Report of the Judicial Commission of Inquiry into State Capture: Part VI: Vol. 1

Judicial Commission of Inquiry into State Capture Report: Part VI

Vol. 1: Vrede Diary Project/Estina and Closure of Gupta Bank Accounts

This is the report of the Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including organs of state, also known to the public and the media as the Zondo Commission

Chairperson: Justice RMM Zondo
Chief Justice of the Republic of South Africa

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Judicial Commission

of

Inquiry into Allegations

of

State Capture, Corruption and Fraud in the

Public Sector Including Organs of State

Report: Part VI

Vol. 1: Vrede Integrated Dairy Project

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

VREDE INTEGRATED DAIRY PROJECT

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VREDE INTEGRATED DAIRY PROJECT

Introduction

1. The province of the Free State with its grassy flatlands always struck even an occasional passer-by along the N1 national road that cuts through the province on the north to south (or opposite) as being ideal for agricultural production, particularly cattle. The idea did not escape the attention of the MEC for Agriculture in the province, Mr Mosebenzi Zwane, who on or about 17 November 2011 called potential role players, including members of the opposition, to a meeting at his offices at Glen Agriculture College in Bloemfontein. At that meeting the MEC unveiled a strategy which he called Mohoma Mobung Strategy. In the local Sesotho language, the term Mohoma Mobung means plough into the soil. The strategy was in due course to be complemented by another strategy called the Zero Tolerance for Hunger.

2. Implicit in the meaning of these two strategies was that the soil had to be worked on and utilised for agricultural production. The concept sought to encourage agri-processing in the province. The land had to be worked on for production which had to be processed within the province. As those who attended understood it, the concept was to create certain agri-centric hubs which would specialise in agri-processing and bring the production and processing of agricultural products to the Free State for the benefit of the provincial economy. The province had for some time been producing agricultural produce which it sent off in trucks to centres such as Gauteng and KwaZulu Natal provinces where it was processed and then either exported or trucked back to the Free State at higher costs. The idea was to create processing centres within the province which would in turn contribute to the economic growth of the province.

3. Most of those in attendance received the strategy as positive for the province and one which would contribute to the creation of employment and alleviation of poverty.

4. The unveiling of the two strategies appears to have coincided with the arrival of Mr Mbana Peter Thabethe within the provincial government. He had just finished a 3-year period as the special adviser to the national Minister of Agriculture Forestry and Fisheries where, according to his outline of his career, he topped his career as an Acting Director-General of the National Department. He had started his career in agriculture in Mpumalanga on 01 February 1989 before he moved to the national government ten years later on 03 August 2009. He appeared to have arrived in the province with a high level of confidence (perhaps too high) which may have blinded him from the need to keep to and comply with the basics.

5. Mr Thabethe was appointed as the Head of the Department (HOD) of Rural Development which was then attached to Public Works, as it were, as two departments under one ministry. Later on, the Rural Development part was moved to Agriculture which then became the Department of Agriculture and Rural Development, a composite department, of which Mr MP Thabethe first remained as the HOD of the Rural Development part, while someone else headed Agriculture. Later he swopped positions with the then HOD of Agriculture, heading the Agriculture for a short period. When the two departments were formally merged under one head, Mr Thabethe was appointed as the HOD of the composite and one Department of Agriculture and Rural Development (DARD).

6. Mr Thabethe testified that he later told the investigators he became aware of a report compiled by the National Agricultural and Marketing Council (NAMC) highlighting amongst others, that the Free State province was ranked second in terms of its suitability in dairy farming and that there was a decrease in the numbers of dairy farmers

nationally. This was his statement to Mr SJ Schalkwyk, the senior financial investigator for NPA). This seems to be what set his sights high. With him at the helm, the Department saw an opportunity for the province becoming a large player in dairy industry, if it found the correct location, as he thought it would benefit from the proximity of KwaZulu-Natal and Mpumalanga provinces, the idea being that KZN and Mpumalanga could assist with their dairy industries or processing of milk.

7. Mr Thabethe said that he conducted a study into dairy production and production of dairy products. He however could not produce the study when required to do so. He said that he had conducted it on the internet. He said that in terms of that study he had identified three overseas countries, India, Germany and Sweden as potential partner countries and subsequently discounted Germany and Sweden because they were first world countries and too advanced. He said that he chose India because he considered that it had similar or comparable economic conditions to South Africa. He said that he was also impressed by Paras Dairy company of India because it collected milk from local producers and then processed it profitably

8. This part of the Report relates to a dairy project which the Department of Agriculture and Rural Development in the Free State Provincial Government embarked upon in 2012. What was contemplated by way of the project was the establishment of a dairy farm in Vrede, Free State, hence the name of the project became the Vrede Dairy Project.

9. This was a project in which over five years the provincial Department of Agriculture and Rural Development (DARD) was going to spend about R300 million and its "partner" in the project would need to spend about R200 million over the same period. It was said that the project would create about 150 jobs and benefit a member of local black farmers. As its "partner" which would run this project, the DARD appointed a little known

company called Estina (Pty) Ltd which only had R16.00 in its bank account the day before the DARD paid the first amount of R30 million. Estina was a company that was not involved in agriculture and had no experience or expertise whatsoever in the agricultural sector. No due diligence was done by the DARD before it appointed Estina.

10. One of the central figures in the project was the Head of the DARD, Mr Peter Mbana Thabethe, whose duty it was to make sure that all applicable legal obligations were complied with in respect of the project and who also was obliged to ensure that proper due diligence was undertaken in respect of any entity which the DARD appointed as a partner of the project but they did not do so and has no sound reason for having put millions of taxpayers' money at great risk by giving it to Estina.

11. The evidence heard by the Commission revealed to say the least a very serious level of incompetence on the part of Mr Thabethe in regard to the role he played in the Vrede Dairy Project. Mr Mosebenzi Zwane, who was the Member of the Executive Council responsible for Agriculture and Rural Development in the Free State Provincial Government, too, shoulders a lot of blame for the debacle that his project was because he failed to perform a proper oversight function over the Head of the DARD. This was a project of the Guptas and Mr Zwane that has been shown and found to have been a Gupta associate and a Gupta Minister. This is dealt with in Parts IV of this Commission's report relating to Eskom and the R 1 Billion Housing Project Debacle in the Free State. It can be safely taken that he knew that this was a project of the Guptas and he was advancing the business interests of the Guptas. The project was a complete disaster and the total disbursed to Estina was R280 million of taxpayers' money by the time the agreement was cancelled.

12. The investigations conducted by the Commission and the evidence led before it related to the extent to which the decisions taken by various public functionaries may have

fallen within the conduct that the terms of reference were intended to uncover. The conduct of public functionaries that was placed under scrutiny included their compliance with prevailing legal prescripts, their appreciation of their legal obligations and administrative responsibilities, and ultimately, their oversight of the R280 million that was disbursed by the Free State Provincial Government through the Department of Agriculture, later the Department of Agriculture and Rural Development ("DARD") between 2012 and 2016 ostensibly for purposes of capitalising the establishment and operations of the Dairy Project.

13. To the extent that some witnesses had previously testified about the same matters before other fora, these witnesses made the necessary disclosure at the hearing, in compliance with Rule 6.5. Rule 6.5 requires that *"where the evidence intended to be placed before the Commission has previously been placed before another Commission, tribunal or Court or body, that fact must be disclosed by the person by submitting that evidence in order for the Commission to secure the relevant transcript in respect of those proceedings"*.

14. The relevant records and/or transcripts have been included in the records of the Commission. In addition, there are bundles of documents marked as exhibits that have been admitted to the record. These include documents submitted to the Commission by the Free State Provincial Government, with special reference to those furnished by the DARD.

15. A legislative bundle and media bundle also form part of the record before the Commission. The November 2014 Provisional Report of the Public Protector entitled *"Lack of Oversight"* ("the 2014 PP Provisional Report") and the Final Report of the Public Protector dated 8 February 2018 ("the 2018 PP Final Report") also form part of the record before the Commission. The 2018 Report was however declared unlawful,

unconstitutional and invalid, and set aside.[1] Finally, the investigation and legal teams went on a site visit to the dairy farm in April 2018 and took some photographs of the farm. These have been packaged into a visual presentation and included in the bundle of documents handed up at the hearing when Mr R Jankielsohn gave evidence on 22 July 2019. The Commission is also aware of the fact that the Public Protector concluded 2020/21 PP Final Report into the Vrede Dairy Project.

16. Finally, as has been indicated above, various court proceedings that occurred prior to and during the currency of the Commission have given guidance and context to the scope and parameters of the Terms of Reference and the mandate of the Commission. Here is how the project unfolded.

Context

17. The November 2014 Provisional Report of the Public Protector entitled "*Lack of Oversight*" ("the 2014 PP Provisional Report") formed one of the primary sources of information on the Vrede Dairy Project. Though a provisional report, it gave a clear indication of the concerns that had been raised with the Public Protector, the steps that she had taken to investigate the matters brought to her attention, the individuals she interviewed and the remedial steps that she proposed should be taken. The evidence that was led at the Commission's hearings encompassed the areas of concern highlighted by the Public Protector in her report.

18. The 2020/21 Public Protector's investigation focused on the following issues:

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[1] Case No. 11311/2018, Judgement para [160]

> "Whether or not there was any political involvement in conception and implementation of the Vrede Dairy Project by the Executive Council in the Free State Provincial Government;"[2]
>
> "Whether or not the Executive Council in the Free State Provincial Government improperly approved the appropriation of further funds for payments to Estina even after the receipt of the National Treasury-Accountant Generals Report by the Premier, Mr Magashule and cancellation of the contract between DARD and Estina;"[3]
>
> "Whether there was possible prejudice suffered by the intended beneficiaries of the Vrede Dairy Project, and if so, whether such conduct amounts to maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994."[4]

19. It is important to note that the Commission's investigation and the evidence led thereon went beyond the scope covered by the Public Protector in the 2020/21 PP Final Report.

20. The March 2013 Report of the Auditor-General on the financial statements and other legal and regulatory requirements for the department highlighted, amongst others, the concerns regarding the transfer of funds, in particular whether such funds were used for their intended purpose. The evaluation and oversight role of the department in relation to, amongst others, the expenditure of funds allocated under the Division of Revenue Act was also highlighted in that report.

21. This report, along with other reports of the Auditor-General, brought to the fore the way transfer funds were being used and accounted for by the department. In particular, the authority of the department to make transfer payments to Estina, including the manner in which these transfer payments were accounted for in the Annual Financial Statements of the department, formed a material part of the evidence that was led and on which various witnesses were questioned at the hearings.

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[2] The 2020/21 PP Final Report p. 34 para [5.1.6.1]

[3] The 2020/21 PP Final Report p. 34 para [5.1.6.2]

[4] The 2020/21 PP Final Report p. 34 para [5.2]

22. Finally, the information furnished by those witnesses who were not implicated parties formed an important element of the evidence that was led at the Commission, regarding giving some context to specific areas of interest that the Commission was required to investigate under its terms of reference.

23. The intended beneficiaries also provided insights that gave further context to the issues that brought the Vrede Dairy Project within the framework of the Commission's terms of reference.

24. The National Treasury Report of February 2014 contributed to the backdrop that informed the investigations of the Commission and the evidence elicited from witnesses.

Witnesses

25. The principal witnesses included the Chief Procurement Officer at National Treasury Mr NW Mathebula, the initial complainant who lodged a complaint with the Public Protector, Mr Jankielsohn, whose evidence was supported to a large extent by Mr Dumisani Cele and Mr Dawie Maree, Mr JCH Theron, Mr E Dhlamini ("Mr Dhlamini") and Mr MM Ncongwane ("Mr Ncongwane"), both of whom represented the beneficiaries' interests.

26. Of the implicated parties who gave evidence, the following testified: Mr AJ Venter from the State Law Advisors Office ("Mr Venter"), Dr TJ Masiteng the Chief Director responsible for District Services, Mr M Moremi (Mr Moremi) Municipal Manager of the Phumelela Local Municipality; the MEC of Finance in the Free State Provincial Treasury, Ms E Rockman ("Ms Rockman"), the Head of the Department of Agriculture ("HOD"), Mr PM Thabethe ("Mr Thabethe") and finally the Chief Financial Officer of the Department of Agriculture ("CFO"), Ms S Dhlamini ("Ms Dhlamini"). Mr Mosebenzi Zwane also testified before the Commission.

27. In total 16 witnesses appeared before the Commission to give evidence on matters relating to the Vrede Dairy Project. Many more were interviewed by the investigation and evidence teams. In some instances, witness statements or affidavits that were not dealt with in oral evidence admitted were as part of the record.

28. The former premier of the Free State Province, Mr Elias Sekgobelo "Ace" Magashule, was also implicated by witnesses who testified under the Vrede Dairy Project/Estina workstream. Mr Magashule was served with Rule 3.3 notices but he did not apply for leave to adduce evidence or for leave to cross-examine any witness.

29. It is apposite to mention the evidence tendered by the Acting Chief Procurement Officer in National Treasury, Mr. Ndleleni W Mathebula. Though not directly related to the Vrede Dairy Project, for current purposes this evidence is useful in understanding the legal framework on procurement that was in place during the period 2011 to 2018.

30. That evidence essentially set out the specialist functions divisions that were established by National Treasury to implement a procurement system that gave effect to the relevant provisions of the Constitution dealing with procurement, the provisions of the Public Finance Management Act[5] (PFMA), as well as the referential Procurement Policy Framework Act[6] (PPPFA) which replaced the provisioning system set up under the State Tender Board.[7] Mr Mathebula's evidence also assists the Commission in understanding the evidence of Mr Dumisani Cele as well as the Treasury Instruction Notes, letters and guidance issued by National Treasury and in part, the exchanges between the department and the Office of the Auditor-General.

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[5] 1 of 1999.

[6] 5 of 2000.

[7] Record - Statement of Mr NW Mathebula Acting Chief Procurement Officer, National Treasury, dated 15 August 2018 para 1.4 – 1.7

31. More pertinently, Mr Mathebula explains in his statement that one of the functions of National Treasury under the PFMA was to create norms and standards, enforce the regulatory regime, and to assist organs of state in implementing the regulatory regime.[8] Of particular relevance to the Vrede Dairy Project is Treasury Regulation 16A6.4 which deals with deviations from the Supply Chain Management ("SCM") policy, read with Treasury Instruction Note 3.4.3 of 2007/2008. These instruments provide for a reporting function to the relevant treasury and the Auditor-General in the event of a deviation[9].

32. Mr Mathebula dealt with the introduction of public procurement reforms, including the review of delegations, the strengthening of the procurement process, the strengthening of contract management, the revision of the Treasury Regulations and the enactment of the Public Procurement Bill[10].

33. Finally, in analysing the conduct of various officials who were involved in some measure in the Vrede Dairy Farm, it will be necessary to refer to the evidence of Dr Joel Hellman and Dr Daniel Kaufman who made submissions and gave oral evidence before this Commission, on the concept of state capture.

Timeline of material milestones relevant to the Vrede Dairy Project

34. The first significant date is the registration of Estina (Pty) Ltd as a company on 24 June 2008. The main business of the company was recorded as "Commercial Industrial Services Sales and Support"[11]. On 18 November 2010 Mr Kamal Vasram was

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[8] Record - Statement of Mr NW Mathebula, Acting Chief Procurement Officer, National Treasury, dated 15 August 2018 para 4.6.4.11; Section 6(2) read with section 76 of the PFMA; Treasury Regulation 16A

[9] Record - Statement by Mr NW Mathebula , Acting Chief Procurement Officer, National Treasury, dated 15 August 2018 para 4.6.6.3

[10] This Bill has been published for public comment

[11] Record – Court File B p 535

appointed a director of Estina. This registration of Estina was amended on 19 October 2012. The amended record stated that the company's business was agriculture[12].

35. On 3 August 2009 Mr PM Thabethe, who was to later become the Head of the Department responsible for the Vrede Dairy Project, was appointed as Special Advisor to the Minister DAFF. Thereafter, he was appointed Acting Director-General (Operations Management) for DAFF until 30 July 2011 when he was appointed as HOD of the Department of Agriculture, Free State Province effective 1 August 2011.

36. On 31 May 2011 the National Treasury issued an Instruction Note on "Enhancing Compliance Monitoring and Improving transparency and accountability in Supply Chain Management". In terms of this instruction note departments had to obtain written approval from the Provincial Treasury prior to issuing any variation order on goods and services which exceeded the original order amount by more than 15% or R15 million.

37. On or about 28 – 30 September 2011 the Department of Agriculture presented the Mohoma Mobung Strategic Concept to the Executive Council of the Provincial Government. This was followed on 16 February 2012 by the Premier's reference to this strategic concept in the State of the Province Address.

38. On 24 February 2012 the MEC for the Department of Agriculture, Mr M Zwane, sent a memorandum to the Premier, Mr Magashule, requesting approval of a visit to India by the HOD Mr Thabethe. This approval was given on 28 February 2012 with the addition that Mr Ashok Narayana travel with Mr Thabethe. The Department of Agriculture funded the travel and accommodation of both Mr Thabethe and Mr Narayana despite Mr

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[12] Record – Court File B p 594

Narayana not being part of government. The two individuals travelled to India from 1 March 2012 returning 3 March 2012.

39. In early 2012 Mr Zwane, accompanied by other individuals including the HOD, Mr Thabethe, met members of the community in Vrede. Some of these members of the community indicated an interest in the dairy farm and were told that they would be beneficiaries of the diary project. The Commission conducted investigations and heard evidence on the experiences of these intended beneficiaries.

40. On 29 February 2012 EXCO called for more details and plans for the dairy parlour and processing facility at Vrede. At this point in time the cost of the project was projected at R13 million.

41. On 1 April 2012 Mr Thabethe signed the SCM Policy document for the department. On 11 April 2012 representatives of Estina and VRS Foods Ltd t/a Paras (Paras) signed a Memorandum of Understanding (MOU)[13] effective for one year[14]. In essence the MOU covers these salient features:

41.1. Paras had been in the business of implementing dairy projects and the production and marketing of dairy products;

41.2. Paras had approached Estina to provide assistance for identifying suitable avenues for participating in dairy projects in South Africa and help it in the execution of deals in RSA on behalf of Estina on a long-term basis;

41.3. the parties agreed that they had suitable and complementary resources to jointly harness the opportunities in the South Africa through an agency MOU,

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[13] Estina Exhibit EST-REFERENCE 0284 to 0295

[14] Record – Reference Bundle HH File (c) p 284 – 295

in terms of which Estina play an active role in identifying and securing such opportunities in South Africa and Paras would assist Estina with the technology and commissioning of those identified opportunities;

41.4. Estina was to act as an agent for identifying and securing opportunities for dairy projects in South Africa;

41.5. the parties remained independent contractors.

42. On 5 May 2012 Estina made a formal offer to the department by way of a draft agreement. According to reports on 5 May 2012 Mr Thabethe met Mr Tony Gupta at the Gupta's Saxonwold address.

43. The first submission to accept the partnership proposal from Estina regarding the Vrede Dairy Project was processed and signed by the department[15]. Here are the salient features of the partnership proposal as contained in a document titled "approval to accept the proposal for the establishment of integrated dairy in Vrede from Estina"

43.1. The background given in the document is as follows: "The department has introduced "Mohoma Mobung Strategy as a provincial approach when implementing agricultural initiatives and 'Zero Hunger' strategy.

43.2. Therefore, the identified and prioritised projects have been carefully analysed and selected to contribute to the Mohoma Mobung Strategy.

43.3. In line with the value adding approach, the department had identified Thabo Mofutsanyane District of the Free State province as a dairy hub.

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[15] Record – Reference Bundle HH5 Masiteng Bundle p 87 –89

43.4. the Vrede Integrated Dairy Project was identified and accepted as a multi-year mega project that would contribute to income generation.

43.5. decent job creation and the creation of on and off farm agri-business, value chain enterprises.

43.6. the department in consultation with Paras had identified 4,400 hectares of Municipal land in Vrede as the general location where the project could be suitably established.

43.7. the Municipality had agreed to avail the land for the implementation of the project.

43.8. Paras was the largest private milk producer in India and had the technical know-how and had agreed to work with the department

43.9. Paras' involvement in milk industry would improve milk productivity locally, provincially, nationally and internationally.

43.10. Paras were already experienced and knowledgeable on International Marketing.

43.11. Paras were internationally recognised and would have liked to maintain that recognition.

43.12. It is against this backdrop the department was seeking to deviate against the normal SCM processes and procedures and enter into an MOU with Paras to implement and manage the operations of the project during its life cycle.

44. Mr Thabethe signed the proposal from Estina on 27 May 2012[16]. This letter read as follows:

> "Your project proposal for the Vrede Integrated Dairy Agribusiness and related presentation to the department refers;
>
> The department hereby informs you that the proposal has been accepted subject to the signing of the partnership agreement which will clearly indicate the terms and conditions of the relationship.
>
> The implementation date will be the date of the last signature on the agreement."

45. On 5 June 2012 Estina and the department entered into the first agreement ("the 5 June agreement"). The HOD signed this agreement on 7 June 2012. This agreement committed the department to spending R570 million on this project, with a proposal that Estina would provide R228 million of this globular amount. These funds from the department were to be paid in tranches of R114 million per financial year for a period of 3 years *and a schedule of detailed project costing for a large-scale Dairy Unit provides for the costing of Vrede Dairy Project. The schedule reflected a description of what it was that was to be paid for and the amounts. It was also agreed that the project would also be in effect to black economic empowerment in accordance with the AGRIBEE Charter on Black Economic Empowerment.*

45.1. Here is the extract (from a signed version) of detailed project costing for a large-scale Dairy Unit for the costing of Vrede Dairy Project. The schedule reflected a description of what it was that was to be paid for and the amount to be paid :

FIXED WORKING CAPITAL	UNITS	BUDGET VALUE

[16] Record – Court File B p 694

Integration & mechanisation	1,000ha	R45,000,000
Rain fed mechanisation	1,350ha@ R20,000	R32,000,000
Dairy Cattle – 'Cows in Milk'	500 @ RR25,000	R12.500,000
Dairy Cattle – Rest of herd (Followers)	500 ea @R25,000	R12,500,000
Dairy bulls/A		R500,000
Milking parlour	1,000 CiM unit 1,000 ea @ R5,000	R5,000,000
Bulk cooling tanks		R25,500,000
Dairy products manufacturing		R60,000,000
UHT Long Life Milk Plant		R149,000,000
Feedlot		R15,000,000
Grain & oilseed mill		R19,000,000
Animal feed plant		R10,000,000
IP Working Capital Requirement		R40,000,000
Total Funding Required	**Excl VAT**	**R500,000,000**
Total Funding Required	**Incl VAT**	**R570,000,000**
Capital Injection/IP/Equipment etc.	**ESTINA/PARAS**	**R228,000,000**
Grants of R114m/yr. for 3 Years	**DoARD**	**R342,000,000**

46. On 13 June 2012 EXCO approved the proposal regarding the dairy project and authorised the department to find further funding for the project. The EXCO Resolution No 62/2012 was approved by the Secretary of the Executive Council, the MEC of the

Department of Agriculture & Rural Development (Mr Zwane) and the Premier (Mr Magashule).[17] In essence the EXCO Resolution approved the following:

46.1. The implementation of the proposed Integrated Vrede Dairy Agri-Business Project as contained in the EXCO Memo that was prepared by the HOD, Mr Thabethe and submitted by the MEC of DARD, Mr Zwane;[18]

46.2. Supports the sourcing of additional funding of R84 million for the current financial year from the province;

46.3. For the next 3 years the Department of Agriculture would have to pay R113 000. (R113 000 seems to be an error. The correct amount per EXCO Memo is R114 million)[19]

47. On 15 June 2012 and on the instruction of Mr Zwane, the CFO of the department requested a R30 million payment for Estina from the Provincial Treasury.

48. The agreement between Estina and the department was referred to the State Law Advisors on 18 June 2012 by the Provincial Treasury. The State Law Advisors advised that the agreement was irregular because the normal procurement processes had not been complied with.

