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Overview of the main findings and recommendations of Part 1 of the Report by the State Capture Commission



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By COHEN GROOTBOOM

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The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (the Commission), chaired by Acting Chief Justice Raymond Zondo released part 1 of its report on 4 January 2022. The complete report is being released in three tranches. Part 2 was released on 1 February 2022 and part 3 is expected to be released by the end of February 2022.

The Commission was established by then President Jacob Zuma pursuant to remedial action taken by the former Public Protector, Advocate Thuli Madonsela in her “State of Capture Report” in October 2016.

The report is the culmination of the investigation by the Commission over the course of 4 years.

The scope of the Commission’s investigation concerned the extent to which state capture, corruption, and fraud were prevalent in the public sector, and in particular whether public officials or functionaries had unlawfully awarded tenders to benefit any family, individual or corporate entity and whether any officials or functionaries within the various SOEs had benefited personally from acts of corruption.

Part 1 of the report is divided into three volumes, each of which is divided into chapters:

- Volume one consists of chapter one which deals with the South African Airways and its associated companies.
- Volume two consists of chapter two and deals with Gupta owned “New Age” and its dealings with government departments and state-owned entities.
- Volume three consists of chapter three and four which deal with the South African Revenue Service and public procurement in South Africa, respectively.

Below are some of the main findings and recommendations under Part 1:

Volume One

Chapter One

South African Airways and its associated companies

Findings

- There was a decline in the quality and effectiveness of governance within South African Airways from 2012 onwards and that this poor quality and ineffectiveness developed over the period that Ms Myeni was the chairperson of South African Airways and her co-board member, Ms Yakhe Kwinana was the chairperson of South African Airways Technical.
- There was inappropriate involvement by the board in the affairs of management of the company including in relation to the appointment of personnel.
- The board took decisions that were contrary to the advice of the management of the company and manifestly unjustified.
- Ms Myeni prepared and submitted false whistle-blower reports to Deloitte, who provides a whistle-blower service to SAA, against staff members whom she had issues with, while she was the chairperson of the SAA board.
- With reference to the transaction involving Pembroke, the Commission found that Ms Myeni knowingly misrepresented to the Minister of Public Enterprises that the Board of SAA had taken two decisions when it had not. Those misrepresentations caused financial losses to SAA. It is likely that her conduct constitutes fraud.
- With reference to the transaction involving LSG SkyChefs, the Commission found that Ms Myeni and Ms Kwinana acted in gross disregard of their fiduciary duties to SAA.
- The award of the components tender for five years to the Joint Venture of AAR and JM Aviation was unlawful, irregular and unfair.
- The ACSA interest swap contracts with Nedbank and Standard Bank were procured through the corrupt involvement of Regiments Capital, Mr Ramosebudi, Mr Wood and Mr Niven Pillay.
- The Commission's investigations into SA Express' dealings with the North West Department of Transport revealed an elaborate scheme of corruption, designed to take money out of the state's coffers for the benefit of those with power and influence who orchestrated the scheme.

Recommendations

- The National Prosecuting Authority should consider whether Ms Myeni should be prosecuted for fraud.
- The Auditor General's office should be further capacitated so that it can audit all public entities. To the extent that that is not practicable, serious consideration should be given to private firms being appointed to audit state-owned enterprises (SOEs) only if they can demonstrate that they have the requisite skills and also the requisite understanding of their obligations to the public at large when they audit an SOE.
- The National Prosecuting Authority should seriously consider prosecuting the JM Aviation directors, the members of the Board of SAAT at the time, including Ms Y Kwinana, and Adv Nontsasa Memela for corruption or related crimes. It should also consider engaging with the United States Department of Justice regarding the role played by AAR in this scheme.
- The President must take note of the involvement of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.

- All of the government and state officials, as well as private individuals who were involved in the looting schemes should be brought to justice.
- Where prosecutions have been recommended, it is also recommended that the Asset Forfeiture Unit of the National Prosecuting Authority takes steps to recover under Chapter 5 or Chapter 6 of POCA any amounts that constitute the proceeds of unlawful activities or the instrumentality of an offence.

Volume Two

Chapter Two

The Gupta Owned “New Age” and Its Dealings with Government Departments and State-Owned Entities

Findings

- The Commission’s investigations revealed how key role players enabled the project of state capture to take hold in state entities and thrive for a number of years, despite the existence of certain institutions designed to protect our country’s democracy, including Parliament.
- The Report identifies at least two categories of people within the affected entities which allowed the Guptas to thrive as they did, namely “Facilitators” and “Followers”.
- There seems to have been a significant lack of checks and balances operating at the entities that allowed this conduct to continue for as long as it did. The contracts concluded by the SOEs were often patently irregular and wasteful by definition because their value simply could not be established.
- It was key to the Guptas’ efforts to have facilitators within the SOEs and government departments, who would ensure that the entities committed millions of Rands to the TNA despite there being no discernible value for the entities or government departments.
- The Report further finds that the Boards and executives of those entities who supported and facilitated the conclusion of these contracts may be guilty of financial misconduct and that in some instances, that misconduct probably also amounted to a breach of their fiduciary duties to the SOEs.

