding the utility and purpose of a commission of inquiry, accountability is not confined to the life of the commission – in fact, accountability largely exists outside of its bounds. In this sense, its democratic function should not be seen as a denouement but rather as a precursor to what ought to follow.

**Accountability is not confined to the life of the commission – in fact, accountability largely exists outside of its bounds**

In the aftermath of the SCC, it would be misguided to conclude that South Africa's chapter on state capture has closed. Now that the facts have been placed on public record, the real work of accountability and reform has been put at centre stage. Law enforcement agencies are under close public scrutiny and, after rebuilding capacity following a protracted period of disintegration, will need to take the public into their confidence as they embark on the long and arduous path of bringing the many perpetrators of state capture to justice.

This endeavour will only bear fruit if it is accompanied by sweeping reforms across the state. These reforms should not only safeguard against such occurrences in the future but also allow ones that empower the administration of justice to be carried out without being frustrated at every turn. During this period – which is likely to see successive administrations – democratic institutions will need to be protected. The public at large will need to remain steadfast in not allowing political subversion to derail the ultimate goal of accountability.

## The public at large will need to remain steadfast in not allowing political subversion to derail the ultimate goal of accountability

In a country such as South Africa, where social, economic and political ills abound, this will by no means be an easy task. However, in its short history, the country and its people have, time and time again, defied expectations and demonstrated remarkable resilience in the face of great adversity. The period of state capture may, someday, become just another stumbling block in South Africa's long walk to freedom.



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