49. On 5 July 2012 the second agreement[20] between Estina and the department was signed. The first payment of R30 million was disbursed to Estina on 9 July 2012.

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[17] Estina Exhibit EST-REFERENCE 0323

[18] Estina Exhibit EST-REFERENCE -0316 to 0322

[19] Estina Exhibit EST-REFERENCE 0318 (Page 3 - Financial Model)

[20] Estina Exhibit EST-REFERENCE 0006 to 0025

50. In July 2012 Dr Masiteng was instructed by the HOD to prepare a deviation memorandum in respect of the dairy project to cure the procurement irregularities. This submission was recommended by the CFO and signed by the HOD on 7 July 2012.

51. On 12 September 2012 the first contract between the Phumelela Local Municipality and the Free State Province was signed.

52. On 1 October the first lease agreement between Estina and the department was signed.

53. The first feasibility study relied on by the department is dated October 2012.

54. The cession and assignment agreement between the Phumelela Local Municipality and the Free State Province was signed on 14 December 2012.

55. On 18 December 2012 the department and Estina signed a 99-year lease agreement.

56. On 18 January 2013 the HOD received a letter from Estina notifying him of the completion of Phase 1 of the dairy project and requesting payment thereon.

57. In March 2013 Ms Rockman was appointed MEC of Finance for the Free State Province, from the position of Director-General of the Free State Provincial Government.

58. In or about April 2013 the Department of Agriculture merged with the Department of Rural Development. All references to this department then became the Department of Agriculture and Rural Development ("DARD").

59. Ms Rockman met Mr Tony Gupta on 6 April 2013. During that meeting Mr Gupta requested the outstanding payment to Estina in respect of the dairy project. The second payment of R34 950 000.00 was made to Estina on 18 April 2013. On 26 April 2013 a further R30 million was paid to Estina.

60. From 26 April to 4 May 2013 the Gupta family hosted a family wedding at Sun City. On 3 May 2013 a further R19 050 000.00 was paid to Estina.

61. The Mail and Guardian report titled "Gupta dairy flouts treasury rules" was published on 14 June 2013. On 21 August 2013 the DAFF withdrew its CASP conditional grant.

62. On 13 September 2013 the ENS National Treasury Investigation team, including Mr Dumisani Cele, met the HOD at the DARD.

63. On 20 December 2013 R29 950 000 was paid to Estina.

64. On 16 April 2014 EXCO decided that the FDC should take over the operations at the dairy farm. The agreement between Estina and DARD was cancelled on 13 August 2014. The FDC took over the operations at the dairy farm on 14 August 2014.

65. On 25 July 2014 R30 million was paid to Estina.

66. On 8 May 2015 a further payment of R60 million was made to Estina.

67. On 8 July 2015 CIPC received an application for a change of directorship in respect of Estina. Ms Soo Young Jen replaced Mr Kamal Vasram as the sole director of Estina.

68. Another R46 252 652 payment was made to Estina on 5 May 2016.

National Government Perspective (including National Treasury)

69. In order to understand the perspective of the role of national government, it is necessary to introduce two witnesses, Ms Elders Mtshiza from the national Department of Agriculture Forestry and Fisheries (DAFF) and Mr Dumisani Cele from the Department of National Treasury (NT) and to analyse the interaction of their evidence.

Department of Agriculture Forestry and Fisheries (DAFF)

70. Ms Elder Mtshiza is the Programme Management Coordinator in DAFF in Pretoria. Part of his duties is to coordinate the Comprehensive Agriculture Support Programme (CASP) which is administered from the national Department. His duties as coordinator of CASP include the following:

70.1. functions of the transferring officer as stated in the Division of Revenue Act,

70.2. administration of the conditional grants CASP and the Ilima/Letsema,

70.3. set norms and standards for the programme,

70.4. provides oversight monitoring and reporting on the programme, and

70.5. he has to ensure that funds are disbursed to provinces as per approved payment schedule.

71. The provinces have access to CASP and in terms of the Division of Revenue Act have to fulfil certain requirements for such access. The conditions may broadly be stated as follows:

71.1. There are conditions as to what the funds can be used for;

71.2. They are expected to abide by the PFMA and Treasury Regulations;

71.3. DAFF has set Standard Operating Procedures for CASP as a guideline to provinces on how the programme should be implemented – these include criteria for qualification, how to implement the projects and what systems must be in place to manage the data and information for decision-making;

71.4. They are required to adhere to all ground conditions in the grant framework;

71.5. Provinces are required to prepare a provisional business plan and present it to the National Assessment Panel (NAP), which is made up of few directors and program experts from different directorates funded by the grant including the programme coordinator, which is himself;

71.6. Every project that is being established should first have the following before construction happens:

71.7. feasibility study conducted,

71.8. environmental impact assessment where applicable,

71.9. water rights, and

71.10. access to electricity.

72. During 30 – 31 January 2013, the Free State Department of Agriculture made a presentation to the DAFF NAP on the VDP as part of the CASP and Ilima/Letsema business plan. The delegation from the DAR D were the following: the provincial CASP coordinator, Dr Masiteng, accompanied by Ms Christa Klick. They informed NAP as follows:

72.1. The VDP had been approved by the provincial Exco as one of its strategic projects for the Mohoma Mobung Strategy;

72.2. The Province had secured a private investor, Estina, to partner with the DARD;

72.3. They were to ensure that 100 black dairy producers around Vrede area were to be owners of the dairy value chain;

72.4. They had already completed the feasibility study;

72.5. They had started investing equitable share in clearing the identified land where construction had started;

72.6. The land had been donated by the municipality.

73. Comments were raised by members of the NAP to the delegation from the Free State. They needed clarity on a number of issues and sought to ensure that the province covered all ground and was ready to implement the proposed project. They needed to determine the amount of water available for the project, water rights, comprehensive feasibility study and a business plan. The province was requested to submit a list of the 100 beneficiaries of the project to the DAFF before the end of April 2013. The panel requested the province to ensure that copies of the following documents were kept safely and ready at the province for when they might be needed:

73.1. water licences;

73.2. the feasibility study;

73.3. the project business plan; and

73.4. the list of beneficiaries.

74. However overall, and subject to the stated requirements, the response of NAP was that:

74.1. The panel supported the implementation of the VDP as it insured that black producers would not only milk the cows but they would also participate on the value chain which included milking, processing and exporting;

74.2. However, only R53 million from CASP was approved in 2013/14 financial year; and

74.3. The requested R23 million from Ilima/Letsema was declined.

75. The province (DARD) was given an opportunity by the national DAFF, through its National Assessment Panel (NAP) to fix what it did not have in line. This included submitting the list of the 100 beneficiaries by April 2013 and having the list and other requirements in place for when NAP would require to inspect same.

Delegation of Department of Agriculture Forestry and Fisheries to Vrede

76. In the meantime, within the national DAFF, following the presentation that the Free State DARD had made in January 2013 to the NAP to access the CASP grant, according to the CASP coordinator, Ms Mtshiza, he led a delegation of DAFF to Vrede in or about July/August 2013. The trigger for the delegation was the letter that National Treasury had sent to DAFF citing concerns of non-compliance by the DARD with PPP due processes around the Vrede Dairy Project. National Treasury needed information from DAFF on the project and on how much CASP funding was made available. The delegation consisted of the following:

76.1. Ms Elder Mtshiza as leader of the delegation;

762 . the chief economist, Mr Daan Du Toit;

76.3. the chief director of Food Security, Mr Sibusiso Dhlamini; and

76.4. the dairy expert of DAFF.

77. On arrival the delegation was received by the HOD, Mr Thabethe, the CFO, Ms Seipati Dhlamini, the CASP coordinator for the province, Dr Masiteng, and the district manager.

Findings and Conclusions

78. These were the findings of the delegation:

78.1. Debushing, fencing, road construction and silage bank were completed;

78.2. Construction of the dairy structure was underway;

78.3. About 351 Friesland cows had been purchased;

78.4. The cows were attended to by a Vet at a separate site from the construction site;

78.5. An assessment on the required documentation indicated that:

78.5.1. the water rights were not in place and the amount of water available for the project was not established;

78.5.2. the list of beneficiaries was not in place;

78.5.3. the feasibility study; and

78.5.4. the business plan was not provided during the visit and the DAFF team once more requested the province to provide these for further analysis.

79. The feasibility study was later sent by the province to the DAFF and was analysed by the chief economist and dairy expert whose views were summarised in a document titled "Back to Office Report". On the basis of the analysis as well as the assessment of the delegation the following conclusions were reached by the delegation:

79.1. The assumption of 45 litre of milk per cow per day was highly unrealistic;

79.2. More detail was required to verify the economic feasibility of the project;

79.3. Figures mentioned for the economy wide impact were not conclusive and were rather on the optimistic side and some might be subject to double counting;

79.4. There was no evidence to support the inclusion of small-scale farmers as beneficiaries in the project;

79.5. The professional technical support required to make the plan work (such as animal scientists – dairy, animal nutritionists, pasture scientists, irrigation and infrastructure engineers) were not involved in the project, though such professionals were available in government departments between the DAFF and the province.

Recommendations

80. Accordingly, the delegation made the following recommendations:

80.1. The province had to conduct a proper feasibility study;

80.2. The province had to develop a proper business plan for the project;

80.3. the province had to get approval for water rights for the project;

80.4. the province had to outline and clearly identify who the small-scale farmer beneficiaries were, mobilise and structure them properly;

81. The R53 million allocated from CASP in the 2013/14 financial year had to be withdrawn from the project immediately and be redirected to incomplete projects in the province and to small-scale farmers who were indebted to the Agricultural Credit Board to help them with their productivity to enable them to service their DAFF loans. The delegation was of the view that: 'the basis for the approval is false'.

After Inspection Response

82. DAFF offered to make experts available to support the province to ensure that the requirements were met. This would allow DAFF to make funds available in the next financial year. However, as far as Ms Mtshiza was aware, no requests were made by the province for additional support and no funding was requested for the completion of the project.

National Treasury

83. In 2013 Mr Dumisani Cele was the Director: Specialised Audit Services, within the Department of National Treasury. He headed the Forensic section of the unit (Specialised Audit Services), which was established by the Minister of Finance in 2010 within the Accountant General at National Treasury. He deposed to his affidavit for the Commission on 17 June 2019 and that affidavit is exhibit HH 8 before the Commission. He attached to his affidavit two documents which he previously procured and tendered same as part of his evidence. These are:

83.1. Copy of an affidavit that he previously provided in criminal investigation into the VDP, under CAS 200/07/2017, which he attested to on 3 October 2017 at Durban, which he attaches to his affidavit as annexure DC 1. The affidavit was used in an application launched in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 ;

83.2. Copy of the National Treasury Report on the investigations into the Vrede Dairy Project conducted by ENS Forensics which was issued on 11 February 2014. He attached that report to his affidavit as annexure DC.

84. He confirms in particular the contents of the affidavit as if specifically repeated in his affidavit of 17 June 2019.

85. It appears from his evidence that on or about 10 June 2013, National Treasury received a complaint regarding the irregular appointment and payments to Estina Pty Ltd with registration 2008/15033/07. The complaint came through a Mail & Guardian media enquiry dated 10 June 2013. It appeared from the media enquiry and the article that the funds used to pay Estina were from a grant administered by the national DAFF.

88. As a result, the National Treasury initiated an investigation and Mr Dumisani Cele was assigned to conduct the investigation. He in turn acquired the services of ENS Forensics to assist with the investigation. Evidence before the Commission suggests that the NT investigation was initiated on 12 June 2013. This is how the National Treasury Report came to be compiled by ENS.

87. As the two documents provide the totality of his evidence, it is appropriate to summarise Mr Cele's two affidavits.

Previous Affidavit in CAS 200/07/2017

88. The affidavit dealt with and exposed the following aspects in connection with that investigation:

88.1. Death threats: It is another confirmation of death threats and a climate of fear around the VDP. On 22 August 2013 he made an appointment with the HOD of DARD in the Free State provincial government, Mr MP Thabethe. The object of his meeting with the HOD was to deliver a letter the subject of which was "request for information pertaining to allegations of irregular engagement of Estina /Para for establishment of integrated dairy in Vrede;"

88.2. He says that, when making the appointment, it became clear that there was resistance from the Department. He said that consequently, he took the precaution of having the same letter, which he had personally signed on behalf of his supervisor, signed by the then Acting Accountant-General at National Treasury;

88.3. On arrival at the office of Mr Thabethe and while walking to his office in the passage the CFO spoke to him in Sesotho language and said "Dumisani Basotho ba tla u bolaea" meaning "Dumisani the Sotho people are going to kill you". When he served the letter on the HOD, Mr Thabethe told him that he (Cele) had no powers to investigate his department. His attempts to explain that he was exercising powers vested in the National Treasury through the PFMA as there was a complaint, Mr Thabethe still resisted and told him that he would declare an intergovernmental dispute. He pleaded that he be provided with the documents on the VDP in the meantime. This failed. As a result, he eventually went back without any documents;

88.4. Procurement: After investigation he found that supply chain management procedures were not followed. The requirements for a deviation stipulated by the prescripts were also not followed. He said "The accounting officer appeared to have abused his powers when appointing Estina;"

88.5. He also found an un-authorised payment of R114 million.

88.6. There were no beneficiaries in terms of AGRIBEE.

89. The four areas appear to be areas where the Commission need not investigate further because they were investigated and there would have been criminal prosecution or there will still be such following his affidavit. The most that the Commission could do is to urge that the conclusions identified in the affidavit of Mr Dumisani Cele of 3 October 2017 should be followed vigorously not only because they are criminal, as he pointed out, but also because the Commission has a responsibility in terms of its own terms of reference to action that in order to dislodge practices of state capture.

90. The one area on which the Commission must continue to report on, as there is no evidence of pending processes that are being followed, is the aspect of threats to life. This is because it is possible that NPA may, based on that affidavit, see it as an isolated incident. However, this Commission has further evidence from Mr Dhlamini, Mr Ncongwane and Mr Albert Doctor Radebe that suggest that the culture and practice is not isolated. It is accumulated and if not curbed, will nurture and support the crippling of state institutions or the seizure of the control by criminals and as well as other unconstitutional activities. It is more than crime.

91. The following is an excerpt from the affidavit of Mr Dumisani Cele which records the findings made by the Directorate: Specialist Audit Services (Forensic Section) as is

evident from the affidavit of the then Director. Paragraphs 21 to 32 where the findings are recorded read as follows:

> "21. The investigation established that no supply chain management was followed in the appointment of Estina. Instead the Department deviated.
>
> 22. The investigation established that the CFO, Dhlamini, co-signed the letter of deviation. However, the letter was flawed in that no reason for the intended deviation was stated. Despite this, the CFO concurred and appended her signature.
>
> 23. Practice Note number 8 of 2007/2008, states that should if it is impractical to invite competitive bids for specific procurement e.g., in the urgent or emergency cases or in cases of a sole supplier, the accounting officer/authority may procure the required goods or services by other means such as price quotations or negotiations in accordance with Treasury regulations. This was not complied with.
>
> 24. The reasons for deviation from inviting competitive bids should be recorded and approved by the accounting officer/authority or his or her delegate. Accounting officers/authorities are required to report within 10 working days to the relevant Treasury and Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured.
>
> 25. The report must include the description of goods and services, the name of the supplier, the amount involved and the reasons for dispensing with prescribed competitive bidding process.
>
> 26. There was no evidence that the Supply Chain Management [procedures] were followed neither any evidence that proper deviation processes were followed in the appointment of Estina / Paras nor evidence of a report with reasons for dispensing with the prescribed competitive bidding process.
>
> 27. The Treasury Regulations require the accounting officer to not only provide reasons for deviation but also to report to the relevant Treasury and Auditor-General, in writing, the incidents where a deviation had occurred. Mr Thabethe could not produce proof that he complied with this requirement.

28. This means that the market was not tested before appointing Estina. There was no information that the tender was advertised by the Department and no other providers responded to the advert. The accounting officer appeared to have abused his powers when appointing Estina.

29. The investigation revealed an amount of R114 million had been paid to Estina. The PAS revealed that at least 3 of those payments were created on 5 July 2012, however, they were only authorised for payment during April 2013. The last payments were captured by a certain Zwide BP, payment authorised by Moalosi SJ and Moloi NJ.

30. Part of the investigation was to identify whether there were any beneficiaries identified for the AGRIBEE and who are they. The investigation discovered that there were no beneficiaries identified in terms of AGRIBEE.

31. Having regard to the contraventions in this procurement, it appears that both the Chief Financial Officer (Ms S Dhlamini) and the Accounting Officer, Mr Thabethe, could have committed financial misconduct as envisaged in section 81 of the Act in that they allowed irregular expenditure to occur in the Department thereby contravening section 38 of the Act.

32. Section 86 of the Act makes it a criminal offence to contravene provisions of section 38 of the Act."

National Treasury report

92. The National Treasury report is thus the result of the investigation by the relevant Forensic Section within the Specialised Audit Services of the NT which in turn engaged the Services ENS Forensics. This particular report is fairly comprehensive. It would however certainly add value for the Commission to say something about those areas that the National Treasury report did not cover.

The Gupta connection and influence

93. The influence of the Guptas was based on their strong relationship with the MECs of the Free State Province which enabled the influence of the Guptas over the operations the Vrede Dairy Project, including; (a) the registered office address of the business; (b) payments to Estina; (c) access to land at Vrede; (d) reckless trading at the Vrede Dairy Project; (e) side-lining of intended beneficiaries; (f) threatening of beneficiaries and other witnesses.

Office address

94. The office address of Estina's sole director had been established to be at the offices of a Gupta entity in Gauteng (Sahara Computers).

Payments to Estina

95. The Estina agreement was cancelled by DARD on 13 August 2014, after having been in existence for a period of about two years since July 2012. Pursuant thereto, Estina continued to receive payments from DARD until 2016 on the basis of an unsubstantiated claim by the HOD of DARD, Mr Thabethe, that Estina had met key deliverables under the contract. No evidence to this effect could be provided, hence all payments to Estina were classified as irregular.

96. Overall the total amount of R280 million was paid to Estina.

97. Furthermore, the monies that were paid by the DARD to Estina were paid over by Estina to entities belonging to, or related with the Gupta family. Evidence given to the Commission by the financial flows expert witness[21] shows that Estina's bank records

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reflect that, of the total funds deposited into the Estina bank accounts with Standard Bank and FNB, those amounts were diverted as follows:

97.1. R59,5 million was paid to Vargafield (Pty) Ltd, a company registered in South Africa and controlled by a Gupta enterprise;

97.2. R205,7 million was paid to Gateway Limited, a company registered in Dubai and controlled by a Gupta enterprise, of which **$3,3 million** was paid to Linkway Trading and **$3,1 million** to Oakbay Investments, both being Gupta controlled enterprises; and

97.3. **R34,6 million** was paid to SARS for various VAT related assessments.

98. Further analysis of the Estina bank records showed that Estina's bank accounts and banks accounts controlled by its sole director, Mr Kamal Vasram, received a total of R891,8 million in deposits. Of that amount, the following is worth noting:

98.1. R280 million was paid by the Free State Government;

98.2. R5,1 million was earned in interest in Estina controlled accounts

98.3. R584,3 million was paid to Estina and/or Mr Kamal Vasram's accounts as "round-tripped" funds, whose ultimate source was, in fact the R280 million that was paid by the Free State Government;

98.4. R22,2 million was paid into Estina controlled accounts from other sources.

Influence of MEC Mosebenzi Zwane

98.5. Mr Mosebenzi Zwane has a long standing and active relationship with the Tony Gupta that dates as far back as 2010/2011.

98.6. With regard to the Vrede Dairy Project he particularly made strategic interventions that made it possible for this project to benefit the Guptas.

98.7. When dealing with the establishment of the Mohuma Mobung strategy, Ms Dhlamini testified that the strategy was conceived of by MEC Zwane in 2011, and that the Vrede Dairy Project which did not have a budget was one of the projects within that broad strategy.

98.8. On 13 June 2012 EXCO approved the proposal regarding the Vrede Dairy Project and authorised the department to find further funding for the project. On 15 June 2012 and on the instruction of MEC Zwane, the CFO of the department requested a R30 million advance payment for Estina from the Provincial Treasury. Mr Mosebenzi Zwane had asked her to meet MEC Mohai to discuss the R30 million payment for Vrede Dairy that needed urgent Treasury approval.

Mr Zwane's involvement or lack thereof in the Estina Vrede Dairy Project and surrounding matters

98.9. In his evidence at the Commission Mr Zwane distanced himself from any involvement in activities and accountability related to the Vrede Dairy Project. Here is the summary of Mr Zwane's responses to the evidence that was led at the Commission:

Mr Zwane's evidence on 27 APRIL 2021 - DAY 383

98.9.1. Mr Zwane was questioned on his involvement with a choir known as Umsingizane. He testified that as an executive Mayor in the Free State he participated in youth development, and part of his work was to assist all poor artists from various places in the district. Further, he helped them in their quest of getting recorded. When questioned about the trip Umsingizane took to India Mr Zwane's response was that he knew that in 2012 they took a trip to India, but he did not sponsor them or know who sponsored them.

98.9.2. Counsel asked if he was familiar with an email that was from "from M Zwane- zwanemail@gmail.com" dated October 13, 2012 which seems to have been sent at 2:46 pm and it was addressed to Ashok Narayan - the subject being 'Detailed Itinerary'. He responded that he remembered that on about three or four occasions he had assisted the choir in terms of communication methods because at that particular time most of them were not working, he did this by allowing them to use his computer. He was not aware of the details within the emails.

98.9.3. Mr Zwane stated that when he went to India he did not go with the choir; he was not part of the arrangement. He went on an official trip that was paid for by the Department of Agriculture and Rural Development, and information relating to that expense was available at the Department. When asked why his name and Mr Narayan's name were put in the list of the choir going to India with the choir, he said he cannot recall.

98.9.4. The itinerary of the choir included lunch at Mr Gupta's house at 14:00 on 16 October. When asked if he knew about this itinerary and what the choir

was going to do Mr Zwane said that he had not attended lunch with the Guptas. He further stated that he has not attended any Gupta weddings.

98.9.5. In the affidavit of the Chief Operations of Operating Officer of Organisation Undoing Tax Abuse (OUTA) Mr Benjamin Theron stated that of particular concern is the evidence of a kickback from the Gupta's to Mr Zwane and other officials in the department for facilitating the Estina Scheme. He claimed that in October 2012- shortly after the launch of the Estina Project- Mr Zwane, officials from the department, and Umsingizane were hosted on an all-expenses paid tour of India by the Gupta's. When this was put to Mr Zwane for comment he stated that he would assist the Commission on all the matters that were raised before him by the Commission except for information and opinions particularly by Mr Benjamin Theron (the CEO of OUTA) "on the information extorted from the leaks". Further, "I just do not want to fall prey to legitimising something that I do not know where it comes from – something that seems illegal in terms of how it was discovered".

Mr Zwane's evidence on 13 MAY 2021- DAY 394

98.9.6. Counsel pointed out that in Mr Zwane's affidavit, submitted that morning, he was on the same plane with the choir going to India which is slightly different from his main affidavit where he says he came to know about the choir being in India when he was already in India and he tried to meet with them.

98.9.7. He responded that he was aware that the choir would be taking a trip and that he had said that. Further, he had also said he was not involved in

terms of the organisation of that trip, but indicated that he had said to the choir that he was also going to India around that month and if it happens that they meet in India he would watch their performance.

98.9.8. Counsel pointed out that there were 24 guests who attended the lunch at Mr Tony Gupta's house, three of which were department's officials – Ms Motau, Mr Narayan, and Mr Zwane.

98.9.9. It was put to him that according to his evidence that was the Paras company was part of the Estina Project and the people who were brought in to work on the project were from India, so it would make sense if the position was: "You people are going to be beneficiaries to this project. Maybe you must go there and see how people, who are beneficiaries there, what they do, what their roles are, get to understand because we want this to be as successful here as it is in India". That is one approach. Alternatively, another approach might be that training would take place in the Free State and people who had the know-how from India could be brought into South Africa. Ultimately that the company was part of the project in the Free State, according to his evidence.