Recommendations

- Law enforcement agencies should investigate a possible crime of corruption against Mr Tony Gupta on the basis of Mr Kona’s evidence that he offered him initially R100 000 and later R500 000 in their meeting at Saxonwold on or about 29 October 2012.
- The position of each of the Board members of Eskom need to be investigated further before any charges could be brought against any of them individually.
- Law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Brian Molefe by the National Prosecuting Authority for fraud and/or contravention of the PFMA.
- Law enforcement agencies should conduct such further investigation as may be necessary with a view to the possible prosecution of Mr Collin Matjila by the National Prosecuting Authority for fraud and/or contravention of the PFMA.

Volume Three

Chapter Three

The South African Revenue Service

Findings

- The SARS evidence is a clear example of how the private sector colluded with the Executive, including President Zuma, to capture an institution that was highly regarded internationally and render it ineffective.
- The Commission's findings on the SARS evidence dovetail with the findings of the Nugent Commission, namely that:
- There was a massive failure of integrity and governance at SARS, demonstrated by what SARS once was and what it has become;
- The above state of affairs was brought about by the (at least) reckless mismanagement of SARS on the part of Mr Tom Moyane. What occurred at SARS was inevitable the moment Mr Moyane set foot there. He dismantled the elements of governance one by one. This was more than mere mismanagement. It was seizing control of SARS as if it was his to have;
- The failure of good governance was manifest inter alia from the fact that senior management was driven out or marginalised at SARS; senior management appointed by Mr Moyane were simply compliant and neglected their oversight function;
- The development of SARS' sophisticated Information Technology systems was summarily halted;
- The organisational structure of SARS that provided oversight was pulled apart;
- Dissent was stamped out by instilling distrust and fear; accountability to other State authorities was defied; and capacity for investigating corruption was disabled; and
- Instead of fostering a culture of healthy dissent, Mr Moyane engendered a culture of fear and intimidation.
- SARS' investigatory and enforcement capacity presented a hurdle to those involved in organised crime, and was, therefore, a target for those engaged in state capture. The involvement of the media in perpetuating false narratives which discredited targeted people as well as providing grounds for their removal was a notable feature of the evidence led in regard to the capture of SARS.
- SARS was systemically and deliberately weakened, chiefly through the restructuring of its institutional capacity, strategic appointments and dismissals of key individuals, and a pervasive culture of fear and bullying. It is a clear example of state capture.

Recommendations

- All Bain & Co's contracts with state departments and organs of state should be re-examined for compliance with the relevant statutory and constitutional provisions.
- Law enforcement agencies should conduct such investigations as may be necessary with a view to enabling the National Prosecuting Authority to decide whether or not to initiate prosecutions in connection with the award of the Bain & Co contracts.
- The [SARS Act of 1997](#) should be amended to provide for an open, transparent and competitive process for the appointment of Commissioner of SARS.
- Mr Moyane should be charged with perjury in relation to his false evidence to Parliament.

Chapter Four

Public Procurement in South Africa

Findings

- Under the section the Commission assesses abuse at various stages of the procurement cycle, including the pre-tendering phase, the tendering phase and post-award phase.
- The Report further considers the collapse of governance within SOEs and deals with strategic appointments and dismissals as well as the demarcation between the board and executive decision makers.

Recommendations

- The Report provides a discussion on the way forward which includes a proposal for the development of a national charter against corruption as well as the creation of an anti-corruption agency, and makes various recommendations in relation to public procurement in South Africa which includes the establishment of an independent agency against corruption in public procurement, proposals on protection for whistle-blowers, recommendations in relation to deferred prosecution agreements, the creation of a procurement officers profession, the enhancement of transparency, protection for accounting officers/authorities acting in good faith, and suggests amendments to the [Prevention and Combat of Corrupt Activities Act, 2004](#) (“PRECCA”), the [Political Party Funding Act, 2018](#).

See also:

- [State Capture Commission Report under the spotlight](#)
- [Constitutional Court confirms that political heads of state departments can be held personally liable for costs in litigation](#)
- [The need for greater transparency in compliance and procurement never more important](#)
- [The Government Procurement Review – South Africa Chapter](#)

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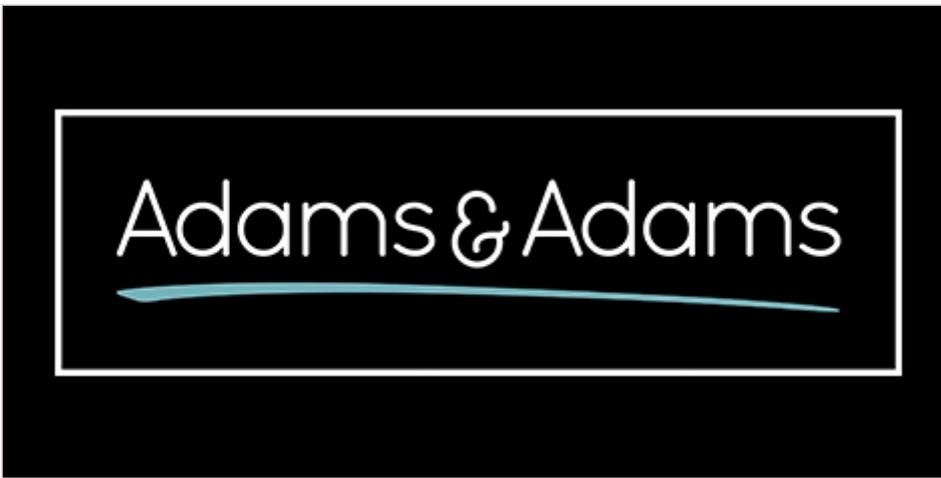
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