98.9.10. Mr Zwane stated that this was speculation.

98.9.11. When questioned about what the purpose of his trip to India on 15 October to 23 October 2012 Mr Zwane responded that he was going to meet with different Ministers; Ministers of Agriculture from different states. He admitted that he was scheduled to go and see the plant in Paras. However, the CEO of Paras was not available and so the meeting did not materialise. This is why he consistently stated in his affidavit that he has never been to Paras.

98.9.12. Additionally, Mr Zwane stated that the purpose of the visit was that, since he was already going to India for other meetings, he wanted to check for myself (in terms of the report that he got from the officials) about the capacity that Paras has. The Department had been informed that Paras had capacity in terms of quantities, milk quantities, it also had a rise in terms of marketing, selling milk. So he thought that when he is in India he may as well verify the report that was given to the Executive and himself.

98.9.13. He stated that after the announcement of the Mohoma Mobung Project (MMP) there were actually a number of projects in the MMP which were divided in terms of the districts of the province. Further, they were open to collaborating with any country who shows interest in those projects. So it was not only India, at some point fisheries was supported by the China.

98.9.14. The Chairperson put it to him that it seemed that the Paras meeting would not have really have been essential. Mr Zwane responded that he did not agree. He stated that his role is oversight, and it is normal to do that in their work. The Chairperson pointed out that by October a lot of ground had been covered in terms of this Estina project. So the meeting would not have been an essential meeting because by then, and the decision to partner with Paras had long been made. Mr Zwane responded that the told of oversight is always played by politicians, and officials implement, so he saw nothing wrong about the trip.

98.9.15. Mr Thabethe, the HOD, stated in his affidavit that he went on a trip to India on the 29 February 2012 to the 4 March 2012; so Mr Zwane did not need to go there. He says that on his trip to Inda with Mr Narayan he met with the CEO of Paras Dairy who explained the whole chain of milk

production in India. He says there were also staff members of Paras who were accompanied by the Indian delegation to visit the processing plant and in India.

98.9.16. Mr Zwane stated that it was a fact that his HOD together with Mr Narayan went to India and went to Paras. He says this necessitated him to go India and verify what was in the report as he was under the impression that Paras is the one that is doing work in Vrede on the Vrede Dairy Project as there were issues that were raised by Auditor General around mid-2013. Notably, he was no longer in the Department because he left in early March.

98.9.17. I asked whether Mr Zwane knew that the Department of Agriculture had not concluded any contracts or agreement with Paras. Mr Zwane confirmed that he only got to know that after he had left the Department. Further, he was asked whether Mr Thabethe told him that the department had concluded an agreement with Paras or not, in order to ascertain where he got the impression from that there was an agreement between the Department of Agriculture and Paras.

98.9.18. Mr Zwane said his impression was based on the fact that it was common cause that there should be processes – due processes that are followed in identifying a service provider, and that those processes are then undertaken by HOD assisted by other officials. Once the HOD has taken all these processes they get ready to move:

"We do not many a times get to a point where we are shown contracts or are told about contracts being ready. In the report normally what comes is that we are going to be working with Paras which in this case was the case I was told. That is why in October I also wanted to go and play my oversight when I was in India."

98.9.19. I asked if Mr Zwane saw the contract, Mr Zwane stated that he had not seen the contract but that this is normal. So it would not have come to him that in this case specifically he must look for a contract. I went further to say that the only agreement they have seen is between the Department and Estina, and Estina is not Paras. I recalled that the whole project was promoted on the basis that Paras was part of the project. Mr Zwane's response was not clear in relation to this.

98.9.20. He was asked what he knew to be Estina's role in the project as at October 2012. Mr Zwane said that he did not know. When asked when he heard about Estina being involved in this project for the first time he said 2014, after he left the Department. Mr Thabethe did not tell him that the department had a contract or an agreement with Estina, it is not part of what he was told. Mr Zwane was obviously being untruthful when he said he did not know Estina's involvement in this project. He was simply lying.

98.9.21. In the affidavit of Ms Anna Fourie, Deputy Director General of Finance Governance in the Free State Provincial Treasury, as the she states that the office of the CFO (Ms Dhlamini) produced the contract between the Free State Department of Agriculture and Estina as well as a payment document request from the Free State Department of Agriculture for an amount of R30 million. When asked if he had a comment on this Mr Zwane said that he did not. He also could not say why the R30 million had to be paid within a space of 20 three days after Executive Council had approved the project.

98.9.22. Counsel pointed out that R184 million was ultimately paid to Estina. Mr Zwane confirmed that he was aware of this, and if there was anything untoward, there should be somebody who is being held accountable to explain what has happened.

98.9.23. Mr Zwane was questioned about the contracts relating to Vrede Dairy Project that were presented to the Executive Council, specifically that those contracts could only have been between Estina and the Department so they would not have been a contract involving Paras. Mr Zwane highlighted the fact that the HOD and the CFO had, for a long time, been understanding or having an impression that the Department has a contract with Paras.

98.9.24. In the affidavit of Ms Rockman, Director General in the office of the Premier she states that Mr Venter (an official in the office of the Premier) sent her a partnership agreement:

98.9.25. "Partnership agreement between the Department of Agriculture Free State Province, South Africa and Estina Pty Ltd...In relation to the implementation of a Dairy Project at Vrede through a special purpose thereof created to fulfil the stipulated Agri BEE business called Zana Investments Pty Limited trading as Mohoma Mobung Dairy Projects, signed by the managing director [Mr Sanjeev Gautam] of Estina Pty Ltd on the 5th of June 2012 and signed by the head of department on the 7th of June 2012."

98.9.26. The HOD had signed the partnership agreement. Chairperson said that for Mr Zwane to not to have known of the involvement of Estina he must have deliberately withheld that information from him. Also, how would it

be possible that he is the only one from whom this information about the involvement of Estina is withheld when everybody else is getting documents that mention Estina. His response was that the approval of his trip to India was approved in the office of the Premier; and at the time when these things were happening, it was between officials – those that let him go to India and those and the officials of the Premier's department.

98.9.27. Mr Zwane was asked if he was ever told by Mr Thabethe or anybody where the money was going to come from to finance of fund this project, the amount being R300 million. He confirmed that his understanding was that all the money to fund this project was going to come from the provincial government. Also, that he did not know that a company would inject some money into the project.

98.9.28. Regarding the sourcing of Estina- Counsel asked if it is true that there was sole sourcing, and that there was no competitive appointment. Mr Zwane confirmed this, but he knew after the fact as his understanding was that it was Paras and not Estina. He admitted that in hindsight, having known all these issues, this project was badly managed.

98.9.29. Counsel summarised the proposition that having gone through the evidence it seemed that:

98.9.30. the project may have been established for a purpose other than what was told to government, the Provincial Government;

98.9.31. shows the non-compliance in the appointment of Estina, the appointment of a company which was run by a person who was not experienced in farming;

98.9.32. Mr Zwane is linked to the Guptas. He sent invoices to Sahara Computers that get paid by Linkway. The payments that went to Estina, ultimately, were channelled to the Gupta company; and

98.9.33. Gateway and the beneficiaries intended to benefit from this company have not seen what this project was meant to do for them. So it seems, given the urgency at which it was appointed, the R 30 million advanced payment, all this was meant to benefit Gupta related entities and/or the Guptas themselves.

98.9.34. Mr Zwane stated that in his view had the management of the project been done well, it would have been regarded as one of the best projects in agriculture to have happened for the people of the Free State.

Influence of MEC Elizabeth Rockman

98.10. Ms Rockman admits that her interaction with the Gupta family predated her discussions with them about the Vrede Dairy Project. She was introduced to them when the New Age made a presentation to the Provincial EXCO to get support for advertisements. Thereafter these meetings were fairly frequent and the Premier was aware of such meeting.

98.11. The interactions continued after Ms Rockman was appointed as MEC Finance and even extended to interaction with the Gupta family about the Vrede Dairy Project outstanding payments related to Estina, which she often facilitated.

Access to land at Phumelela Municipality, including securing a99-year lease

99. Another possible Gupta connections relating to access to land at Phumelela Municipality, including securing a 99-year lease. The role of MEC Zwane is once again prominent in the evidence that certain witnesses gave to the Commission.

100. The official description of the land on which the Vrede Dairy Project was to be established is: Farm Krynaauwlust 276, district Vrede, Free State province, measuring 4439, 5122 (Four Thousand Four Hundred and Thirty-Nine comma Five one Two Two) Hectares Held by Deed of Transfer T 43752/1893.

101. The property was owned by the Phumelela Municipality, which held it through a Deed Trust.

102. The Vrede Dairy Project (VDP), takes its name from the name of the district in which the farm is situated. Evidence suggests that the first idea of the HOD of the provincial DARD was to locate the project somewhere near the town of Sasolburg which would have been close to the big market of the densely populated City of Johannesburg and Gauteng Province. It was eventually taken to Vrede in the eastern part of Free State Province on the suggestion of the then MEC Mr Mosebenzi Zwane who advised of the availability of land there. The MEC's hometown where he grew up and was educated is the town of Warden whose residents were also targeted to benefit from the project. The black small-scale farmers of that town and those of the nearby Memel were invited to join and placed their names as potential beneficiaries.

103. At the time when the suggestion was made and a decision taken to locate the project (VDP) there, the local municipality had leased a substantial part of the farm to some local farmers for a total annual rental income of approximately R1m. The lease agreements were all terminated and the whole farm was leased to the project on a 99-

year rent free lease. There is no demonstrable benefit that the Municipality derived from the lease.

104. Evidence about how the land was acquired for the VDP came mainly from Mr Albert Doctor Radebe, a farmer and member of the Municipal Council of Phumelela Municipality, where he represented the minority opposition party, the DA, and from Mr Moremi, the Municipal Manager at the time. The evidence is summarised for both, starting with Mr Radebe.

Mr Albert Doctor Radebe

105. The statement of Mr Albert Doctor Radebe, which he signed at Vrede on 22 June 2019 was not sworn to but it is exhibit HH 6 before the Commission.

106. He is a farmer who conducts his business at Geluk Farm situated at Ascent, Vrede District.

107. He gave evidence mainly about the presentation to the municipality in June 2012 about land for the farm, and his being attacked for exposing irregularities on the farm. This section of the report covers only his evidence about the presentation and the evidence about the attacks will follow later.

108. Mr Radebe testified about a day on which the MEC for Agriculture, Mr Mosebenzi Zwane, the HOD, Mr Thabethe, and the CFO, Ms Seipati Dhlamini, came together to make a presentation to the council. Council meeting stood down for 2 hours for the presentation. The purpose of the presentation, as he understood it, was to facilitate the transfer of 4400 ha of agricultural land owned by the municipality in Vrede to the DARD, Free State. The land was required for the purposes of establishing a dairy farm which the council had just leased to local commercial farmers for a period of 3 years. The

MEC and his officials told the council that they would pay off the commercial farmers and lease the land from the municipality at market rates, which he knew to be approximately R1 million per annum.

109. The presentation that Mr Radebe testified about, which differs from most versions placed before the Commission, state that DARD had budgeted R400 million for the project and that Estina, which was in partnership with Paras of India, would inject funds of approximately R500 million to bring the project to approximately R900 million in value. There were to be approximately 100 BEE beneficiaries who would together hold 51% shareholding. The project would generate R100 million a year and would benefit and uplift the community.

110. Mr Radebe other DA members on the council were not supportive of the project as presented because the details presented by the government officials appeared sketchy, there was no budget, no business plan presented to council and no feasibility study had been conducted. There was nothing documented and the council was provided with only an oral presentation.

111. The mayor, Mr John Motaung, was highly supportive of the VDP proposal and Mr Radebe's view was that the mayor and the MEC were very close, like brothers. As members of opposition were vastly outnumbered by members of the majority party on the council, a resolution was passed by council "allowing the Department and Estina to use the municipal land to develop dairy production facilities in Phumelela".

112. A copy of the resolution which he attached to his affidavit is, to say the least, vague, stating only that 'Estina Pty Ltd/ Paras Dairy Company are hereby permitted to use the 4400 ha of agricultural land located in Phumelela local municipality, for use in conjunction with a dairy production facility.' (The farm was not properly described nor identified and the company that was permitted to use the land was stated in the

alternative.) The resolution was unanimously adopted on 19 June 2012, the opposition having decided not to participate.

113. What is recorded is ostensibly a summary of the representation regarding VDP, which he attached to his statement, put forward as the structure of the proposed shareholding in the project which simply does not add nor make sense in that it suggests that the beneficiaries were to hold 51%, Estina 49% and the municipality 4%. However consistent with other evidence, it records that: "the government will fund the establishment of dairy. Paras / Estina will fund the processing plant."

114. Mr Radebe was thereafter informed that there were several dead cattle on the farm which had been dumped next to a stream which provided drinking water to the town of Vrede. Mr Radebe went to the area and having confirmed the facts reported this to the press. Mr Radebe also informed the environmental authorities who ordered owners of the farm to remove the carcasses and bury them at an appropriate place on the farm. This was done.

115. In his view, "the people who were in charge of the operations at the dairy farm knew nothing about farming dairy cows." He saw this as the reason for the cattle dying on the farm.

116. After publication of the deadly state of affairs on the farm, those running the farm placed security guards at the entrance gate and prevented the public from accessing it.

117. As a result of his activities, he became a target of the people he calls "a group of enforcers employed by the Department of Agriculture in Vrede", whom he names, and is dealt with elsewhere in this report.

Mr Tekoetsile Moses Moremi

118. The evidence of Mr Tekoetsile Moses Moremi on the presentations and the deal on the land from which the dairy was to be operated complements that of Mr Radebe, though given from a slightly different perspective.

119. At the time when he gave his version, Mr Moses Moremi was the Chief Director at the Free State Provincial Treasury. He attested to 3 affidavits on the subject matter, one on 26 October 2018, the second on 23 July 2019 and the third on 13 August 2019. The affidavits are taken together for the purposes of a summary of his evidence.

120. Between May 2012 and 14 February 2014, he was the Municipal Manager of the Phumelela Local Municipality within whose area of jurisdiction the VDP was established.

121. He recalls that in June 2012 a team from DARD led by the HOD, Mr Thabethe, visited the municipality where they made a presentation about the VDP to municipal managers, the community and commercial farmers. The purpose of the presentation was to brief those addressed and to request the municipality to make land available, namely, a farm Krynaauwlust 275 owned, by the municipality, for the establishment of the project.

122. He confirms that the presentation sounded very positive: the project was going to be one of the biggest in the country and was going to attract foreign direct investment in Vrede with an Indian company, Paras, being part of the project. The municipality was going to be on an international map with massive economic spin-offs and was offered at 4% shareholding in the project.

123. At that time, part of the farm in question had been leased to four commercial farmers from 1 October 2011 until 30 September 2013 for an annual rental of approximately

R1million (R959 880k). But this did not appear to be an obstacle. There was sufficient will both on the side of DARD and the municipality to negotiate and reach agreement with the existing commercial tenants.

124. On 26 June 2012 Mr Moremi wrote a letter to the HOD confirming that the municipality had in principle agreed to avail its farm to the Department for the VDP. On 21 June 2012 the HOD had sent to the municipal manager a draft resolution which the municipality was requested to adopt. On 3 July 2012 the municipal council took a formal resolution that Estina Pty Ltd / Paras Company were permitted to use the 4400 ha of agricultural land located within the municipality for use in conjunction with the dairy production facility. The resolution directed the municipal manager to publish the resolution which was to take effect after 30 days unless a valid petition in opposition was filed in accordance with municipal bylaws.

125. Consequent on the foregoing, on 18 July 2012 he held a meeting at municipal premises with representatives of a new venture company, Zayna Investments Pty Ltd (a Gupta linked company). They were one Mr Ashok Narayan and a lawyer Mr Johann Schalkwyk. At that meeting the lawyer presented the municipal manager with a draft lease agreement which he had brought along. After perusing the agreement in their presence, the municipal manager requested that he be afforded an opportunity to seek a legal opinion on the draft.

126. Following the legal advice which he obtained from Legal Services in the Office of Premier, the draft lease agreement was not signed. Instead, subsequent thereto, he acting on behalf of municipality and the HOD acting on behalf of the provincial government - with the due delegation to the HOD – signed a Cession and Land Use Agreements on 12 and 14 December 2012 in which the municipality assigned its rights

in respect of the farm and under pre-existing lease agreements to the Free State provincial government.

127. The provincial government then in turn entered into a 99-year lease of the farm with Estina on the same date with the HOD signing on behalf of the government and Kamal Vasram signing on behalf of Estina. The lease was notarially executed on 18 December 2012 and registered in the Deeds Office on 18 January 2013.

128. The salient terms of the lease agreement were the following:

128.1. the lease agreement was entered into for a period of 99 years;

128.2. no monthly rental was payable by Estina to the government for the entire term of the lease.

129. As appears from the National Treasury report, the HOD was asked several times about whether the 99-year rent free lease was signed with Estina and his position was that such a lease was not signed.

130. It is fair to state that the lease agreement benefitted Estina and held nothing in it for the interests of the state or DARD.

131. At a later stage, following events that we sketch elsewhere, when we deal with the role of the national Department of Agriculture Forestry and Fishing (DAFF), the latter withheld its CASP allocation for the project for 2013/2014 financial year when elements emerged with which it was dissatisfied. The lease was consequently cancelled together with the main agreement between DARD and Estina.

Allegations of overpricing of assets acquired and inexperience in Dairy Farming

Local business – Vrede, Free State – Perspective

132. The possible Gupta connections in allegations of overpricing of assets acquired and mismanagement of the Vrede Dairy Project is clear demonstration of lack of interest in the successful performance of the business. The interest seemed to rest purely on access to funds that came from the DARD as has been demonstrated in the flow of funds analysis above,

133. This scenario fits in with the evidence of Mr Willie Basson and other local business personalities that had interacted and/or provided services to the Vrede Dairy Project. This perspective was given in evidence by the following witnesses:

Mr Albert Doctor Radebe

134. Mr Albert Doctor Radebe, a municipal councillor and a local farmer on the Geluk Farm in the district of Vrede, testified that, after the start of the project, he heard of dead cows dumped next to a stream that supply water to the town of Vrede. He said that he went to the farm and once he had confirmed the facts for himself, he contacted the press and also reported the matter to the environmental authorities, which ordered the removal of the carcasses and the reburial on an appropriate site on the farm, which was done.

135. Mr Radebe also testified that, after the publication, the entrance to the farm was barricaded to deny access. He personally became a target and a victim as described in the section of the Report under 'Threats, culture of fear, intolerance and accountability'.

Mr Willie Basson

136. In addition, the Commission also received the evidence of another local farmer in the area, Mr Willie Basson, a business man and farmer in the area as well as the evidence of Mr Johannes Cornelius Hermanus Theron, who was also involved in local dairy farming. In a sense the experience of beneficiaries about the project also adds a dimension to the local perspective to the Vrede Dairy Project but that is a section on its own in this report.

137. Mr Willie Basson deposed to an affidavit at Vrede on 26 June 2019. He conducted business under the name and style, Vrede Trekkers in Vrede, Free State. He owns and operates a construction company and also hires out as moving equipment, plant and machinery. In addition, he is a farmer in his own right and is well versed in cattle farming.

138. Mr Basson's evidence before the Commission related mainly to three areas: excavation services which he provided to the Dairy farm, his impression of the level of experience in the management of the Dairy farm and his supply of cattle feed to the farm.

139. Between approximately 2012 and 2014 Mr Basson was contacted either by Estina itself, alternatively by one of its other contractors, particularly EG Construction, represented by one Mr Koos Eksteen and another gentleman known to him only as Floris, to assist in various construction works as a subcontractor. He was, for instance, contracted to clear, level and compact the farm surface, prior to any construction work taking place on the dairy farm.

140. In about March 2013 he was contracted for purposes of attending to the drainage and certain construction and earth moving works related to various of the cattle sheds in which dairy cows would be referred and/or housed. In the same year he was

approached directly by Mr C Prasad to assist in the establishment of what was called "the processing plant."

141. Due to the fact that Mr Basson had earthmoving equipment, plant and machinery and was the only provider of such equipment, plant and machinery in and around Vrede, it made sense for Estina to approach him to assist it.

142. Parts of the processing plant that Mr Basson saw on the farm appeared to him to have been shipped in containers. When they arrived on trucks at Vrede Dairy Farm it was required that they be removed from the containers and fitted in the appropriate positions in the processing plant. He was thus required to provide various heavy lifting equipment to facilitate the process. He said that he was personally present when much of the equipment was removed and "immediately noted that several of the stainless-steel kettles and containers appeared used and in fact were badly rusting and in a general poor condition." His view was that this equipment was not new but rather second-hand.

143. In about the same year Mr Basson was contacted again by Mr Prasad to assist Estina "after approximately 100 of the cattle had died." In this regard, he was required to excavate a suitable burial site, transport the carcasses of the dead animals, bury them and then to refill the excavated site. His observation of the cattle, being a farmer himself, was that "the majority of these cattle had died from hunger and malnutrition ."

144. Mr Basson assisted again in the burial of cattle two or three times after the initial high number of cattle which had died. He testified that on the further occasions the number of cattle to be buried was between 10 to 15 cattle at a time. He and Mr Radebe provided eye witness account of the dead cows.

145. Mr Basson said that in about 2014 it became quite apparent to him that Estina was in no position to feed its cattle. This time he approached Mr Prasad and informed him that

he (Mr Prasad) would require feed if his cattle had to survive the winter months. He offered to be of assistance to source and supply a quantity of animal feed but wanted to be assured that he would be paid should he be able to purchase and provide such cattle feed to Vrede Dairy Farm.

146. Mr Basson testified: "It was very clear to me that the people in charge of the project had absolutely no idea about cattle farming and the feed requirements for such cattle in the area nor did they have the requisite contacts to purchase and arrange animal feed for the cattle."

147. Mr Basson testified that he then proceeded to procure "approximately R1 million worth of cattle feed." He attached to his affidavit invoices for a variety of services that he provided to the farm and the calculation shows that he provided just over R2 million worth of cattle feed between 8 August 2014 and 4 January 2016. Cattle feed was provided even in the months of October 2014 (R240,000), on 1 December 2014 (R228,000), 18 January 2016 (R112,500) and 4 January 2016 (R240,000). It was clearly not only during winter months. Estina paid quite a bit for lack of experience to keep their dairy cows alive after paying heavy school fees with the death of over 100 dairy cows.

148. Mr Basson, gave an inkling of the Gupta connection to the Vrede Dairy Project. During the course of his involvement, he came to meet several of the people tasked with the establishment of the Vrede Dairy Project. He says "No less than 3 of these individuals were clearly Indian nationals who had very limited ability to communicate in [the] English language and who were identified to me by Mr Prasad as being members of the Gupta family."

Mr Johannes Cornelius Hermanus Theron

149. Mr Johannes Cornelius Hermanus Theron is a dairy farm manager of an established dairy in Vrede with extensive experience in the industry, including in the Free State. His evidence was the following effect:

149.1. He provided information to representatives of Estina about dairy farming in Vrede;

149.2. He had an idea about the termination of the lease contracts of the four commercial farmers who previously leased the farm, Krynaauwlust, from the municipality;

149.3. He referred representatives of Estina to the local agents of Alva Laval from whom they bought milking machines;

149.4. Representatives of the company later invited him to Saxonwold compound which belonged to the Gupta brothers.

150. Mr Theron deposed to an affidavit. He has a B Com degree from the University of the Free State which he obtained in 1976.He has extensive experience in dairy farming, having been involved in the industry for 40 years in both KwaZulu-Natal and the Free State.

Explaining dairy farming in Vrede.

151. During or about 2012 Mr Theron was in the employ of Mr Rodney Neuman as a dairy manager at his dairy business at Cork in the district of Vrede. In the middle of that year Mr Neuman invited him to a meeting with a delegation from Estina which visited the Neuman Dairy and needed some advice as to the local dairy conditions. In the

delegation he recognised Mr John Motaung – the Mayor of Vrede at the time – who came together with a delegation of about 15 people, all of Indian descent. Although some of them were South African, several were not South African but from India.

152. As the dairy farm manager, he explained and demonstrated to them the activities at the Neuman's Dairy, which had 400 cows producing about 21,000 litres of milk every second day, equating approximately 25 litres per cow per day. It was a profitable operation.

153. Mr Theron's employer, Mr Rodney Neuman, had leased a portion of the farm from the local Phumelela Municipality. After the delegation had exerted substantial pressure on the Neuman's, the agreement was subsequently terminated.

Mr Theron– Gupta Connection

154. Approximately a month later, Mr Theron was contacted telephonically by Mr Ashok Narayan, who had been part of the delegation to the Neuman's Dairy, who invited him to urgently meet with him in Johannesburg. After Mr Theron had spoken to Mr Neuman, he agreed to Mr Narayan's request. They then left together for Johannesburg. The meeting took place in a security compound in Saxonwold. They were both astounded at the security measures in place at the compound.

155. The meeting was initially conducted by Mr Narayan who said that Vrede Dairy Project was a major government project in which Estina had undertaken to make a substantial investment of R300 million and that the government would in turn invest some R700 million, making it a R1 billion agricultural project. The project was explained as a key project of the then Premier of the Free State, Mr Ace Magashule. Mr Narayan was there as an adviser or agent of the Premier to ensure the success of the project. Mr Theron and Mr Neuman were initially in awe though they had some misgivings. The budget felt

rather inflated; the area in which they wished to establish the project was not the best option. Mr Theron felt that the project would be best suited to coastal areas where water is in abundance.

156. After the initial discussions, Mr Theron was introduced to an Indian vet to whom he spoke at length, giving substantial ideas and plans as to how to construct and establish the dairy. At the end of the meeting, Mr Narayan handed an envelope containing approximately R5000 in hard cash to Mr Theron. There were no invoices and no receipt for this payment.

157. Both he and Mr Neuman's primary interest was to sell cattle to the project. They had top quality Holstein genetic material of stud quality and would have been able to supply cattle at approximately R8000 a head at the time.

Mr Theron - Referral to Alva Laval

158. Mr Neuman and Mr Theron referred their hosts to the local agents of Alva Laval, the suppliers of dairy plant and equipment, who were successful in selling and installing a 30-point rotary milking machine at the farm for R6 million. Both Mr Neuman and Mr Theron were jointly paid a further sum of R60,000 as a 1% spotter's fees for the referral.

159. Some months later, Mr Theron offered his services as a dairy farm manager to Mr Prasad of Estina but was rejected and chased by the said Mr Prasad who made him feel very unwelcome.

Mr Theron - Corruption rumour

160. Mr Theron became aware of a rumour that the mayor Mr John Motaung, the municipal manager for Vrede, had been given a brand-new Mercedes Benz ML450 as a thank you gesture for facilitating the lease agreement and negotiation of the new 99 year lease

that Estina secured for the farm. He however never saw the vehicle himself, that the rumour was wide.

161. The evidence of these local business people indicates that they were called upon to assist and did assist with services or information when those managing the Vrede Dairy Project encountered problems and called for help. Similarly, the same commercial farmers who were willing to assist assisted Mr Ncongwane with information and training when he approached them, even before the establishment of the Vrede Dairy Project. It, therefore, does not make sense to suggest that the local businesses were not willing to assist as a result of which the HOD had to seek assistance from India . Nor does it make sense that Estina would have been a sole provider of services in the area of dairy farming. There must have been another reason why local expertise was overlooked when assistance was sourced from India. That assistance must be at the core of the appointment of Estina without complying with prescribed competitive bidding.

Mr David Andreas Maree - Expert perspective

162. In addition to the various perspectives considered by the Commission, evidence was also received of an objective expert assessment of the project. Far from being flattering, the expert assessment was downright negative. The Vrede Dairy Project in the Free State was simply ill advised and not properly considered.

163. The expert evidence came through Mr David Andreas Maree. He was a 43-year-old agricultural economist employed by FNB as Head: Information and Management at FNB Business – Agriculture.

164. The evidence he submitted to the Commission is based on his assessment and investigation of Estina and the Vrede Dairy Project in November 2013.

165. His expertise for the report he gave must be seen against his curriculum vitae which, with regard to academic qualifications and experience, show that he is uniquely qualified for the assessment he made and for his evidence as an expert in the field.

166. Mr Maree holds the following degrees: BSc (Agri), University of Pretoria, a Master's degree in Business Administration (MBA) from the University of Antwerp Management School, Belgium and an MSc (Agri) in Agricultural Economics from University of Pretoria.

167. Mr Maree's relevant experience is as follows: From February 1999 to November 2000, he served as a research assistant in the Department of Agricultural Economics, Extension and Rural Development at the University of Pretoria, where he started his career. Then from August 2003 till October 2004, he was employed at HG Grain Marketing in Delmas as agricultural economist. His major charges were to assist farmers in risk and price management, production planning, research and distribution of information to role players in the market. From November 2004 to March 2009 he was employed as an agricultural economist and Management: Regional Services at the Milk Production Organisation. There he was responsible for the gathering and analysing of statistics, especially in production costs. Managerial responsibilities included the general management function for the region of Mk Producers Organisation including budgeting and financial management. Thereafter for six years (April 2009 – January 2015) he was employed as the senior economist for Agri SA, the biggest agricultural union in South Africa. In that position he represented Agri SA in various forums including in BUSA activities dealing with issues that affect farmers. His responsibilities included analysing economic data and statistics in order to assist policy development. He was in the current position since February 2015 and was responsible for all the below-the-line marketing of the agricultural division of FNB Business. He had established a wide network with industry role players and speaks regularly at events on agriculture related

issues. With regard to information, he was internally responsible for the sign-off on all reports generated by the team to ensure that information, both in and outside the bank, was correct and relevant.

168. Mr Maree started his expert report with an overview of the project followed by a statement of the problem before he proceeded to the methodology he used. In the latter regard he reviewed the applicable documentation, with costs and other figures being compared either to current costs or to industry benchmarks. However, a full cost review was not possible because of the limited information available to him.

169. Mr Maree testified that the essential background to dairy industry in South Africa is that the number of dairy farms declined from 3899 in January 2007 to 2083 in September 2013. In the Free State in particular, producers declined by 57% over the same period – the number reducing from 1067 in June 2007 to 423 in September 2013. The decline was a result of higher production in the pasture-based areas – the coastal areas. The cost of milk production in-land was a key factor due to the increase in maize prices and other input costs. In December 2007 the Free State province produced 80% of total milk production in South Africa; but by February 2012 this had declined to 10.5% due to the declining number of producers and the increased production in the coastal areas. The average herd size in the Free State was 111 cows in milk per producer (with a median of 79). Vrede Dairy Farm would be substantially different from the normal dairy farm. However, Mr Maree said that there were concerns regarding the project. Those concerns are dealt with below.

Mr Maree - Concerns regarding Project Proposal

170. In its preamble the project proposal states that India was the largest milk producer in the world. Mr Maree said that this was only true if buffalo milk was included. South African consumes mainly cow milk. A graph of the largest cow milk production countries

for the period 2010 to 2012 reflected the European Union as the biggest producer followed by the United States with India in the 3rd place. He provided a graph which showed that the claim was clearly false. A copy of the graph, was attached as schedule DAM 1 (the same number that he had given to the attachment to his affidavit). Similarly, DAM 2 was a list of top 20 major dairy companies in the world and Estina and Paras do not feature. Mr Maree therefor said that the claim to world production status was not backed up by the available data.

171. The proposal estimated employment opportunities through VDP at 600 jobs, which Mr Maree said was rather high given the growing mechanisation taking place in the sector.

172. As to project costs, dairy cattle are costed at R25,000 per cow in milk in the Estina proposal. Mr Maree said that this, too, was in his opinion very high since the costs for an in milk or dairy cow is approximately R15,000 per cow.

173. An amount of R5 milion was budgeted for a milking parlour, in addition to which a further R15 million was budgeted for what was called "other dairy equipment." Mr Maree's view was that this was unnecessarily high and that, for an amount of R15 million, a state of the art, high precision parlour could be erected.

174. The proposal mentions that the sale of milk provided extra income on a regular basis for rural people. However, the Vrede Dairy Project was envisaged primarily as a large commercial project that would provide jobs in the rural areas rather than to promote small-scale milk production. The proposal did not seem to appreciate the difference between the various business models. Mr Maree said that, compared to the rest of the world dairy consumption was still low to average in South Africa, with lactose intolerance being a limiting factor for consumption of large amounts by certain population groups.

175. In conclusion it was Mr Maree's opinion that the cost of the project was unreasonably high, for instance cow prices, equipment et cetera. In his view an in-depth cost benefit analysis on the impact of the proposed project was clearly called for, given the amount of money the government was lured to spend.

176. Mr Maree pointed out that business plan was inconsistent. For example, on page 1 (one) it talked about a 500-cow dairy, yet on the very next page it referred to 1000 cows in milk. In addition, Mr Maree was of the opinion that many of the initial assumptions were unrealistic. His conclusion was that the business plan as a whole was not realistic and needed to be revised.

177. The feasibility study which was reviewed was found to be very academic in nature, with no clear findings and recommendations. Mr Maree noted further that there was no detail on the costing of equipment. The study further lacked information such as marketing study for the products to be produced; and a complete cash flow projection was absent from the feasibility study. It was noted also that there was scarce information about the management and personnel requirements of the project, environmental issues were not addressed and there was no time schedule for the project which should have formed part of the feasibility study.

178. Mr Maree said that the documents reviewed lacked the information required to carry out a proper analysis of the project. The feasibility study was more an academic study than a feasibility study and contained a significant amount of jargon. Information was lacking as to basic and critical information as to the type of cows that were to be sourced, where the cows would be sourced from.

179. There was also no indication of the availability of cows given that current established producers bought cows when cows became available. Mr Maree also said that it was also not generally recommended to buy cows from all over the place, since experience

of dairy producers was that moving cows for example from one production area to another could result in significant decline in milk production.

180. Mr Maree also pointed out that a significant point not dealt with in the feasibility study was possible contingency plans with regard to electricity costs and energy supply. Constant and reliable supply of energy is critical for milk production and storage of products. Assuming that there was an electricity supply point, provision should have been made for alternative options in the times of interrupted electricity supply. The feasibility study did not address these alternative options.

181. Mr Maree concluded that: "given the current trends and realities in [the] South African dairy sector, the most appropriate investment in the dairy industry would be in the coastal areas where the conditions for productions are more favourable. An investment of this magnitude in the Free State province is considered too risky and not sustainable."

182. Mr Maree's clear and unequivocal recommendation was that the government should not continue with the project in the Free State in which it was, since the government would not receive value for money and the costs were not reasonable or market related.

Beneficiary experiences and perspective

183. The legitimate objective of any project initiated or supported by the government, whether at national, provincial or local level, has to be the public good that governments are brought into being to serve. The dairy project of the Free State government must or should have envisaged benefitting the general public, the consumers of milk and other dairy products. At business level, the Vrede Dairy Project was intended to benefit small scale black dairy farmers who were offered an opportunity to scale up their farming operations and interests in dairy farming.

184. It is this group which is referred to as the beneficiaries of the project. Those who were already in that business would benefit by growing their dairy farming businesses into bigger commercial operations while those interested but not yet in dairy farming were offered an opportunity to enter. The opportunity was thus offered to small-scale farmers in general and dairy farmers in particular.

185. As a group, they were no strangers to farming. They had cattle of their own already, some already producing milk, and were offered a chance to do better in what they were doing.

186. The project was put forward on the basis that it aimed to empower 100 individual small farmers who would each get a donation of 10 milk cows via government funding. There were to be no cows in the dairy project business except those that the government would acquire and donate to beneficiaries. Beneficiaries were not expected or requested to pay for entering the project; the government would pay for their shares.

187. From the perspective of the group that became known as beneficiaries, evidence was obtained mainly from two people: Mr Dhlamini – the chairperson of the local Framers Association and Mr Ncongwane – his deputy. Evidence was also obtained from Mr Mhlaba, who, together with two others, were chosen to form a committee of representatives of beneficiaries in dealing with government representatives, on the one hand, and representatives of the company appointed to implement the project on the other. Mr Mhlaba was elected to chair the committee in question. Messrs Dhlamini and Ncongwane testified from a similar angle while Mr Mhlaba testifies from a distinct but complementary perspective.

Summary

188. Reading the perspective of beneficiaries, as presented in affidavits and oral evidence, one gets the impression that the locals were taken for a ride. They were duped Nongqawuse style and persuaded to sell their cattle on the basis that government would donate dairy cows to them, but that never happened. Having regard to what was truly happening as evidenced by written documents and other informed evidence, beneficiaries were told half-truths - plainly lied to by officials who promised the sky but did not give even a twinkle from its wide space. It was an Indian run project on African soil – operated by people who did not speak English or any local language. Beneficiaries were merely mentioned, identified late and were truly never involved or properly informed about the project.

189. From this perspective, Estina used the fairy tale Indian connection (Paras) to mk more than R250 million (1/4 of R1 billion) from the government, which deliberately or with gross negligence blindly pumped money without asking questions or looking as to how it was spent.

190. The core evidence comes from two informed members of the local community, farmers in their own right: the chairman and deputy chairman of the local African Farmers Association, respectively, Mr Ephraim Makhosini Dhlamini and Mr Meshack Mpaleni Ncongwane.

191. What follows is a summary of their evidence.

EphraimMakhosiniDhlamini

192. Mr Dhlamini testified through a sworn interpreter. He however can read and understand English but preferred to testify in isiZulu. He, therefore, personally read and understood the statement he made and signed it, confirming its contents.

193. He confirmed his signature on the document and declared: "it was written by me, (I) will never forget the contents." The statement he made to the investigators appears as an exhibit.

194. He is a resident of Thembalihle Township, Vrede. Ironically, the name of this township means, in English, "Good hope". Mr Dhlamini and other black farmers were given a good hope for a better future by Mr Mosebenzi Zwane and the Free State Provincial Government which the same government later crashed. Mr Dhlamini was born on the farms in Vrede, grew up there, later went to Johannesburg, and then came back to Vrede to rebuild his family home. He lives in the area since.

195. He said he was previously interviewed on the Vrede Dairy Project by the Public Protector (Adv Mkhwebane), once at her office and later when she came to Vrede. He said that he also met with representatives of the Hawks on a Saturday and on a Sunday. He said that they came down to Vrede and took statements from him on the subject.

196. At the time when he testified before the Commission, Mr Dhlamini was self-employed, mainly as a farmer, with 52 head of cattle in the homage of the municipality. Out of his farming proceeds he established another business, a record bar, in in the town of Vrede, which he still operated at the time.

197. Thembalihle Township is small. Most residents work on surrounding farms where they earn very little. Unemployment is high. As residents work outside the town, a business operator has to be creative to generate revenue.

198. Mr Dhlamini was the local chairman of the local chapter of the African Farmers Association and his deputy was Mr Meshack Mpaleni Ncongwane (Mr Ncongwane). Their names appear on the list of beneficiaries of the Vrede Integrated Dairy Farm Project (VDP). His deputy owns approximately 60 heads of cattle and focused on dairy farming while he himself focused on beef farming, even before they heard of the Vrede Dairy Project.

199. Mr Dhlamini and Mr Ncongwane they attended a number of meetings about VDP and by and large they confirm each other's evidence. Mr Ncongwane did not attend the second meeting with Mr Mosebenzi Zwane (Mr Zwane), then MEC of DARD. Mr Dhlamini attended some meetings, amongst others, together with Mr Ncongwane, M Piet Mokoena, Mr Willem Kanye, Mr Jose Mofokeng and Mr Silas Mokonehatsi. Most meetings were held with government officials, mostly representatives of the Department of Agriculture and Rural Development (DARD), officials of the office of the Public Protector, the Hawks, representatives of political parties and the media.

200. Mr Dhlamini testified that Mr Mosebenzi Zwane was well known to him and other beneficiaries. He said that Mr Zwane grew up, was educated and worked within that locality. Mr Dhlamini said that Mr Zwane's home was in the nearby town of Warden, whose residents were included amongst the beneficiaries.

201. Through the African Farmers Association, Mr Dhlamini represented the small farmers in the area, mostly in activities coming from DARD. Most people in the area own cattle and live and survive on farming. He basically assisted them by writing to and

communicating with DARD. The Association initially comprised 82 farmers but at the time when he testified the number had risen to 120 farmers.

202. Mr Dhlamini's evidence and that of Mr Ncongwane was structured on the basis of the various meetings, it is convenient to summarise it on the same basis.

First Meeting

203. The first meeting was called by then MEC, Mr Mosebenzi Zwane, in about June 2012. The meeting was also attended by the Mayor of Vrede, Mr John Motaung, Mr MP Thabethe (HOD of DARD), Mr Dume Kobeni (from the local ANC office, who was also an extension officer attached to DAR D), Mr Jimmy Mphahlele and two other officials of DARD who were local residents of Vrede, namely, Mr Khuliza Sibeko (Mr Sibeko) and Ms Thuto Kganye (Ms Kganye). In total there were approximately 100 community members in the first meeting.

204. The MEC wanted the local farmers to indicate which of them had an interest in the various categories of stock farming. They had to indicate if they were interested in farming in red meat, dairy, piggery, and poultry. Mr Dhlamini put his name under meat farming while Mr Ncongwane and five others put theirs under dairy farming. Not all attendees were farmers. Only few were. In comparison, between them Mr Ncongwane and Mr Dhlamini had fairly substantial herds of cattle.

205. Prior to this first meeting, Mr Ncongwane had written to the town council asking for land to be allocated to him to establish a dairy farm. He had also spoken to the local member of Parliament but he had been unsuccessful in his endeavours.

206. The meeting was opened by the local mayor, Mr John Motaung. The MEC spoke of the upcoming dairy project where there would be activities like milking, processing of milk

into products like yoghurt, cheese and a number of other dairy products. The MEC spoke of wanting good things for the people. It sounded like a very good project and most members of the community were happy with it though few were suspicious. Mr Sibeko, a local representative of Mr Zwane, took down the names or those who were interested in farming.

Second Meeting

207. The 2nd meeting, which was held not long after the first, also convened by the MEC, was held in Thembalihle Township. Mr Sibeko, a local representative of the MEC contacted them for this meeting. In attendance were the mayor, the HOD, Ms Alta Meyer, Mr Kganye / Khanye, Mr Dume (an employee or official of the municipality) as well as the two local representatives of the MEC, Mr Sibeko and Ms Thuto. The meeting was also attended by beneficiaries from the nearby towns of Warden and Memel.

208. It was at this meeting that more details were given about the establishment of the dairy farm by the government. The farm was to be for farmers in Vrede. The Mayor of the Phumelela Local Municipality had made available to DARD 4000 ha of land where these cows would be kept. And government would provide feed for these dairy cows as well.

209. Farmers were told that they should sell their existing cattle, especially meat or beef cattle, and the government would give each of them 10 heads of dairy cows. Those who obliged and sold their beef cattle could get more shares in the project, presumably by acquiring dairy cattle of their own, in addition to what the government would donate to each small-scale farmer. The retention or selling of red meat cattle was not given as an option, as Mr Dhlamini understood the situation, 'It was not an option. It was something that they were imposing on us that we should sell the red meat comes in order for us to get the dairy cows –the cows that produce dairy.' The land was being given to the dairy project and there would be 'no space anymore available' for red meat farmers.

210. There were more than a hundred people at this meeting. MEC Zwane told them that beneficiaries would hold 52% shareholding in VDP, 20% would go to roads, bursaries for scholars, hospitals, et cetera, and 28% would go to government. He urged the beneficiaries not to sell their shares that was to be allocated to them as these would be their legacy.

211. The beneficiaries would be taken to India for training in dairy farming. Mr Dhlamini says: "our expectations for a better future increased." The mayor also said that he was happy that someone who had grown up in the same area in Vrede was bringing good news to the community. No one else addressed the meeting, save when they were socialising thereafter.

Third Meeting

212. A third meeting was called on a Friday in 2013. People who notified beneficiaries of this meeting were Mr Sibeko and Ms Thuto. This particular meeting was convened for Ms Aita Meyer, who at the meeting requested beneficiaries to furnish her with their identity documents. That appeared to be the primary purpose for the meeting. It was understood that Pretoria (possibly the national Department of Agriculture) 'was demanding to know who the beneficiaries of the dairy project were, as money for the project had already been released.'

213. Having anticipated the issue, Mr Dhlamini held a brief caucus meeting with the farmers before the meeting with Ms Meyer, advising the farmers to refuse with copies of their identity documents as funds had already been released without the details of beneficiaries having been provided. (There was a clear realisation that the identity documents were sought to legitimise a project which was already afoot.) However, the farmers did not heed the advice and all (including Mr Dhlamini) ended up providing the details including copies of identity documents to Ms Meyer.

214. Ms Meyer also took the beneficiaries through the rules of the project. The beneficiaries also nominated and selected from amongst themselves 3 beneficiaries to represent them at meetings with DARD relating to VDP. The representatives were Mr June David Mahlaba (as chairperson), Ms Zelpha Lindiwe Masiteng (as secretary) and Mr James Dumalisile Ngqosini (as treasurer).

215. As things turned out, however, the committee of representatives was totally ineffective and at no stage provided a report to the local farmers. Farmers ended up taking the issue of being side-lined in the VDP initiative to the media. This was in 2013. One Dr Radebe from the DA brought the media to them – he came with M&G.

216. Mr Dhlamini is not sure whether the forms were signed on the 3rd or 4th meeting. He thinks that the rules may have been explained to them in the 4th meeting – the only time when it would have made sense to sign forms. Be that as it may, it is common cause between the two that forms were signed by beneficiaries at some stage.

Fourth Meeting

217. The 4th meeting was also convened by or for Ms Meyer. Mr Ncongwane estimates that this meeting was held in or about 2013/14. Ms Meyer had been sent by the office of the Premier, Mr HS ('Ace') Magashule, to tell the beneficiaries that the Free State Development Corporation (FDC) would be taking over VDP (from Estina) the following week. This was more likely in 2014 than 2013. Mr Dhlamini is more positive that the 4th meeting was in 2014.

218. The beneficiaries were never given a document that recorded that they were beneficiaries in VDP. The only document that has surfaced along those lines is an undated document titled 'Beneficiary Agreement' in the name of and signed by Mr June David Mahlaba with Dr T J Masiteng purporting to represent DARD.

219. The beneficiaries made it clear that they continued to be beneficiaries of VDP. However, although the farm (VDP) was operating, none of the beneficiaries had even been taken to the farm, not even under FDC. They were never invited to play their role as shareholders in the project. This is a point that Mr Dhlamini highlighted in the 4th meeting.

Imbizo at Frankfort

220. At an imbizo at Frankfort, Mr Dhlamini tried to raise the concerns of the beneficiaries around VDP. In attendance from the side of the officials were, amongst others, Minister Mosebenzi Zwane and HOD Thabethe. Lesedi Radio Station was in attendance. Mr Dhlamini raised his hand for an opportunity to speak but was ignored. He says the Minister patently told him that as he had called the people running the farm 'Ma-Gupta' the Minister could not help him. (If this is in fact happened, quite clearly Mr Dhlamini was at this stage being victimised or side-lined for speaking out raising concerns about the exclusion of beneficiaries from VDP.) He was concerned that the identity documents of beneficiaries had been taken, money was received for the project and utilised without beneficiaries being involved. He sees an element of criminality. At the imbizo, HOD Thabethe promised to sort things out but as far as the beneficiaries could see nothing was done to honour that undertaking.

Fifth Meeting

221. There was yet another meeting which was supposed to be attended by the Premier, Mr 'Ace' Magashule. Beneficiaries had been informed that the Premier wanted to address them; they attended. However, the Premier who came together with Mr M Zwane conducted a site visit at the farm and thereafter left Vrede without having spoken to the beneficiaries.

Other Subsequent Meetings

222. Both Mr Dhlamini and Mr Ncongwane speak of further meetings which were held in connection with VDP but for which beneficiaries saw little if any benefit. In brief some of those are the following:

223. In approximately March 2019 one meeting was held with MEC Ms Mamiki Qabathe of DARD where nothing of substance was discussed. Instead, the MEC reprimanded beneficiaries for having contacted the media.

224. Another meeting was held with Chief Director, Mr Madiba. The beneficiaries had called the Chief Director but on arrival the latter took over the meeting without giving the beneficiaries an opportunity to state their issues. Mr Dhlamini walked out of that particular meeting in protest. Mr Madiba also wanted the beneficiaries once more to reregister as beneficiaries but they refused stating that it could not be expected of them to reregister as beneficiaries every time a new chief director was appointed.

225. In yet another meeting, Dr Takisi J Masiteng, also a Chief Director, accompanied by Mr Madiba, went to meet beneficiaries at Vrede. The issue of status of beneficiaries was once more discussed at that meeting. Dr Masiteng informed them that the farm project had not started making any profit. Beneficiaries asked why they had never had an opportunity to exercise their rights as 52% shareholders and officials conceded that this was an error. At that meeting beneficiaries were asking pertinent questions and many local officials who hosted the meeting tried to deflect those questions.

226. The last meeting that both Mr Dhlamini and Mr Ncongwane attended, and which was held at the farm, was when the then leader of the Democratic Alliance, Mr Mmusi Maimane , visited VDP. He fought for the beneficiaries to enter the farm. It was for the first time that many had seen the project. Beneficiaries from Warden were also there

but not the ones from Memel. On the farm he and other beneficiaries noticed the many of what he knew as 'poisonous plants' which to his knowledge kills cattle. The locals call the plant 'Delamon'. They also saw carcasses of a dead cows, which for him was a clear sign 'that there was a problem with the management – it was not up to the correct standard'. At the time of the meeting the dairy cows that he saw on the farm were very old, an indication to him that there could not be much productivity.

227. Although not formally a meeting, both Dhlamini and Ncongwane also independently met with and gave statements to representatives of both the Hawks as well as the Public Protector. They met more than once with the PP and in the last meeting they made it clear to her that they had lost trust in her. They state a few reasons. In approximately 2017 she undertook to send people to take statements from beneficiaries at Vrede – but she only come to Vrede in 2019. She had issued her first report (probably an interim report) on VDP without consulting or interviewing the beneficiaries. (D139:8:2-9) Beneficiaries felt excluded from her investigation. She had also postponed an initial meeting that she had scheduled at Vrede and later wanted Mr Dhlamini to convene the next one making use of his own cell phone and air time. That was in November 2018. It was only when he pointedly refused to call the meeting at his costs that she undertook to reimburse him for his air time. Again, when beneficiaries were in her office, she said she was only aware of 35 beneficiaries, a number which they do not know where she got from.

228. Mr Dhlamini also noticed at one stage that milk from VDP was delivered to a shop next to his record bar. The shop is owned by some people of Indian origin who could not speak English or any of the local languages. Milk was then sold from that shop to consumers. He noticed also that cattle feed intended for cows on the Vrede Dairy farm was sold in Vrede.

229. The beneficiaries felt let down by a government. Mr Dhlamini sums it thus:

> "[D]espite being invited by the provincial government to be part of this project, and taken the trouble to register as beneficiaries, we had been completely side-lined by the same provincial government. Even in relation to the sale of milk produced at the farm, we as beneficiaries had no role to play, nor have we reaped the profits of that enterprise."

230. He adds:

> "The manner in which the government has handled this matter has led to unnecessary tension here in Vrede. Today many beneficiaries fear for their lives because of intimidation by those who believe that they must protect Mr Zwane. I personally have had to take precautionary measures when going about my business in town. This is completely untenable."

231. There is a feeling also that having promised to take local farmers for training in dairy farming to India, Mr Zwane had instated taken a music choir he supported to India. The listed beneficiaries of VDP never benefitted from it.

Meshack Mpalelingcongwane

232. He lives at stand number 2325 Kanye Street, Thembalihle Township, Modise Section, Vrede. He is a farmer who produces milk. Like Mr Dhlamini, he confirms that he can read and understand English but prefers to testify in isiZulu. He confirms his statement and his signature thereon which is signed at Vrede on 21 June 2019.

233. He developed interest in farming when he started attending meetings with other farmers first in Qwa-Qwa. Then later he also attended workshops conducted by white commercial farmers. Then together with farmers from Qwa-Qwa, they formed a cooperative called Emerging Milk Producers Organisation (EMPO). When he went back home to Vrede and found people interested in the same thing, they decided that they needed land on which to conduct their operations.

234. He wrote a letter to the Mayor of Vrede, Mr John Motaung, in which he stated his request but his endeavour was unsuccessful. The mayor did not seem to understand his request and requirements. Then he spoke to a national Member of Parliament, one Bheki Radebe, and showed him the letter. The latter did not find anything complicated or unclear in the letter. He also later discussed his requirements with an administrative officer, one Mr Ralebenyana. The latter demanded proof of financial support for the project. It was in November 2011 when he made approaches to the municipality.

235. Barely a year later, he heard of a dairy project to be established by government in Vrede. This was in 2012. He says he was at first chairperson of the local National Agricultural Farmers Union (NAFU) but later became deputy to Mr Dhlamini.

236. His testimony confirms to a large extent the testimony of Mr Dhlamini and has been incorporated into the summary of the latter's testimony. The two worked hand-in-hand and confirm each other's evidence. His statement was accepted exhibit HH3 before the Commission and is supported by a copy of the Beneficiary Agreement which he signed.

237. He also made a statement to the Public Protector and interacted with the latter. Furthermore, he made a statement to the Hawks.

238. In conclusion he sums up his experience with VDP as follows:

> "None of the community members who were registered as beneficiaries have benefited from this project. None of us ever worked at the dairy farm. No one was taken to India for training as promised. Not one received any cattle from government."

June David Mhlaba

239. Mr June David Mhlaba is a resident of Thembalihle Township, Vrede, in the province of Free State. He is one of the beneficiaries of the VDP. He placed on record the two roles

that he played. Firstly, as a beneficiary, and secondly, as one of the three (3) people who were elected by other beneficiaries to serve on a representative committee that was to liaise between DARD and Estina on the one hand and the beneficiaries on the other. He was chairperson of the committee.

240. He testified about two (2) meetings that he attended, one in or about April/May 2012 and the other about a month later (I estimate June/July 2012). Both meetings were held at Mhlabunzima Hall, in Thembalihle.

241. In attendance at the first meeting on the government side were MEC Mosebenzi Zwane, HOD MP Thabethe and Ms Alta Meyer. There were also a number of members of the community who had an interest in agriculture/dairy farm. This is the day when members of the community were invited to participate in the dairy farm as beneficiaries; those interested were asked to write down their names and identity numbers for this purpose, which they did. He was one of the people who responded positively.

242. In attendance on the official side at the 2nd meeting were the HOD and Ms Meyer. The meeting/elected 3 persons on the representative committee with himself as chairperson together with Ms Lindiwe Zelpha Masiteng as secretary and Mr James Dumalisile Ngqosini as treasurer. Ms Meyer explained the contents of the Beneficiary Agreement to all the beneficiaries whereafter he was required to sign the agreement which he attaches as an annexure to his affidavit together with a list of beneficiaries. (The writer notices that there are two (2) versions of the list, one with 80 beneficiaries and the other with 78. In the affidavit the discrepancy is not explained) When the Agreement was presented for his signature, it had already been signed on behalf of the Department by Dr TJ Masiteng with witnesses (one of who appear to be Ms Meyer) but not dated. He too assigned together with 2 witnesses (of one appears to be the secretary of the

committee) and the agreement was left undated. He does not recall ever meeting Dr TJ Masiteng, having interacted only with Ms Meyer on the day he signed.

243. His role as chairperson of the committee, as he understood it, was to liaise on behalf the beneficiaries. Ms Meyer and Mr Thabethe promised to come back to them after two (2) months to select workers for the dairy farm but the further interaction did not take place. Beneficiaries were promised work on the farm as well as shares in the dairy farm. In December 2012 they realised that there were already people working at the farm, none of whom were beneficiaries.

244. Members of the committee never met to discuss the dairy farm and were waiting to be contacted by either Ms Meyer / Mr Thabethe or management of the farm. (Committee members seem to have perceived their function as being to react only when contacted. It is fair to say, even from this perspective, the committee never functioned beyond Mr Mhlaba signing the beneficiary agreement, which he believed he did on behalf of the rest of the beneficiaries).

Beneficiary Agreement

245. A document called Beneficiary Agreement emerged in the process of attempting to formalise the interest of the beneficiaries in the VDP. This is the agreement which Mr June D Mhlaba signed at a meeting with Ms Meyer on a date, which; on his testimony, he would have signed in June/July 2012 (his second meeting). Advice was sought and provided to the Department (DARD) by Legal Services. The advice was given orally by AJV to Dr Masiteng on the part of DARD. He occupied the position of Chief Director District Services and presented the agreement, which he and one beneficiary, Mr Jun Mhlaba, had already signed. Legal Services was concerned that Dr Masiteng was not an accounting officer and therefore had no authority to sign such agreement. LS was

simultaneously provided with a list of beneficiaries who would be presented with those agreements, as per the specimen provided, in order for them to sign.

246. Mr AJ Venter, as head of Legal Services, was less than impressed. He says he was annoyed as the document was clearly inappropriate for the purpose for which it had been drawn. He had not drawn it and did not know who had drawn it. Amongst others, it was not clear precisely what was being transferred to each individual beneficiary. The agreement just referred to the project being transferred. The same thing, the project, was being transferred to each beneficiary. The beneficiaries were at that stage not in a cooperative and it was not clear how they were to hold rights over the same thing without a structure to do so. The Beneficiary Agreement also contained clauses that individual beneficiaries may dispose of the assets of the project. The prospects of beneficiaries individually being able to dispose of 'the project' was clearly not thought through carefully or at all. It appeared to AJV that DARD wanted to use the Beneficiary Agreement as drawn and drafted by them without any careful thought having been given for its effect. The final advice he gave was that the Agreement was totally inappropriate. DARD never had further discussions with him or LS about the Beneficiary Agreements.

247. From the perspective of Dr, TJ Masiteng, the document titled "Beneficiary Agreement" that Mr Venter spoke about was not drawn by him personally. It was drafted by his internal legal team. He testified that for submission to the national government some agreement with beneficiaries was essential. However, as the document itself shows, it was actually signed by him and Mr Mhlaba – the chairperson of representative committee which never functioned. Dr Masiteng concedes that the document does have certain defects. He says it was cleaned up and certain clauses rectified and that there is now a new agreement in place. (We have not seen this new cleaned -up 'Beneficiary Agreement'. What is more, Mr Mhlaba speaks of signing only this particular Agreement and does not speak of ever signed another version of the Beneficiary Agreement. This

is also the Beneficiary Agreement that Legal Services – per AJV - talks about. He too does not mention a later version of the Beneficiary Agreement and says Legal Services were not again, till his testimony in 2019, approached to settle of review another version.

248. Dr Masiteng says the document that Mr Venter referred to was drafted in 2010 and was used until 2013. This was for almost the entire life of the project if not for its major part. He was not examined thoroughly on the multiple deficiencies of the beneficiary agreements, why they were concluded late and so on and so forth. One would be forgiven for thinking that, as he testified well after 5 PM on this aspect, perhaps the evidence leader had grown fatigued. Or was she so impressed with his elaborate explanation on his role in the deviation and therefore lost any appetite to take up the relevant issues with this Audi witness who dealt with the beneficiary agreement. The evidence leader did not even seem to have had the basic appetite of wanting to see the so-called "cleaned up beneficiary agreement". That appetite was necessary in the light of the earlier critical evidence of AJ Venter on the Beneficiary Agreement.

Special Purpose Vehicle

Roy Jankielsohn

249. Mr Roy Jankielsohn (RJ), a member of the provincial legislature who took a keen interest in the VDP, testified that, as he understood things, a special purpose vehicle was to be registered in which BEE beneficiaries were to hold 51% and Estina 49% shares. The new legal entity to be formed was Mohoma Mobung Dairy Project Pty Ltd. As it will appear elsewhere in this report, other evidence identifies the entity as Zayna Investments Pty Ltd t/a Mohoma Mobung Dairy Project.

250. The project started and took off without beneficiaries being identified. The beneficiaries were only identified – or an attempt was made to identify them – late in 2013. This was

when the national Department of Agriculture Fisheries & Forestry (DAFF) raised some queries. Evidence from RJ shows that beneficiaries were side-lined. However, it appears that for a greater part of the project they were non-existent in the implementation process for the VDP. Though listed at some stage, they were never brought into the project or involved.

251. Funds were pumped into Estina – not the Agri-BEE or special purpose vehicle. The exclusion of beneficiaries is a strange phenomenon because the project would have been set up to benefit them in the first place. They ought to have been identified, registered and even employed on the project from onset. The project was supposed to have been theirs.

252. RJ testifies that there is a climate of fear about the project in the Free State provincial government. People fear to raise questions which are perceived as critical about the VDP. One Moses Chake /Tshake was kidnapped, tortured and murdered. It is alleged that it is because he raised too many questions about the project. Some people lose jobs within the government for speaking out.

253. Speaking at the funeral of a certain HOD, the Premier reportedly stated publicly that the deceased had been poisoned. Surprisingly the Premier had not reported the matter to the police for a proper investigation. RJ subsequently laid a charge against the Premier at Parys police station for failing to report the unnatural death. Some of these incidences might be unrelated to VDP but go to explain an atmosphere in which fear and impunity reign.

AJ Venter

254. Of importance to record, is that at some stage, the evidence does not say exactly when, DARD sought legal advice from Legal Services (LS) section within the Office of the

Premier, which was headed by Mr AJ Venter (AJV), on Beneficiary Agreements. According to AJV the advice was given orally by himself to Dr T JMasiteng on the part of DARD. Dr Masiteng occupied the position of Chief Director District Services and presented to AJV a Beneficiary Agreement which he had already signed. AJV notes that Dr Masiteng was not an accounting officer and therefore had no authority to sign such agreement. LS was simultaneously provided with a list of beneficiaries who, it was assumed, were to be presented with those agreements, as per the specimen provided, in order for them to sign.

255. AJV was less than impressed. He says he was annoyed as the document was clearly inappropriate for the purpose for which it had been drawn. Amongst others, it was not clear precisely what was being transferred by DARD to each individual beneficiary. The agreement just referred to the project being transferred. The same thing, the project, it appeared, was to be transferred to each beneficiary. The beneficiaries were at that stage not in a cooperative and it was not clear how they were to hold rights over the same thing without a structure to do so.

256. The Beneficiary Agreement also contained clauses that individual beneficiaries could dispose of the assets of the project. The prospects of beneficiaries being able to dispose of 'the project' was clearly not thought through. It appeared to AJV that DARD wanted to use the Beneficiary Agreement as drawn and drafted by them without any careful thought having been given for its effect. The final advice he gave was that the Agreement was totally inappropriate. DARD never had further discussions with him or LS about the Beneficiary Agreements.

257. A further observation from a specimen of the Beneficiary Agreement,[22] shows that the Agreement was concluded between DARD on the one hand and an entity, 'Vrede Dairy

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[22] Ref B 1333 – 1347.

Project 2013/14', described as 'Project Beneficiary' represented by a named beneficiary whose details are completed by hand. On the signed Beneficiary Agreement examined the beneficiary is June David Mhlaba. In terms of the signed Agreement, the Department contracts with the Project and not with the Beneficiaries, with individual Beneficiaries mentioned acting only as representative of the actual contracting party, the Project. The identification of contracting parties on the face of the contract makes absolutely no sense. One cannot avoid the impression that there was an attempt to rush these through after the national Department of Agriculture had raised the issue of absence of beneficiaries one year into the project.

Conclusion on Beneficiaries

257.1. Beneficiaries were never included despite the fact that they had been promised to be included in the project;

257.2. Beneficiaries were denied access to the Project (not employed);

257.3. Payments were made in their collective name without their involvement;

257.4. Attempts were only made in Aug 2013 to have them registered when national DAFF demanded;

257.5. The agreements were signed with only one beneficiary and the agreements were legally defective;

257.6. There was no proper structure for their participation. The committee they formed was totally ignored and was never consulted;

257.7. Whatever remains of VDP, it must be returned to them.

257.8. All the 100 beneficiaries ever listed up to Aug 2013 must be given shares in the SPV – which in turn must be given full ownership (under leadership of African Farmers Assoc);

257.9. The FDC should only serve as a service provider and for guidance;

257.10. Local small black farmers are to be given preference both in employment and in contracts on the dairy project.

Deaths / Threats and culture of fear, intolerance and lack of accountability

258. In the wake of the failure of VDP, those who asked propping questions and wanted to know more appear to have been and are probably still being targeted by those who deemed it their duty to cover up and protect those who have to answer. A culture of fear, impunity and lack of accountability emerged as critics were shouted at, victimised, threatened with death. Some were even mysteriously killed after threats of deaths were issued against others. The would-have-been beneficiaries, members of legislature, politicians, businessmen and investigators were not spared.

Beneficiaries

259. As already stated, Mr Ephraim Makhosini Dhlamini and Mr Meshack Mpaleni Ncongwane are respectively the chairperson and deputy chairperson of the local chapter of the African Farmers Association which predates VDP. They were farmers in their own rights albeit at a small scale, before they were invited to become beneficiaries of the VDP. They were leaders of other African small-scale farmers who were looking for ways to pull themselves up with their own shoe straps to become commercially competitive. They became outspoken when they and other beneficiaries were sidestepped and ignored in the project which was promoted as being for their benefit.

It appears that those at the receiving end of their critical enquiries did not take kindly to their assertion of their rights and those of other small-scale they led.

260. The two beneficiary witnesses talk of threats to their lives, particularly that of Mr Dhlamini, and of the killing without perceptible criminal justice consequences of those of beneficiaries who spoke out about the concerns of the beneficiaries, including investigators. Some of those who are known to have died in consequences are:

261. A Mr Philemon Ngwenya – a beneficiary from Vrede. He was killed after being threatened and told that he would die. The first person to threaten him was Thuto Kanye (he, together with Mr Sedibe, work for the DARD – and are believed to be the contact persons for the former MEC). When Thuto uttered the threatening words, it was in [the] open with a number of people present, "even the media was there."

262. There are two people in Warden - who are believed to have been shot and killed by bullets fired from a black vehicle;

263. Mr Moses Chauke, who was coming to investigate VDP was killed even before he reached Bloemfontein. It is not clear where he came from. His life is said to have been threatened by Ms Thuto Kanye before he was actually killed.

264. Investigators from the Hawks visited VDP and held a meeting with beneficiaries on 25 January 2019 and took statements from some. The meeting was held on a Saturday and Sunday. Beneficiaries from Vrede, Warden and Memel were interviewed.

265. Once members of the Hawks had left Vrede, Mr Dhlamini made a phone call to a brigadier at the Hawks. He says he did so because "we were being threatened by death at Vrede." The investigation of these threats seems to have stalled, yielded no results

or simply did not take place. His cries in the face of criminality were never responded to. This will give his attackers courage and an increased sense of impunity.

266. The following are incidences and indications of available evidence about the threats:

267. Mr Dhlamini came into possession of a video in which threats were made on his life and a name or names were mentioned in the video. He sent a copy to a Mr Ntombela at the Hawks.

268. He also provided the video to the station commander at Vrede police station who also listened to it. The latter promised to investigate but at the same time also told Mr Dhlamini to look after himself. (Did the station commander consider that the police might not protect Mr Dhlamini?) As far as Dhlamini is aware no formal file has been opened and certainly no statement was taken from him regarding that complaint.

269. Some people made threats directly to him and in his face. He is therefore in a position to give police further information if there is credible investigation.

270. He says: "In Vrede once you mentioned the dairy project (or the name of Mr Mosebenzi Zwane) you won't sleep in your house."

271. "We had to brave ourselves to come before the Commission and report before everyone is killed," says Mr Dhlamini. He adds: "They utter words like we have to be killed; they have no regard for us."

272. What is frustrating to the beneficiaries, especially to Mr Dhlamini and Mr Ncongwane, is that despite their having reported threats against their lives to Law Enforcement Agencies (SAPS), nothing seems to have been done and they have not been given any feedback. They live and move around with threats to their lives hanging over their heads and in fear for victimisation and other unpleasant consequences for themselves and

their family. Mr Dhlamini has lost trust in SAPS and resorted to taking the defence of his life into his own hands. He has his firearm on him ready to defend himself against any attacks, which he is aware may be fatal.

273. I directed on record that a supplementary affidavit be taken from Mr Dhlamini in which he would be free to mention names and those mentioned would be given rule 3 notices before their names are disclosed before the Commission. Whether this has been done or not the Commission should ensure that credible investigators take the process forward. He has hopes that his coming forward to disclose these to the Commission will lead to effective law enforcement and bring justice in the area.

Threats to other Witnesses – Oversight, Investigators, Executives

Opposition (Jankielsohn & Radebe)

274. Mr Roy Jankielsohn was at the material period a member of the provincial legislature for the Free State province, where he occupied a seat as a member of the DA, a minority party. He focussed attention on the developments around VDP, raised a number of questions orally and in writing in the legislature about it, which in his view were not satisfactorily answered.

275. He did not keep quiet and also reported to the Public Protector. He testified about how the project was reported on in an article in the Mail and Guardian (M&G) of 7 to 13 June 2013. The article in M&G (RJ2) raised a number of concerns about the project which are aptly summarised in a report of the National Treasury Report at para 1.2.1 (and we do not repeat them here). The concerns included allegations that DARD might have flouted treasury rules relating to procurement in entering into a R500m partnership with Estina, which did not seem to have discernible infrastructure, track record and resources.

276. As member of the provincial legislature and the portfolio committee, he was part of a collective charged with oversight over provincial government projects. Vrede Dairy Project was part of their responsibility. He saw it as his function to probe the Project 'trying to get to the bottom of this project from the perspective of the PL whose job it is to do oversight and ensure accountability'.

277. Following the M&G article he raised the issue in Portfolio Committee which then called upon the Department of Agriculture and Rural Development (DARD) to submit a report on the project. The report to the portfolio committee was dated 10 July 2013 and signed by the then MEC for DARD (Ms M Qabathe). It was only from this report that Mr Jankielsohn noticed that the project called 'The Vrede Integrated Dairy Initiative' was presented as part of the Mohoma Mobung initiative. However as already mentioned the SOPA of the year before had already made the link.

278. Following the unsatisfactory responses on issues about the VDP he speaks of a climate of fear that grabbed the provincial government. He says there is a climate of fear over the project in the Free State provincial government. One Moses Chake /Tshake / Chauke was kidnapped, tortured and murdered. It is alleged that it is because he raised too many questions about the project. Some people lose jobs within the government for speaking out.

279. Speaking at the funeral of a certain HOD, the Premier Ace Magashule reportedly stated publicly that the deceased had been poisoned. Surprisingly the Premier had not reported the matter to the police for proper investigation. Mr Jankielsohn subsequently laid a charge against the Premier at Parys police station for failing to report the unnatural death. Some of these incidences might be unrelated to VDP but go to explain an atmosphere in which fear and impunity reign.

Legislative oversight frustrated

280. Mr Jankielsohn also speaks of a culture and climate in which the members of the ruling party in the legislature protect fellow comrades in the executive and thus frustrating the oversight role of the provincial legislature over the provincial executive.

281. In this context, Mr Jankielsohn testified about the refusal first by MEC for Agriculture, Ms Mamiki Qabathe, to answer questions in the legislature about the project. When later Ms Qabathe was the speaker and Mr M Zwane was the MEC, the latter also refused to answer questions and the new speaker protected him. The new speaker of the legislature even failed to answer written complaints directed to her by Mr Jankielsohn. This, if true, is clearly an incident where the provincial legislature, assisted by the speaker and the MEC, failed to function - that is, provide effective oversight - and thus enabled state capture to grow unchecked. They protected each other from any probe on the VDP. Mr Jankielsohn calls it "musical chairs".

Local Council

282. Mr Albert Doctor Radebe is a member of Municipal Council for Phumelela Municipality where he represents the minority DA party in a council ruled by the ANC majority. He was in the council when DARD made a presentation to the council to secure from the municipality the use of land owned by the municipality. He and other DA members on the council were sceptical about the presentation and decided not to take part in the decision which eventually agreed to make land available for VDP as requested.

283. He thereafter learnt that there were several dead cattle on the farm which had been dumped next to a stream which provided drinking water to the town of Vrede. He went to the area and having confirmed the facts reported this to the press. He also informed

the environmental authorities who ordered owners of the farm to remove the carcasses and bury them at an appropriate place on the farm. This was done.

284. In his view, "the people who were in charge of the operations at the dairy farm knew nothing about farming dairy cows." He sees this as the reason for the cattle dying on the farm. As a result of his speaking out critically about VDP and the problems that emerged, he found himself targeted and victimised.

285. After publication of the deadly state of affairs on the farm, those running the farm placed security guards at the entrance gate and prevented the public from accessing it.

286. As a result of his activities, he became a target of the people he calls "a group of enforcers employed by the Department of Agriculture in Vrede", whom he names as Mr Thuto Khanye, Mr Khulisa Sibeko, Mr Bongani Radebe, and Mr Dingaan Dinga. He says 'these individuals eventually became well known as enforcers of Mr Zwane's policies in and around Vrede and more particularly relating to the Vrede Dairy Project.' Indeed, evidence from other witnesses have identified the first mentioned two in similar vein.

287. Mr Radebe was physically attacked by the above-mentioned group, who assaulted him with fists and pepper spray because he was against the position of the ruling party on the project.

288. He attempted to report the attack to the SAPS in Vrede but officials at the police station, including the new station commander, 'Mr Xhasa', informed him that he was not allowed to open a case since this related to political activities. He was to wait for SAPS members from Bethlehem police services for the purposes of opening a case. However, no one from SAPS ever contacted him nor has he ever been provided with a case number. This

underscores the need for independent effective investigation under new leadership from outside Vrede and possibly outside the Province.

289. He was further victimised for his position on the VDP as a result of which he was continually refused access to the State Vet in the area. This resulted in a situation where his cattle had a disease that was wreaking havoc in his herd. He lost approximately 45 heads of cattle as a result. But he was eventually able to obtain a contact numbers for the state vet who helped him immediately, diagnosed the disease and stopped the unnecessary deaths of his stock.

290. The theme of collaboration of state law enforcement officers with corruption and state capture and the consequent failure to enforce the law emerges here again. Allegations of members of the ruling party bulldozing their way through council or government structures to facilitate and cover corruption also appear. It also becomes difficult not to notice the recurrence in allegations that Mr Thuto and Mr Sibeko were acting as personal enforcers or foot soldiers for MEC Zwane in Vrede. This ought not to be left without proper investigations.

Dumisani Cele - Investigator

291. That the climate of fear and death threats around VDP is a fact and not fiction, confronted the National Treasury investigator, Mr Dumisani Cele in August 2013. He was at the time a Director: Specialised Audit Services at the Department of National Treasury. He previously attested to an affidavit in criminal investigation into the VDP, under CAS 200/07/2017. The affidavit was used in an application launched by NPA in terms of section 38 of the Prevention of Organised Crime Act, 121 of 1998 in the Free State High Court.

292. His testimony is another confirmation of death threat and a climate of fear around the VDP. On 22 August 2013 he made an appointment with the HOD of DARD in the Free State provincial government, Mr MP Thabethe. The object of his meeting with the HOD was to deliver a letter the subject of which was "request for information pertaining to allegations of irregular engagement of Estina /Para for establishment of integrated dairy in Vrede." When making the appointment it became clear that there was resistance from the Department as a result of which he took the precaution of having the same letter, which he had personally signed on behalf of his supervisor, signed by the then Acting Accountant General at National Treasury.

293. On arrival at the offices of the HOD and while walking in the passage with the CFO towards the office of the HOD, the CFO spoke to him in Sesotho language and said "*Dumisani,' Basotho ba tla u bolaea.*" The free translation is 'Dumisani the Basotho people are going to kill you.' A clear and express threat of death against Mr Cele. He says when he served the letter on him, the HOD questioned his powers to investigate DARD. His attempts to explain that he was exercising powers vested in the National Treasury through the PFMA as there was a complaint, did not assist. He pleaded that he be provided with the documents on the VDP in the meantime but this failed as a result of which he eventually went back without any documents and had to come back on another day.

294. After investigation he found that supply chain management procedures were not followed. The requirements for a deviation stipulated by the prescripts were also not followed. "The accounting officer appeared to have abused his powers when appointing Estina."

295. Arising from his experience, and over and above any other conclusions arising from his investigations, the least that the Commission is to urge that the conclusions identified

in the affidavit of Dumisani Cele of 3 October 2017 should be followed vigorously, not only because they are criminal, as he pointed out, but also because the Commission has a responsibility in terms of its own terms of reference to action that in order to dislodge practices of state capture.

296. The particular area on which the Commission must continue to report on, as there is no evidence of pending processes that are being followed, is the aspect of threats to life. This is because it is possible that NPA may, based on that affidavit, see it as an isolated incident. However, this Commission has further evidence from Dhlamini, Ncongwane and Albert Doctor Radebe that suggest strongly that the culture and practice is not isolated. It is accumulated, and if not curbed, will nurture and support the crippling of state institutions or the seizure of the control of criminal and unconstitutional activities. It is more than crime. It is state capture.

297. The Commission must therefore ensure that all deaths, death threats, acts of violence and threats of violence around the VDP and made in this Report are investigated by an independent team under independent leadership from outside the Free State. The spectre of vigilantism committed with impunity must be nipped in the bud. Investigations must follow the chain upward to include those in whose name or at the behest of whom these acts are being perpetrated. No stone should be left unturned in uprooting lawlessness and impunity in the Province. The absence of effective law enforcement feeds and protects state capture. Complainants must be informed directly about the outcome of their complaints if public confidence in the justice system is to be restored.

Ms Elizabeth Cornelia Rockman - Executive

298. The thorough independent police investigation that the Commission must call for must include the robbery which took place at the house of Ms Elizabeth Cornelia Rockman, the former DG in the Office of the Premier and later MEC Finance in the province, which

took place in the early evening of 3 February 2018 at her home in Bloemfontein. The robbers held had two sons at gunpoint and stole her laptop and two small safes, ignoring other valuables in the house. The ostensible target of the armed robbery appears to have been the information which was possibly stored in her laptop as well as the two small safes.

299. The fact that no one was arrested for that robbery must be a matter of concern. The robbery remains unresolved. The investigation musts look into the type of security, if any, provided for her at her house at the time given her senior position in the provincial government. If she had no security at all at her house, that aspect too must be of interest to the investigators.

300. Responsible law enforcement agencies and political leadership of the province would ordinarily not be expected to rest until such high-profile crime has been resolved. Their roles and responses in the aftermath of that robbery should be covered by the independent thorough investigation. The investigators assigned to the case is under investigation must report on why they have not resolved the reported crimes and provide satisfactory account of their investigations demonstrating how comprehensive same was.

A summary of the evidence of selected witnesses

Mr R Jankielsohn ("Mr Jankielsohn")

301. Mr Jankielsohn was the first witness called to give evidence on the Vrede Dairy Project. At the time he gave evidence he was a member of the Democratic Alliance the Free State Provincial Legislature and had also occupied those positions during the period that the Vrede Dairy Project was conceived, established, and implemented. His evidence gave a contextual backdrop to all the evidence that was ultimately traversed

during the hearings on the Vrede Dairy Project. Other witnesses extended the scope of the factual matrix set out by Mr Jankielsohn.

302. He testified that he had also been a member of the Portfolio Committee on Agriculture and Rural Development. In addition, in his capacity as a member of the Legislature he was involved in oversight over Provincial Government projects, which included the Vrede Dairy Project. The function of this Committee was also to hold the executive to account.

303. Mr Jankielsohn confirmed that he had first heard about the promotion of the Mohoma Mobung Agri-processing initiative/strategy in the Free State Province during a meeting held with Mr Mosebenzi Zwane on 17 November 2011 at the Glen Agricultural College. He supported the initiative in principle because, in his view, it was important for the Free State to create additional employment opportunities for the local population and to stimulate local economic development in the province. It was only later that he came to realise that the agri-processing strategy named Mohoma Mobung would evolve into a company named "Mohoma Mobung". This company was connected to the Vrede Dairy Project[23].

304. With regards to the Vrede Dairy Project, Mr Jankielsohn testified that he understood that this dairy project would be part of the Mohoma Mobung initiative and that, under this umbrella concept, it would produce milk that would be processed at a processing plant built on the Vrede dairy farm. The products from this processing plant would then be sold locally, nationally and abroad.

305. In addition, the Premier, Mr Magashule, mentioned the Vrede Dairy Project in his State of the Province address in February 2012. It was mentioned as one of a number of

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[23] Record – Transcript 22 July 2019 day 137 p 31-32

projects in which the Provincial Government would be involved. In this context, the establishment of a dairy project in 2012 did not raise alarm bells[24].

306. However, when the Mail & Guardian newspaper published an article[25] in 2013 about what they had uncovered regarding the Vrede Dairy Farm and the involvement of the Gupta family in the establishment and implementation of the dairy project, he became concerned. His concerns related to the irregularities that appeared to have been committed. This article by the Mail & Guardian raised alarms bells, and he decided to investigate this matter.

307. He said that he requested a report from the department, i.e. DARD. Two responses were obtained from the then MEC for the DARD, Ms M Qabathe. The first report to the Chairperson of the Portfolio Committee on Agriculture and Rural Development is dated 10 July 2013.[26] It gives an executive summary of the setting up, objectives, and benefits of the dairy project. The second report that was presented to the Legislature by the then MEC, Ms Qabathe, dated 13 November 2013 indicated, among others, the involvement of Estina in this project.[27]

308. That report also recorded that a company called Estina (Pty) Ltd had been appointed to operate the dairy project. This was also the first time that he found out that the Vrede Dairy Project was a flagship project of Government. The presentation also explained that the project would be implemented in phases, and that the phased investment by the partners in the project would be based on a projected investment of R570 million over a period of 5 years.

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[24] Record – Transcript 22 July 2019 day 137 p 33- 34

[25] Mail and Guardian "'Gupta' dairy project milks Free State coffers" 7 June 2013 available at https://mg.co.za/article/2013-06-07-gupta-dairy-project-milks-free-state-coffers/.

[26] Exhibit HH 1.1 pages 45-49.

[27] Exhibit HH 1.1 pages 176-181.

309. The first phase of implementation required a grant of R114 million from the Department of Agriculture and Rural Development (DARD), whose total commitment over a three - year period would be R342 million. The second phase of implementation was premised on an investment of R228 million by Estina which funding was to be used to build and establish the processing plant in the second year of implementation. Mr Jankielsohn testified that it later transpired that Estina did not meet its obligation to invest R228 million to build and establish the processing plant.

310. Mr Jankielsohn regarded the response of MEC Qabathe as most unsatisfactory. He found that Estina had been appointed as both an implementing agent and a managing agent of the project. In his view, the appointment of Estina as both an implementing and managing agent was highly irregular. He decided to visit the dairy farm. He also lodged a complaint with the Public Protector, the first in 2013 and the second in 2014.

311. If regard is had to the emails that were sent to the Office of the Public Protector in Bloemfontein[28], it is evident that the main complaint was that the department had entered into an agreement with a private company, Estina without following due process. The terms of engagement also appeared to be unjustifiable and prejudicial to the department and intended beneficiaries.

312. According to the department, this agreement was subject to a confidentiality clause. The terms of the agreement allocated 49% of the shares of the partnership agreement entered into by the parties to Estina and its investment partner, Paras. The investment by Estina into the partnership with the department allocated a 49% shareholding to Estina in return for a R228 million investment by Estina/Paras. The beneficiaries of the project were to obtain a 51% share of the project for an investment of R342 million by

[28] These emails were addressed to Adv Erika Cilliers of the Bloemfontein Office of the Public Protector. They are also annexed to the review application that the Democratic Alliance launched against the Public Protector under Case No. 1131/2018

DARD. That meant that, though Estina only made an investment of 40% of the projected costs into the project, it received a shareholding of 49%.

313. This complaint is recorded in the first complaint dated 12 September 2013. In March 2014 Mr Jankielsohn also raised among others the issue of the inflated cost of items purchased, services rendered by service providers and equipment procured. He noted that the necessary environmental assessments had not been complied with and that there had been reports of the cattle purchased for the project dying on the farm.

314. In 2016 he reregistered his complaints by way of a letter dated 10 May 2016. In addition to the issues raised in his previous letters, Mr Jankielsohn further noted his concerns about:

314.1. the cancellation of the agreement with Estina including Estina's failure to account for its role in the project,

314.2. the Free State Development Corporation (FDC) taking over the project,

314.3. the fact that the local beneficiaries had not been formally included in the project at inception, that the first tranche of funds was transferred to Estina prior to the finalisation of a list of beneficiaries, and that, up to that stage, the beneficiaries continued to be side-lined by the department,

314.4. the lack of accountability by Estina and/or Paras.

314.5. the investigation of the project by National Treasury, and

314.6. the intransigence of the MEC for DARD with regard to giving a full response to questions raised in the Legislature about the project.

315. Mr Jankielsohn testified that he raised his concern with the manner in which the agreement with Estina had been cancelled, in particular the additional funds that were paid to Estina on the termination of that agreement. He expressed the view that those payments were not due to Estina.

316. In addition, he raised his concern with the appointment of the Free State Development Corporation ("FDC") and the payments made to this entity as he was of the view the FDC did not have the capacity or competence to operate a dairy farm.

317. To a large degree, little regard was had to Mr Jankielsohn's complaints and concerns by both the MEC for DARD and the officials at DARD.

Dr Takisi J Masiteng

318. Dr Takisi J Masiteng held the position of Chief Director, District Services, when the agreement between the department and Estina was signed. He was appointed to this position in April 2012, having previously served in various capacities in the Department of Agriculture. At the time that he appeared before the Commission he was the Acting Head of DARD, having been appointed to this position on 24 December 2018.

319. He confirmed that he was cited as a party in the civil matter brought by the Asset Forfeiture Unit of the National Prosecuting Authority.

320. He explained the department's organogram, confirming that he and the CFO reported to Mr P Thabethe who was the HOD of the department. In 2012/2013 the political head and Executive Authority of the department was Mr Mosebenzi Zwane. Other important officials who had some dealings with the Vrede Dairy Project were Ms Alta Meyer who was an Acting District Director and Project Co-ordinator responsible in part for

communicating with beneficiaries and Mr George Madiba who was the District Director for the Thabo Mofutsanyane District.

321. The other relevant officials who played a role in the dairy farm were extension officers known as food security officers or "foot soldiers". One of these was Mr Jimmy Pashell. Last were officials contracted to the department, one of these being a Mr Thuto Kganye, another being Mr Khuliza Sibeko. Dr Masiteng confirmed that all the appointments in the department were the responsibility of the HOD unless the task was delegated to some other official[29].

322. Dr Masiteng stated that District Services would normally only start working on a project once a completion certificate had been issued. However, with the Vrede Dairy Project, because an implementing agent was appointed, District Services did not have much of a role to play, except to interact with beneficiaries and provide professional services. These professional services included officials with competencies in engineering, economics and research[30].

323. The Chief Financial Officer was responsible for the financial affairs of the department. On being asked about the relationship between the Executive Authority and the HOD, Dr Masiteng explained that the PFMA allowed the Executive Authority to give an instruction to the HOD concerning financial commitments, but such instruction must be in writing. If the instruction is likely to result in irregular expenditure, it must be in writing and be sent to both the Provincial and National Treasury. In other words, the instruction had to be lawful, irrespective of how senior or junior the official is to whom the instruction is given[31].

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[29] Record – Transcript 24 July 2019 day 139 p 95 - 100

[30] Record – Transcript 24 July 2019 day 139 p 106 - 107

[31] Record – Transcript 24 July 2019 day 139 p 111 - 116

324. He drew a distinction however between the case of an instruction given by the HOD where the latter took on all the risk emanating from the instruction and accepted the consequences of an instruction given to a subordinate. For purposes of illustrating the point, reference was made to the submissions on the Vrede Dairy Project that were made to the Executive Council of the Free State Provincial Government (Exco). That is the provincial "cabinet" led by the Premier.

325. In this regard, the first submission that the department prepared was dated 26 May 2012.[32] That submission sought to obtain the approval of the HOD relative to the proposal from Estina on the Vrede Dairy Project, and permission to enter into an agreement with Estina to implement an integrated dairy project at Vrede.[33]

326. Dr Masiteng confirmed that he did not draft or sign that submission as he was travelling abroad at the time. He also confirmed that he was not consulted on the content of the submission prior to traveling abroad.

327. In the context of this submission and the submission that was prepared and signed by Dr Masiteng on 5 July 2012, a discussion ensued on when an official is a referee and a player. I put the proposition to Dr Masiteng that the fact of preparing the submission meant that the official was associating him or herself with the content thereof. In debating this proposition Dr Masiteng expressed the view that his role was limited, given that everything with financial implications that was submitted to the HOD had to first be scrutinised by the CFO for her recommendation, then considered and approved by the HOD. He, however, ultimately agreed with the proposition that in the given

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[32] Exhibit HH 5.1 pages 87-89.

[33] Record – Transcript 24 July 2019 day 139 p 119 - 120

circumstances his expressed input into the submission was not inconsequential in that he could have differed with his superiors[34].

328. Dr Masiteng also explained that he compiled and signed the submission of 5 July 2012 based on the supporting documentation that the HOD had given to him. This included the agreement between Estina and DARD, the Estina Company Profile, the Project Proposal of 15 May 2012 and the EXCO resolution of 13 June 2012. On instructing him to prepare the deviation submission, the HOD had made it clear to him that he was deviating from procurement procedures, explaining that Estina was bringing money into the project and that EXCO had approved their participation in the project[35].

329. The difference between the submission of 26 May 2012 and that of 5 July 2012 was that the content of the latter submission made provision for a deviation from procurement procedures. Dr Masiteng testified that the inclusion of this deviation was specifically requested by the HOD[36]. He also understood that the justification for the deviation was that EXCO had approved the implementation of the dairy project as indicated by the EXCO resolution of 13 June 2012.

330. Dr Masiteng further stated that the CFO could have refused to recommend the approval of the submission he prepared, especially as she was the custodian of the supply chain management policy (SCM Policy). In his view, it was the duty of the CFO to discuss the regularity of the deviation with the HOD[37]. Later in his testimony Dr Masiteng

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[34] Record– Transcript 24 July 2019 day 139 p 123-125

[35] Record – Transcript 24 July 2019 day 139 p 130- 137

[36] Record – Transcript 24 July 2019 day 139 p139-141

[37] Record – Transcript 24 July 2019 day 139 p 142

reiterated that he was simply the compiler of the submission. He said that he had no input whatsoever on the content of the submission made[38].

331. The next aspect of Dr Masiteng's evidence related to the location of the Vrede Dairy Project within the Mohuma Mobung strategy. He explained that this dairy project was one of the projects under the Mohuma Mobung strategy[39].

332. In his view, the voted allocation for Mohuma Mobung was not spent exclusively on the Vrede Dairy Project. Those funds supported the dairy project as one of several projects under the strategy.

333. Dr Masiteng next dealt with the source and conditions of the Comprehensive Agricultural Support Program ("CASP") funding, explaining that the province received conditional grants every year. Those grants came from the National Department of Agriculture. He explained that a presentation was made to the National Assessment Panel ("NAP") of Department of Agriculture Forestry and Fisheries (DAFF) on 30 January 2013. In the normal course, once the DAFF approved the projects presented to them, then the beneficiaries' agreements were signed. He indicated that, after lodging their application for conditional funding with DAFF, the total amount in conditional grants received from CASP was R206 million. Of this, R8.5 million was for land care, R57 million was for Ele Maletse which was another conditional grant and the balance was for DARD to allocate. The amount set aside for the Vrede Dairy Project was R53 million.

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[38] Record – Transcript 24 July 2019 day 139 p 163

[39] Record – Transcript 24 July 2019 day 139 p 146- 147

334. Given that CASP was only providing R53 million for the Vrede Dairy Project, the balance of the R114 million required for the dairy project was to be obtained from the Provincial allocation of the voted funds[40].

335. With regard to the beneficiaries, he stated that he was not part of the initial identification of beneficiaries, and he was not present when meetings with beneficiaries were held. His first meeting with the beneficiaries was in 2017.[41]

336. Dr Masiteng's views of Estina as an implementing agent were that Estina was the project manager in charge of the implementation of the project from inception to completion. This role included the appointment of service providers and the purchase or procurement of material. Once the project was completed, a completion certificate would be issued.

337. In this instance Estina was appointed to do the feasibility study, the business plan, resolve any water issues, and so forth[42]. When asked by the whether it was appropriate that Estina was both an implementing agent and beneficiary of the project, Dr Masiteng's said that this was not ideal.[43]

338. He also confirmed that he had not seen any document in the custody or possession of the department, including the Memorandum of Understanding between Estina and Paras that showed that Paras had invested in this project[44]. The Memorandum of Understanding ("MOU") between Estina and Paras was signed in April 2012, and it recorded that its term was for 1 year. It further recorded that the parties were entering

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[40] Record – Transcript 24 July 2019 day 139 p 154 - 159

[41] Record – Transcript 24 July 2019 day 139 p 164

[42] Record – Transcript 24 July 2019 day 139 p 166

[43] Record – Transcript 24 July 2019 day 139 p 165 - 166

[44] Record – Transcript 24 July 2019 day 139 p 170 - 172

into an association relative to a dairy project in the Free State province as opposed to a partnership [45].

339. Dr Masiteng testified that he was not aware of any background checks that had been done on Paras nor was he involved in the selection or payment of Estina. He was also not aware that Mr P Thabethe, the Head of Department had gone to India to speak with Paras, as his involvement in this project was triggered by the deviation memorandum that the HOD had instructed him to prepare.

340. In answer to a question about whether there was justification to give this project to Estina, Dr Masiteng expressed the view that, because Estina was investing funds in the project and partnering with a more experienced strategic partner, their appointment was justified[46].

341. With the departure of Estina and Paras, the expertise that the latter was expected to bring to the project also left. Dr Masiteng confirmed that the Free State Development Corporation (FDC) was appointed to operate the dairy farm and bring a business element into those operations. In addition, the project manager of the dairy project, Mr CP Prasad, remained to work with the FDC. In his view, the appointment of the FDC was practical and appropriate.

Ms Anna Fourie ("Ms Fourie")

342. Ms Fourie was employed by the Free State Provincial government over a period of 38 years. During that period, she had worked in various capacities in the Provincial Treasury, taking on responsibilities in all financial administration components, including salary administration, bookkeeping, expenditure, revenue, debtors and creditors

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[45] Record – Transcript 24 July 2019 day 139 p 173 - 178

[46] Record – Transcript 24 July 2019 day 139 p 180 - 182

control, financial systems, risk management, internal audit and municipal finance management.

343. She explained that there were various components that made up the Provincial Treasury. These components were available to support departments in their management of finances, among others. She confirmed that the Provincial Treasury's broad mandate was that as the custodian of state resources, it controlled and monitored the expenditure of those resources[47].

344. Ms Fourie explained that sections 20 to 25 of the PFMA provided the legal framework for the work of the Provincial Treasury. All revenue collected by provincial departments was paid into the Provincial Revenue Fund. However, funding for the Provincial Legislature and for public entities was paid into their own bank accounts. Ms Fourie also explained that the equitable share of revenue allocated to a province is transferred by way of the Division of Revenue Act ("DORA"). These funds can be utilised at the discretion of a department, in line with its business plans and budgets. On the other hand, conditional grants, which are also published in DORA, are made up of funds appropriated made available with certain conditions. These conditional grants are disbursed by national departments.

345. With respect to her interactions on the Vrede Dairy Project, Ms Fourie testified that on 15 June 2012 she was approached by the Head of the Provincial Treasury, Mr Kgomongwe, to assist in doing an assessment on a payment that was urgently required by the Department of Agriculture. Her understanding was that this payment had to be made on the same day. The documentation supporting this request was with the CFO of the Department of Agriculture, Ms S Dhlamini. Ms Fourie stated that she and two other officials went to the Provincial Treasury office with the CFO. It was only when she

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[47] Record – Transcript 12 August 2019 day 142 p 10 - 11

looked at the documentation that she realised that the amount requested was R30 million, which was a substantial amount.

346. The requested funding related to an agreement between the Department of Agriculture and Estina. That agreement had been signed on the 5th and 7th June 2012. When she looked for the financial report which would indicate the budget and expenditure already incurred and committed, she could not find it. That report was required to confirm that funds were available. The CFO did not have that report in her possession. Ms Fourie then read through the agreement because that was the reason the funds were requested. She realised that no tender process had been followed for the appointment of Estina.

347. In addition, Treasury Regulation 16A 6.4 had not been complied with. That regulation provides that a department may deviate from the procurement processes *but there must be a submission approved by the relevant accounting officer of the department and then the reason for the deviation must be stated in that submission.* No such submission had been made and the CFO could not provide it when asked to do so.

348. Ms Dhlamini did not explain to Ms Fourie why such a large sum of money was required. She simply indicated that it was required to make an upfront payment[48]. Ms Fourie then explained the process for requisitioning funds from Provincial Treasury[49]. There was a weekly mechanism in place for drawing funds that were available to a department. She said that the Department of Agriculture ought to have resorted to this process to requisition funds from Provincial Treasury.

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[48] Record – Transcript 12 August 2019 day 142 p 43-45

[49] Record – Transcript 12 August 2019 day 142 p 46-47

349. Seeing that the procurement processes had not been complied with, and in the absence of a deviation approval, Ms Fourie advised that, if the payment was made that would result in irregular expenditure, particularly as she could not prove that the funding was provided for, was available and was appropriated. If the funds were not available, it could result in unauthorised expenditure.

350. When she asked whether a feasibility study had been executed for the implementation of the project that too was not available. The agreement with Estina had various other weaknesses including lacking clarity on timeframes for deliverables. In addition, there was no indication that the R342 million that the department was committed to providing was available over the MTEF period as appropriated. She also verified that, as structured, the agreement with Estina could not be terminated even if there were no funds made available in the future. That is a feature which was also present in the agreements that TNA Media insisted upon concluding with Transnet and Eskom in respect of certain transactions as will be reflected in Vol I in Part 1 of this Commission's Report.

351. Given these uncertainties, she did not believe that the R30 million could be paid. However, the CFO indicated that she needed the funds immediately as these had to be paid over to Estina the following day. The CFO also stressed that payment had to be made as the recipients were coming from abroad[50].

352. Ms Fourie stated that she then suggested that the provisions of section 64 of the PFMA be applied, i.e., the MEC for the Provincial Treasury should be informed and requested to give an instruction in writing that the R30 million should be paid. She also indicated that she could not issue a handwritten cheque as requested, principally because there was a substantive process that had to be followed for a handwritten cheque to be

[50] Record– Transcript 12 August 2019 day 142 p 24-31

issued. At the same time, she checked the bank account to see if the Department of Agriculture had R30 million in its account. She found that the department had less than R6 million available to it[51]. She indicated to the CFO that, with the CEO's consent, R5 million could be made available to the Department of Agriculture. The CFO declined that offer[52].

353. She further explained that, even if funds were to be drawn from the Provincial Treasury's investment account, due process had to be followed. She briefed the CEO, Mr Kgomongwe, on these developments, and undertook to give him a fuller briefing on Monday 18 June 2012, which she then did. The CEO also gave her permission to consult the State Law Advisors. On consulting the State Law Advisors in the Premier's office, the latter agreed with her assessment.

354. Ms Fourie also pointed out that in terms of Treasury Regulation 15(10) a department can provide for the advance payment of funds if the agreement between it and the service provider so allows. She highlighted, however, that given that one of the responsibilities of Accounting Officers is for them to ensure the efficient utilisation of state resources, it was particularly important for the Accounting Officer to understand the project costing of a project prior to advancing funds to a service provider.

355. With respect to the expenditure of funds, Ms Fourie confirmed that, prior to the Department of Agriculture committing to pay Estina R114 million per financial year over a three-year period, in terms of sections 38, 39, 40 and 81 of the PFMA there ought to have been confirmation that those funds would be available[53]. In terms of section 81 of

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[51] Record – Transcript 12 August 2019 day 142 p 33-36

[52] Record– Transcript 12 August 2019 day 142 p 37

[53] Record– Transcript 12 August 2019 day 142 p 49

the PFMA, failure to comply with these provisions could result in a charge of financial misconduct being preferred.

356. Sections 38, 39 and 40 of the PFMA read as follows respectively:

> "38. General responsibilities of accounting officers—
>
> (1) The accounting officer for a department, trading entity or constitutional institution—
>
> (a) must ensure that that department, trading entity or constitutional institution has and maintains—
>
> (i) effective, efficient and transparent systems of financial and risk management and internal control;
>
> (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;
>
> (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
>
> (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;
>
> (b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;
>
> (c) must take effective and appropriate steps to—
>
> (i) collect all money due to the department, trading entity or constitutional institution;
>
> (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and
>
> (iii) manage available working capital efficiently and economically;
>
> (d) is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;
>
> (e) must comply with any tax, levy, duty, pension and audit commitments as may be required by legislation;
>
> (f) must settle all contractual obligations and pay all money owing, including inter-governmental claims, within the prescribed or agreed period;

(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board;

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;

(i) when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with;

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

(k) must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person;

(l) must take into account all relevant financial considerations, including issues of propriety, regularity and value for money, when policy proposals affecting the accounting officer's responsibilities are considered, and when necessary, bring those considerations to the attention of the responsible executive authority;

(m) must promptly consult and seek the prior written consent of the National Treasury on any new entity which the department or constitutional institution intends to establish or in the establishment of which it took the initiative; and

(n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.

39. Accounting officers' responsibilities relating to budgetary control. —

(1) The accounting officer for a department is responsible for ensuring that—

(a) expenditure of that department is in accordance with the vote of the department and the main divisions within the vote; and

(b) effective and appropriate steps are taken to prevent unauthorised expenditure.

(2) An accounting officer, for the purposes of subsection (1), must—

(a) take effective and appropriate steps to prevent any overspending of the vote of the department or a main division within the vote;

(b) report to the executive authority and the relevant treasury any impending—

(i) under collection of revenue due;

(ii) shortfalls in budgeted revenue; and

(iii) overspending of the department's vote or a main division within the vote; and

(c) comply with any remedial measures imposed by the relevant treasury in terms of this Act to prevent overspending of the vote or a main division within the vote.

40. Accounting officers' reporting responsibilities—

(1) The accounting officer for a department, trading entity or constitutional institution—

(a) must keep full and proper records of the financial affairs of the department, trading entity or constitutional institution in accordance with any prescribed norms and standards;

(b) must prepare financial statements for each financial year in accordance with generally recognized accounting practice;

(c) must submit those financial statements within two months after the end of the financial year to—

(i) the Auditor-General for auditing; and

(ii) the relevant treasury to enable that treasury to prepare consolidated financial statements in terms of section 8 or 19;

(d) must submit within five months of the end of a financial year to the relevant treasury and, in the case of a department or trading entity, also to the executive authority responsible for that department or trading entity—

(i) an annual report on the activities of that department, trading entity or constitutional institution during that financial year;

(ii) the financial statements for that financial year after those statements have been audited; and

(iii) the Auditor-General's report on those statements;

(e) must, in the case of a constitutional institution, submit to Parliament that institution's annual report and financial statements referred to in paragraph (d), and the Auditor-General's report on those statements, within one month after the accounting officer received the Auditor-General's audit report; and

(f) is responsible for the submission by the department or constitutional institution of all reports, returns, notices and other information to Parliament, the relevant provincial legislature, an executive authority, the relevant treasury or the Auditor-General, as may be required by this Act.

(2) The Auditor-General must audit the financial statements referred to in subsection (1) (b) and submit an audit report on those statements to the accounting officer within two months of receipt of the statements.

(3) The annual report and audited financial statements referred to in subsection (1) (d) must—

(a) fairly present the state of affairs of the department, trading entity or constitutional institution, its business, its financial results, its performance against predetermined objectives and its financial position as at the end of the financial year concerned; and

(b) include particulars of—

(i) any material losses through criminal conduct, and any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure, that occurred during the financial year;

(ii) any criminal or disciplinary steps taken as a result of such losses, unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure;

(iii) any material losses recovered or written off; and

(iv) any other matters that may be prescribed.

(4) The accounting officer of a department must—

(a) each year before the beginning of a financial year provide the relevant treasury in the prescribed format with a breakdown per month of the anticipated revenue and expenditure of that department for that financial year;

(b) each month submit information in the prescribed format on actual revenue and expenditure for the preceding month and the amounts anticipated for that month in terms of paragraph (a); and

(c) within 15 days of the end of each month submit to the relevant treasury and the executive authority responsible for that department—

(i) the information for that month;

(ii) a projection of expected expenditure and revenue collection for the remainder of the current financial year; and

(iii) when necessary, an explanation of any material variances and a summary of the steps that are taken to ensure that the projected expenditure and revenue remain within budget.

(5) If an accounting officer is unable to comply with any of the responsibilities determined for accounting officers in this Part, the accounting officer must promptly report the inability, together with reasons, to the relevant executive authority and treasury."

357. She outlined both the statutory responsibilities of the Accounting Officer and those of the CFO of a department. She further explained that ultimately it was the responsibility of the Executive Authority to investigate any non-compliance by an Accounting Officer. She pointed to the services provided by the Sustainable Resource Management Chief Directorate, which was in the Provincial Treasury. It was a resource available to departments.

358. With regard to the FDC, Ms Fourie indicated that she was involved in a discussion on the manner of reporting the assets that the FDC took over when it was appointed to take over the management of the Vrede Dairy Project. Her understanding was that the assets were managed by the FDC but belonged to the DARD until such time that these were donated or transferred to the beneficiaries. In the result, these assets ought to have been reported in the financial statements of the DARD. Neither the FDC nor the DARD reported these assets in their financial statements. Her view was that, if the department provided the funding, the assets belonged to it and ought to be reported in

its financial statements, even if the dairy was still in the process of being completed[54]. Similarly, the responsibility for securing the assets lay with the department.

359. Ms Fourie next sought to assist by explaining how transfer payments were processed. She testified that around 2014/2015, 2015/2016 the previous reporting system, the Modified Cash Standard ("MCS"), was amended by the Office of the Accountant - General. This amendment had national reach. The services of implementing agents were introduced because direct payments to beneficiaries were often not used for the intended purpose. The intention was that the implementing agent would use the funds transferred to it for services intended for the beneficiary more optimally.

360. The amendment to the Modified Cash Standard led to confusion on how to classify expenditure for goods and services. A May 2018 Circular 21 was issued by National Treasury. This circular ultimately resolved the problem by defining what constituted payment for goods and services and when transfer payments could be utilised.

361. She emphasised, though, that the way transfer payments were used prior to the clarification brought by Circular 21 in 2018 could not and should not be regarded as financial misconduct because there was great confusion on the appropriate manner of reporting transfer payments. However, where there was a failure to have effective control over assets, this could be regarded as some form of misconduct[55].

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[54] Record – Transcript 12 August 2019 day 142 p 56-58

[55] Record – Transcript 12 August 2019 day 142 p 59-69

Mr Albertus Johannes Venter ("Mr Venter")

362. Mr Venter was the Chief State Law Advisor in the Office of the Premier in the Free State. The post he occupied dealt with human resource management, skills development, legal services, information technology and communication services.[56]

363. Mr Venter confirmed that Mr Ashok Narayana was appointed as the Premier's Special Advisor in March 2012.[57]

364. He further testified that on the 29 February 2012, Mr Narayana travelled to India with Mr Thabethe. The trip to India for both Mr Thabethe and Mr Narayana was paid for by the Free State government. Mr Venter confirmed that he saw the documents authorising the trip to India for both individuals. At the time of Mr Narayana's travel to India, he did not hold any position in the Free State government.[58] This trip was approved by the Premier's office.

365. Mr Venter testified that he heard for the first time of the Estina project in an EXCO meeting that was held on the 13th of June 2012. The initial amount that was budgeted for the project was R30 million, but the project was reprioritised and then the estimated cost increased to R114 million per annum over a 5-year period. This project was treated as urgent because it had been mentioned in the Premier's State of the Province Address for that year. A plan had to be made to source an additional R84 million to make up the R114 millionrequired for the project.[59]

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[56] Record – Transcript 22 July 2019 day 137 p 142 line 7

[57] Record - Exhibit HH2.1

[58] Record – Transcript 22 July 2019 day 137 p 148 line 18

[59] Record – Transcript 22 July 2019 day 137 p 158 line 10-18

366. In or about mid - June the Office of the State Law Advisors was approached by Ms Anna Fourie from Provincial Treasury[60], who requested a legal opinion on a contract she had received from the Department of Agriculture. This was a contract entered between the department and Estina. Ms Fourie had been requested to make a payment of R30 million in terms of this contract. The contract was dated 5 June 2012. The Provincial Treasury's main concern with the contract was that they were required to make an upfront payment of R30 million , yet it was unclear what the deliverables for the R30 million were.[61]

367. The Office of the State Law Advisor advised the Department of Agriculture of the discrepancies in the contract. It offered to assist the department with drafting a contract where it would be clear what the deliverables would be.

368. The later contract was drafted by Adv Ditira. It is the contract dated 5 July 2012. The department was required to provide all relevant procurement information to enable the State Law Advisors to draft this contract. There was a deviation that was already approved relative to this contract.[62]

369. He testified that what was notable from this contract was the fact that Estina was described as a sole provider of the required services. The deviation was based on that fact.[63]

370. Around December 2012, Mr Venter was approached by the Municipal Manager for Phumelela Municipality, Mr Moremi enquiring about a lease agreement he was requested to sign by Mr Thabethe, the HOD for DARD. The municipality was to lease

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[60] Record – Transcript 22 July 2019 day 137 p 158-p159

[61] Record – Transcript 22 July 2019 day 137 p 165 lines 7-17

[62] Record – Transcript 22 July 2019 day 137 p 175 lines 1-21

[63] Record – Transcript 22 July 2019 day 137 p 181 line 20 – p 182 line 1-5

the land to a company called Zayna Investment. The procurement processes in terms of Municipal Financial Management Act were not followed. This agreement had a clause whereby Phumelela Municipality was to be a shareholder at Estina. This process would require a council resolution and compliance with the Municipal Finance Management Act. Mr Venter advised Mr Moremi against signing this contract. He advised that the land be ceded to the Provincial Government and the Provincial Government could then address the lease agreement with Estina.[64]

371. Mr Venter stated that the State Law Advisors' advice that the municipality should cede the property to the Province was taken. A set of delegations from the Premier to the MEC for Agriculture, from the latter to the HOD for Agriculture then took place on the advice of Mr Venter[65]. Mr Venter drafted the Cession and Assignment Agreement between the Municipality and the Provincial Government. He also testified that a year later he became aware that there was in fact a transfer of this property to the Free State Provincial Government and that a 99-year lease was concluded with Estina in respect of this land[66].

372. In 2014, Mr Venter received a draft memorandum from Mr Thabethe which was to be sent to the Executive Council of the Provincial Government, requesting him to draft a cancellation agreement relating to the agreement between Estina and DARD. He advised Mr Thabethe that all the subsidiary agreements linked to the main agreement between Estina and the department had to be cancelled[67].

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[64] Record – Transcript 22 July 2019 day 138 p 19 line 20-25 – p 20 line 1-9

[65] Record – Transcript 23 July 2019 day 138 p 19-20

[66] Record– Transcript 23 July 2019 day 138 p 20

[67] Record – Transcript 23 July 2019 day 139 p 25-36

373. In terms of this agreement, there was still an additional R106 million due to Estina. He also drafted an agreement between DARD and Free State Development Corporation (FDC).

Ms Elizabeth Cornelia "Elzabe" Rockman ("Ms Rockman")

374. Ms Rockman joined the Provincial Government in 2009 as Head of Monitoring and Development in the Premier's Office. In 2013 she was appointed MEC for Finance. The material part of Ms Rockman's evidence related to her oversight role of the DARD when she was MEC of Finance in the Free State Province. More specifically, her testimony dealt with the regulatory framework that informed the work of the Provincial Treasury and DARD, and the extent to which these prescripts were complied with relative to the Vrede Dairy Project.

375. She testified that she met Mr Thabethe, the HOD for DARD in 2011 while she was in the Premier's Office. She confirmed that by the time that Mr Thabethe signed the agreement with Estina dated 5 June 2012, she had met the HOD several times in her capacity as Director - General in the Premier's Office. She testified, however, that, when the matter was presented at EXCO in June 2012, the accompanying memorandum did not indicate that the agreement had already been signed. It was only when the Provincial Treasury was asked to find additional funding to allocate to the Vrede Dairy Project that she realised that the contract had been signed before the EXCO meeting[68].

376. Ms Rockman confirmed that, when Mr Thabethe signed the agreement of 5 June 2012, he had not processed it through the State Law Advisors Office in the Office of the Premier. This was contrary to the letter instructing all departments to clear all contracts

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[68] Record – Transcript 16 October 2019 day 181 p 16

with the State Law Advisors in the Office of the Premier prior to signing them[69]. She explained that it was unlikely that the HOD had signed the contract without the MEC to whom he reported knowing about it[70]. On being questioned about that letter of instruction, her view was that it was a guideline. She conceded though that, if the letter instructing that all contracts be cleared with the State Law Advisors was a directive as opposed to a guideline, it had to be complied with.

377. In response to a question about the authority of EXCO to implement resolutions taken, Ms Rockman clarified that any implementation of an EXCO resolution had to comply with the regulatory framework. EXCO decisions and resolutions did not constitute a procurement process[71].

The New Age subscription

378. Ms Rockman next explained that her interaction with the Gupta family predated her discussions with them about the Vrede Dairy Project. She was introduced to them when The New Age made a presentation to the Provincial EXCO to get support for advertisements. This led to her having various meetings with them between 2010 and 2013. Most of these engagements were with Mr Ashok Narayana and Mr Nazeem Howa. They essentially wanted the Provincial government to sign a subscription agreement for the New Age newspaper[72]. One of the Gupta brothers was present at this meeting.

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[69] Record – Transcript 16 October 2019 day 181 p 17 - 20

[70] Record – Transcript 16 October 2019 day 181 p 20

[71] Record – Transcript 16 October 2019 day 181 p 22

[72] Record – Transcript 16 October 2019 day 181 p 24 - 25

379. She testified that one of the more significant meetings took place in August 2011 in Bethlehem where the subscription proposal was discussed. In return the provincial government wanted The New Age to involve young people in skills development[73].

380. She stated that the idea was that the Office of the Premier would enter into this subscription agreement on behalf of all the provincial departments. This was common practice as the Provincial Government had taken a decision to centralise certain government activities. It was not unusual for the Office of the Premier to centralise services in this manner. One such decision was that government had decided to enter into transversal contracts[74].

381. The then Premier introduced her to these associates of the Gupta family.

382. In responding to a question on how often she had met the Gupta brothers, Ms Rockman referred to the first business breakfast meeting that took place on 17 May 2012. It was held in Bloemfontein and President Zuma attended and addressed this meeting. More than one Gupta brother was in attendance. She next met them at the African National Conference's national conference which they attended[75].

383. Ms Rockman confirmed that by August 2011 the provincial government was already advertising in The New Age newspaper even though a subscription agreement had not been signed yet. This was because at the July 2010 presentation to Exco the provincial government had already taken a decision in principle to support The New Age.[76] The New Age was going to be the only English daily newspaper.

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[73] Record – Transcript 16 October 2019 day 181 p 37 – 41; 64

[74] Record – Transcript 16 October 2019 day 181 p 26-27

[75] Record – Transcript 16 October 2019 day 181 p 28-29

[76] Record – Transcript 16 October 2019 day 181 p 32; 34-35

384. She stated that this process necessitated a deviation from the normal procurement procedures as it was impractical to get three quotations because they wanted a subscription agreement with a specific supplier. Also, in terms of their media research they did not believe that anyone else in the province was able to offer an English newspaper[77]. The provincial government intended to use a dedicated page to communicate its messages and programmes to the general public. Other than that, the intention was to generally support the New Age newspaper[78].

385. She confirmed that the subscription agreement was eventually signed sometime before April 2012. The budgeting for this would have been in the 2012/2013 financial year. It was a three-year subscription, which was renewed. She stated that she believed other provinces had similar subscription agreements with The New Age. One edition would have distinct pages for each province that had signed a subscription agreement with The New Age[79]. The subscription was terminated in March 2018 as a cost containment measure under Instruction Note 3 of 2017/2018[80].

Meeting Mr Tony Rajesh Gupta regarding the Vrede Dairy Project

386. Her first meeting at Saxonwold with Mr Tony Gupta was in April 2013 after she had been appointed MEC of Finance. This meeting was intended to discuss the outstanding debt arising from the subscription to the New Age newspaper. The outstanding amount owed on the Vrede Dairy Project for the 2012/2013 financial year formed part of their discussion, as Mr Tony Gupta told her that the provincial government owed them money as they had only been paid R30 million for the 2012/2013 financial year. They also

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[77] Record – Transcript 16 October 2019 day 181 p 42-48

[78] Record – Transcript 16 October 2019 day 181 p 48 – 49; 56 – 57; 61-64

[79] Record – Transcript 16 October 2019 day 181 p 51-53

[80] Record – Transcript 16 October 2019 day 181 p 49 – 50; 58

discussed the financial implications of the dairy project relative to the 2013/2014 financial year[81].

387. Ms Rockman referred to the Myburgh Report, explaining that already at that point in time, i.e., January 2013, concerns had been raised by this unit of the Provincial Treasury about the value for money return for government on Estina's involvement as an implementing agent[82]. She also testified that the Provincial Treasury had no relationship with Estina. All accountability for the project lay with Mr Thabethe who, as HOD, had to be satisfied that the conditions for further funding to be made available to Estina had been met.

388. What was in the Provincial Treasury's records was that the R30 million that was given to Estina as an advance payment was intended for the feasibility study, EIA, securing water rights, etc., not the version put up by Estina that they had reserved R29 million for milking parlour equipment[83].

389. Ms Rockman recalled having another meeting with Mr Tony Gupta and Mr Ashok Narayana in or about February 2014 where they discussed the media reports on cows dying on the dairy farm. She described this as one of the more critical meetings that she held with Mr Tony Gupta to discuss what was going on at the dairy farm[84]. She held another meeting with Mr Tony Gupta in April 2014 where once again the payment of outstanding funds was discussed. She recalled attending approximately four or five meetings with Mr Tony Gupta where they discussed matters relative to the Vrede Dairy

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[81] Record – Transcript 16 October 2019 day 181 p 31; 70

[82] Record – Transcript 16 October 2019 day 181 p 71

[83] Record – Transcript 16 October 2019 day 181 p 74

[84] Record – Transcript 16 October 2019 day 181 p 75-77

Project[85]. She explained further that the reason Provincial Treasury became involved in these meetings was because funding in terms of the budget was being requested[86].

390. With respect to her meetings with Mr Tony Gupta whilst she was Director - General in the Office of the Premier, Ms Rockman confirmed that the Premier was aware that she was having these meetings, and certainly aware of the meetings about the New Age subscription. Similarly, with regards her attending these meetings as MEC, she was confident that the Premier would have known about them[87].

391. Ms Rockman confirmed that she was invited to the Gupta wedding at Sun City but stated that she did not attend. She had met Mr Ashok Narayana in 2010. She testified that she had always associated him with the New Age newspaper, but at some point linked him to Mr Thabethe whom he was assisting[88]. She also knew him in his capacity as a member of the Premier's Advisory Council.

392. She testified that she heard about Paras for the first time during the presentation by DARD to the Provincial Exco in June 2012. She knew nothing about the relationship between Estina and Paras and had not held meetings with anyone from Paras[89].

393. Regarding the oversight role of the Provincial Treasury relative to the Vrede Dairy Project, Ms Rockman explained that the matters were investigated by National Treasury. Her department was not consulted, nor were they asked to comment on the forensic report. The report was also not tabled at Exco for discussion[90]. She stated that

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[85] Record – Transcript 16 October 2019 day 181 p 81

[86] Record – Transcript 16 October 2019 day 181 p 83

[87] Record – Transcript 16 October 2019 day 181 p 78-79

[88] Record – Transcript 16 October 2019 day 181 p 85-86

[89] Record – Transcript 16 October 2019 day 181 p 95-96

[90] Record – Transcript 16 October 2019 day 181 p 103-104

they were aware of the broader problems around the issue of the budget not being fully secured before a project was initiated.

394. She highlighted that "the monitoring and evaluating responsibility remains that of the contracting department and the contracting department was Agriculture. They signed off on each and every invoice ... they confirmed goods and services rendered". She stated that they gave the impression that they had complied with all the provisions of the PFMA[91]. However, when asked whether on her visit to the dairy project, she could justify the funds expended so far on the project, Ms Rockman's response was that her observation was that this was a project in the beginning stages of implementation, and that Provincial Treasury would not be drilling down into a project at this early stage.

395. In any event, they did not have the capacity to monitor that closely, and that the accounting responsibility remained with the HOD of the affected department. She emphasised that, though the Legislature had an oversight role in terms of the Annual Performance Plan that a department tables for debate, the first line of monitoring and evaluation lies with the affected department[92].

396. In addition, she stressed that, given that the funds expended were transfer payments which then became unrequited funds, these were no longer considered to be public funds. There was thus no way that Treasury could go to Estina and ask for an explanation on how the funds were spent. She also testified that the audit treatment of transfer payments became the subject of several engagements between National Treasury and the National Accountant General and ultimately the Auditor-General. It

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[91] Record – Transcript 16 October 2019 day 181 p 107 - 108

[92] Record – Transcript 16 October 2019 day 181 p 119 - 127

took two years to get clarity on what should be classified as a transfer payment and what was to be reclassified as goods and services.[93]

397. Ms Rockman also commented on the fragmented investigations and site visits made by national and provincial officials to the dairy farm, and the fact that none of the observations made during these visits, or the reports that emanated as a result of these visits, were brought to the Provincial Treasury's attention. In the meantime, funding for the project was not available, as it had not been possible to provide such funding in the adjustment budget of November 2013. She stated that even when funding was secured, that did not mean that the Provincial Treasury agreed with the purpose of the expenditure.

398. She also pointed out that, despite the investigation by National Treasury, at no stage did anyone at a political level from the National Government raise the Vrede Dairy Project matter with her as MEC of Finance. It would have been appropriate to do so if there were substantial concerns about the dairy project. It was a matter that could have been discussed in the National Executive Committee of the ANC, in the President's Co-ordinating Council, and in any number of inter-governmental forums. To her knowledge it was never discussed, nor was it raised directly with the Provincial Treasury[94].

399. She explained that, though the Provincial Treasury had an obligation to monitor expenditure by departments, it only received cash projections and money requisitions from departments and assisted by managing the funds requisitioned by those

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[93] Record – Transcript 16 October 2019 day 181p 127 – 129; see also the Memorandum on Implementing Agents where the testimony of Ms Rockman is recorded

[94] Record – Transcript 16 October 2019 day 181 p 135-136

departments. It did not have sight of the detailed invoices presented to departments by service providers or approved by departments[95].

400. With respect to the deviation by the HOD, she testified that though, Provincial Treasury was not in possession of all the relevant documentation, it became aware of the deviation but could not undo it. The HOD had approved the deviation, he stood by his decision, and the contract was signed. The HOD of the Provincial Treasury and the MEC of Finance signed off on the deviation but with certain conditions. She had no insight on how Estina was identified as an implementing agent as its appointment was not through a public process. The department regarded the partnership agreement with Estina as being no different to other partnership agreements[96]. The Provincial Accountant General did indicate that this expenditure, certainly the R30 million, would likely constitute irregular expenditure[97].

401. Though the Provincial Treasury would share their concerns with departments after an audit, Ms Rockman explained that in the bigger scheme of things, the dairy project was not their biggest challenge. The spending in the Department of Health was followed by Education both of which were under administration[98].

402. She explained the sources of funding, emphasising that conditional grant funding could not be used for any other purpose. Those funds are transferred into the Provincial Revenue Fund and disbursed from there by the Provincial Treasury.[99] She testified that she had no insight on how the original February 2012 budget of R13 million for the Vrede Dairy Project ballooned into the R572 million that Exco was presented with in

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[95] Record – Transcript 16 October 2019 day 181 p 139- 140

[96] Record –Transcript 17 October 2019 day 182 p 39-40

[97] Record – Transcript 16 October 2019 day 181 p 144- 146

[98] Record– Transcript 16 October 2019 day 181 p 152-153

[99] Record – Transcript 16 October 2019 day 181 p 156 – 157, 159- 160

June 2012, nor did she know what motivated it. The adjusted cost of the dairy project was not discussed with the Provincial Treasury as it was procedural to do[100].

403. She explained the annual budgeting process and the reprioritisation of budgets and confirmed that any reallocation of funds or readjustment of a budget would have to comply with section 31 of the PFMA.[101] She also confirmed the evidence given by Mr Thabethe that the department was able to seek additional funding for the Vrede Dairy Project during the budget adjustment process of 2012/2013. This was because it was not an entirely new project as it had been provided for by amending the department's Table B5 infrastructure project list. So, though the dairy project was substantially underfunded (R13 million only had been budgeted for 2012/2013) they were able to ask for an adjustment[102].

404. The R30 million that was paid to Estina in July 2012 was drawn from the R35 million that had been allocated to Mohuma Mobung under the MTEF allocation of 2012/2013[103]. She testified that the R30 million that was authorised for payment in December 2013 was drawn from the special adjustment made under the Special Adjustment Appropriation Act. The R4.950 million was drawn from an internal reprioritisation by the department and the R25 million was additional funding that was taken by Provincial Treasury from all other uncommitted funds of provincial departments and made available under the Special Adjustment Appropriation Act[104]. In 2014/2015 provision for the dairy project was made from the Infrastructure Enhancement Allocation and other sources.

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[100] Record – Transcript 16 October 2019 day 181 p 168 - 174

[101] Record – Transcript 16 October 2019 day 181 p 178 - 181

[102] Record – Transcript 16 October 2019 day 181 p 182 - 183

[103] Record – Transcript 17 October 2019 day 182 p 5

[104] Record – Transcript 17 October 2019 day 182 p 7 - 9

405. In essence, her view was that the only time that there was a failure to comply with section 38(2) of the PFMA was when the first contract was signed. Section 38(2) of the PFMA reads: "An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated." Once Provincial Treasury asked for that contract to be revised and then signed off on the revised contract, this signified that all the necessary budgetary requirements had been fulfilled[105]. The urgency attached to this project, despite the concerns raised by Mr Moses, was that the project had been made public, Exco had signed off on it and it would have been difficult to ask Exco to scale back on this project[106].

406. With regards to the appointment of the FDC to take over from Estina, Ms Rockman testified that she was not aware of any specific agricultural expertise or development training expertise that would make the FDC a suitable replacement for Estina[107].

407. Ms Rockman then explained the expenditure incurred by implementing agents who provided services to the department and the disbursement of transfer payments. She also dealt with the reclassification debate and accounting treatment of these transfer payments that was finally settled by the issue of an Instruction Note in 2018[108].

408. She confirmed that if the normal procurement processes had been followed with the appointment of Estina, the bid specifications would have interrogated the type of bidder applying, the competencies of such bidder and the suitability of such bidder as a partner[109].

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[105] Record – Transcript 17 October 2019 day 182 p 11

[106] Record – Transcript 17 October 2019 day 182p 14-17

[107] Record – Transcript 17 October 2019 day 182p 21-24

[108] Record – Transcript 17 October 2019 day 182 p 24 – 25; 26 – 42; 48; – Ms Rockman's views are dealt with in the memorandum on Implementing agents.

[109] Record – Transcript 17 October 2019 day 182 p 42-43

409. Ms Rockman explained the irregular expenditure incurred by the Vrede Dairy Project as noted in the Schedules in her supplementary affidavit[110]. She discussed the effect that the Public Audit Amendment Act would have on the incidence of irregular expenditure, saying that it would enforce consequence management of irregular conduct[111].

410. The evidence of Mr Moremi about her role in informing him about the delegation of Indian nationals that would be visiting the farm was brought to Ms Rockman's attention. She confirmed that she knew Mr Moremi but denied that she had made the telephone call that Mr Moremi referred to in his testimony, advising him of the visit by this delegation. Her recollection was that Mr Moremi called her about being under pressure to sign a certain agreement relating to providing land for the dairy project. Her advice to him was that he should contact the State Law Advisors for assistance. She also confirmed that she played no role in facilitating the signing of the lease agreement on land[112].

Ms Seipati Dhlamini ("Ms Dhlamini")

411. Ms Seipati Dhlamini's evidence relates to the period when she was the CFO of first the Department of Agriculture in the Free State Province, and then in 2012 the CFO of DARD. She testified that she joined the Free State Provincial Government in 2007 and that at all material times while working for the province, was employed in the capacity of CFO.

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[110] Record – Transcript 17 October 2019 day 182 p 49-55

[111] Record – Transcript 17 October 2019 day 182 p 55-57

[112] Record – Transcript 17 October 2019 day 182 p 65-67

412. She confirmed that in terms of the requirements of the post of Financial Officer, she is appropriately qualified, and that she has vast experience in the service of government departments. She further confirmed that she is familiar with the legal framework that regulates and governs procurement, including section 217 of the Constitution, and the PFMA[113].

413. Ms Dhlamini testified that she was also a member of the Chief Financial Officers Forum which was convened and coordinated by the Provincial Accountant General. This forum provided support to all financial officers. She confirmed that the most important functions she discharged as CFO were financial management, budget and expenditure control, and giving advice to the management team, and especially to the HOD.

414. Ms Dhlamini confirmed that section 38(1), section 44 and section 45 of the PFMA were relevant to the discharge of her functions as CFO, though she qualified the ambit of those provisions that would have applied to her job functions[114]. She also acknowledged the relevance of sections 66 and 68 to her functions.

415. When dealing with the establishment of the Mohuma Mobung strategy, Ms Dhlamini testified that the strategy was conceived of by MEC Zwane in 2011, and that the Vrede Dairy Project was one of the projects within this broad strategy. She also agreed that in the 2011/2012 financial year there was no budget for the Vrede Dairy Project. She confirmed that she was aware of Mr Thabethe's trip to India and that he did not travel with any official from the department. She was also not aware of the R17 million that Mr Thabethe testified had been allocated for the feasibility study into the QwaQwa, Setsoto and Vrede Dairy Projects[115].

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[113] Record – Transcript 02 September 2020 day 259 p 37 - 41

[114] Record – Transcript 02 September 2020 day 259 p 48 -49

[115] Record – Transcript 02 September 2020 day 259 p 183- 184

416. With specific reference to Dr Masiteng's evidence that he did not know about the Vrede Dairy Project, Ms Dhlamini testified that this statement was not correct as the Vrede Dairy Project was one of the projects that was budgeted for in the 2012/2013 financial year. She was aware of this budget item when dealing with the budget for district Services. She conceded, however, that Dr Masiteng was not present when Estina made a presentation to the department, or that in that presentation the budget for the project changed from R9 million to R570 million[116]. She also confirmed that District Services is essential to the registration of beneficiaries.

417. With respect to implementing agents, Ms Dhlamini testified that the department started using implementing agents in the 2011/2012 financial year. One of the reasons for using these agents was to resolve the difficulties that the department was having with the management of assets, especially those assets that were procured by the department and given to farmers. Those assets would be recorded in the department's asset register yet be in the precarious possession of the farmer.

418. When an audit was done, the department would have to account for those assets held by the farmer, yet they would have no control over what the farmer did with the assets[117]. This is when the classification of goods of services was changed to that of transfer payments to farmers. The intended beneficiary of the asset was the farmer, not the department, hence the reclassification[118].

419. Ms Dhlamini agreed that the implementing agent has no role to play in the absence of the farmer or beneficiary. The objective of the implementing agent was to assist in the

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[116] Record – Transcript 02 September 2020 day 259 p 84 - 90

[117] Record – Transcript 16 October 2019 day 181 p 76 – see comment by Rockman regarding the lax recording of assets – cows were never properly branded or tagged when they first arrived. So, it was difficult to say whose cows were dying when the media reported on this. She further testified that in an audit done later there was a reluctance on the part of the DARD to disclose the assets as part of its work in progress on the asset records.

[118] Record – Transcript 02 September 2020 day 259 p 92-93

implementation of projects. They charge for their services. The employment of implementing agents assisted the department in avoiding fruitless and wasteful expenditure in two respects. First, the quality of the products purchased was much improved and second, it was easier to monitor expenditure. Ms Dhlamini conceded, however, that the management of the department failed to discharge their functions hence the need to employ implementing agents. She explained, however, that officials continued to monitor the work of implementing agents and the operations of projects[119].

420. On the matter of transfer payments made to Estina and the deliverables attendant on that payment Ms Dhlamini explained that the first R30 million paid to Estina was for the obligations agreed to for phase 1 of the project. In response to a question about the way the department monitored these transfer payments, she stated that she was responsible for her own financial management unit, and she had advisory responsibilities in respect of other managers including the HOD. She stated that the individual that was supposed to sign off on a budget was the one who accounted for that budget.

421. In context, she explained that the HOD and District Services would have been aware of the milestones that had to be achieved by Estina. She would not know why the HOD had signed off on those milestones that enabled the transfer payment to Estina. She explained that any other invoice related to the Vrede Dairy Project would have been signed off by District Services because it was the program that managed that expenditure[120].

422. Ms Dhlamini dealt with her knowledge of the appointment of Estina as an implementing agent and the presentation that Estina made to a select audience. She testified that,

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[119] Record – Transcript 02 September 2020 day 259 p 94 – 104; 113-116

[120] Record – Transcript 02 September 2020 day 259 p 110 – 111; 256-259

after the presentation by Estina, the economists were expected to look at it closely. She took the documentation that was given to her at the presentation and next looked at it when the first submission was given to her.

423. The submission was sent to her because it had financial implications. Her task was to confirm the availability of the budget. She also explained that included in her responsibilities when she assessed submissions prior to making a recommendation was the task of checking on the intended use of the funds and whether the purpose of the funds was in accordance with the appropriation of those funds[121].

424. Ms Dhlamini testified that what she recommended in the submission that was given to her was the acceptance of the proposal that Estina partner with the department. She explained that she was aware that the R342 million required was not available, nor was the R30 million available. In the result, she went to see the HOD and discussed these financial implications with him. She told him that the department had only budgeted R9 million for the Vrede Dairy Project.

425. Mr Dhlamini testified that the HOD's response was that he would be re-prioritising the budget in order to accommodate these additional funds. She then did a further check to see if the required funding would be available over the MTEF period. She was comfortable that for the 2013/2014 and 2014/2015 financial years, the project was fully budgeted for[122].

426. It was possible for the HOD to obtain approval to use what was classified as goods and services under equitable funds and re-prioritise those funds by seeking an adjustment under the Adjustment Appropriation Act. Alternatively, the HOD could go to Treasury

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[121] Record – Transcript 02 September 2020 day 259 p 113 – 123

[122] Record – Transcript 02 September 2020 day 259 p 125 – 127

and ask for an increase in the transfer payment budget[123]. Another source of funding was the conditional grants basket of funding, mainly CASP, Ilima/Letsema and Land Care. These conditional grants were intended to support farmers. Those conditional grants had sufficient funds to enable annual provision of R184 million to be made for the Vrede Dairy Project.[124]

427. Ms Dhlamini testified that the first R30 million that was approved was to be used on the feasibility study, the EIA, and so forth. Having satisfied herself on these financial matters, she then signed the submission of 26 May 2012. Ms Dhlamini then explained the approvals for the payment of the R30 million. The Sundry Payment Advice was signed by two officials, Ms Alta Meyer and Mr Van Schalkwyk, both from the Farmer Support Development, District Services, and by the HOD[125]. Those managers manage their budget independently of the CFO. This is where the relevance of section 45 of the PFMA arises as these managers take responsibility for their decisions as prescribed in section 45 of the PFMA.

428. Ms Dhlamini next dealt with her oversight in respect of the use of the R34.9 million that was requested by Estina in July 2012 but only paid to it in April 2013. She was questioned about what was recorded on the Sundry Payment Advice that essentially authorised the payment of funds to a party and asked whether the details given in the supporting documents provided a sufficient explanation of where those funds were to be applied. Her view was that the supporting documents were sufficiently detailed in giving a full explanation of what the funds were to be used for[126].

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[123] Record – Transcript 02 September 2020 day 259 p 131 – 132

[124] Record – Transcript 02 September 2020 day 259 p 132

[125] Record – Transcript 02 September 2020 day 259 p 140

[126] Record – Transcript 02 September 2020 day 259 p 165- 166

429. With regard to the monthly reports that were submitted to the department for payment, Ms Dhlamini 's view was that it was the task of District Services to interrogate those figures and confirm the value for money proposition presented[127]. She said that she was not the manager of the project and, accordingly, she said that she would not have interrogated the bank accounts of Estina.

430. She testified that the fact that Paras was involved with the project and the HOD's knowledge of the parties provided the necessary reassurance. In any event, the HOD retained the power to overrule her recommendation[128]. She testified that she was not aware of the employment of non-South African parties to do the feasibility study. She also conceded that in hindsight, maybe she should have looked more closely at the memorandum of agreement between Paras and Estina to understand their terms of engagement[129].

431. Ms Dhlamini testified that her justification for approving the deviation was informed by the relationship between Paras and Estina, and especially the investment that Paras was making in the dairy project. This investment was intended to create jobs in an area where there were limited job opportunities. In the circumstances, she thought it was not practical to invite competitive bids. She also conceded that they had not informed the Provincial Treasury and the Auditor General of the deviation within the prescribed 10-day period[130]. Ms Dhlamini was questioned on her understanding of the concept of impracticality in the context of the tender regulations or provisions. She said that because, on her understanding, since Paras was going to be investing in the project, it was not practical to invite other bidders. This explanation either means she did not know

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[127] Record – Transcript 02 September 2020 day 259 p 169-173

[128] Record – Transcript 02 September 2020 day 259 p 174 - 180

[129] Record – Transcript 02 September 2020 day 259 p 190

[130] Record – Transcript 02 September 2020 day 259 p 193-204

what the meaning of "practical" or she knew it but was dishonestly pretending not to know it. Obviously there was nothing impractical in the situation she was dealing with.

432. In her view this omission did not constitute irregular and wasteful expenditure because it did not constitute a failure to comply with a law, but simply an omission to report a certain situation[131]. It is inconceivable that a person holding the position of Chief Financial Officer would hold his view.

433. Ms Dhlamini further explained that, when the HOD first approached her with the agreement with Estina in the dairy farm, she advised him that the arrangement between Estina/Paras and the department was really a partnership[132].

434. According to Ms Dhlamini, the proposal for a deviation was initiated after the first two contracts of 5 and 7 June 2012 had been signed. At that point she had formed the view that this agreement was not about the provision of goods and services[133].

435. Regarding her request to Provincial Treasury that they furnish the R30 million to Estina, Ms Dhlamini explained that the MEC Mr Mosebenzi Zwane had asked her to meet MEC Mohai to discuss the payment for Vrede Dairy. This was the first time that MEC Zwane had made such a request. She testified that the department had already processed the payment by capturing it on the system. However, because the payment was for more than R1 million, it had to go to Treasury for finalisation.

436. The documentation supporting this payment would have been sent to Treasury. She had signed the relevant certificate confirming the requirements for the payment and that

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[131] Record – Transcript 02 September 2020 day 259 p 205-206

[132] Record – Transcript 02 September 2020 day 259 p 245 – 246; 249

[133] Record – Transcript 02 September 2020 day 259 p 210-214

it would not result in unauthorised expenditure. Her finance unit did not keep a copy of the package of documents as these were lodged with Treasury[134].

437. She discussed the payment with MEC Mohai and indicated to him that they had made a requisition but did not have sufficient funds in the bank. The department had also asked Treasury to increase the cash in their bank account, but this request was not approved as Treasury itseif did not have sufficient funds to accede to this request. She advised the HOD that the department would have to make the request again, possibly the following week, and provision would have to be made in the following month. The R30 million was then sourced through the reprioritisation of budgets. The clear point she emphasised was that she was aware, prior to meeting MEC Mohai, that there was no cash available to meet their requisition. The reason she attended the meeting was because MEC Zwane had asked her to do so[135].

438. MEC Mohai then interrogated the availability of a budget for this transaction and the availability of funds from Treasury. Ms Fourie, Mr Mabija and Ms Dhlamini then went to the Treasury office to see if anything could be done to enable this transaction. However, this attempt came to nought because Mr Mabija did not arrive at the office as arranged. After waiting for Mr Mabija, she left that office[136].

439. Ms Dhlamini disputed Ms Fourie's version. She denied that she had been offered R5 million by Ms Fourie, or that she said she wanted R30 million or nothing. She also denied that she had any documentation on her when she attended that meeting,

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[134] Record – Transcript 02 September 2020 day 259 p 218 – 221; 260 -261

[135] Record – Transcript 02 September 2020 day 259 p 221-230

[136] Record – Transcript 02 September 2020 day 259 p 231-232

including the contract between the department and Estina. On leaving that meeting she reported back to the MEC, Mr Zwane[137].

440. With respect to the testimony of Mr Cele, Ms Dhlamini stated that she did not recall speaking to Mr Cele in Sesotho as she always communicated with him in English. She denied warning Mr Cele[138].

441. She also confirmed that ordinarily an MEC should not get involved in operational matters, but simply give the department strategic direction. She conceded that, once the State Law Advisors had looked at the second agreement, they found that it did not protect the department's interests. She had not come to that conclusion prior to the State Law Advisors pointing it out[139]. She also confirmed that, due to the volume of work in her office, she did not go to the dairy farm to investigate the reason that the media was so critical of its operations. She did, however, go there with National Treasury officials and with MEC Qabathe.

442. Ms Dhlamini confirmed that she was aware that the beneficiaries did not benefit from this project. She explained that ultimately the project would have to be handed over to the beneficiaries as the department could not own it[140]. She left the department in 2015.

443. Ms Dhlamini testified that, when the ultimate agreement was signed, she signed it after the HOD had already signed it[141].

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[137] Record – Transcript 02 September 2020 day 259 p 233-238

[138] Record –Transcript 02 September 2020 day 259 p 238-239

[139] Record – Transcript 02 September 2020 day 259 p 240-241

[140] Record – Transcript 02 September 2020 day 259 p 244

[141] Record – Transcript 02 September 2020 day 259 p 246-247

Mr Peter Mbana Thabethe ("Mr Thabethe")

444. Mr Thabethe was the most important player within the provincial government in respect of this project, because he was the Head of Department and was its accounting officer.

445. His evidence can be segmented into four major themes. The first relates to his background, qualification for the job, and his appreciation of the legal framework that rendered him accountable as HOD of DARD for decisions taken and strategies adopted. The second theme addressed the Supply Chain Management Policy ("SCM Policy") and the deviation that was authorised relating to the agreement that established a relationship between DARD and Estina. The third traverses operational issues over which Mr Thabethe as HOD ought to have had supervised. The fourth deals with the classification of the transactions as transfer payments as opposed to payments for goods and services and related matters.

446. Mr Thabethe occupied various ranks in the provincial and national government prior to moving to work for the Free State Provincial Government in August 2011 in the capacity of Head of Department for Rural Development. He had served as special advisor to Minister Tina Joemat-Pietersson then as Acting Director-General (Operational Management) in the Department of Agriculture, Forestry and Fisheries ("DAFF") immediately prior to relocating to Bloemfontein in 2011.

447. Mr Thabethe was appointed head of Department of the newly established DARD after the Department of Rural Development was amalgamated with the Department of Agriculture[142]. As is convention, he was appointed by the Premier of the Province. He testified that his appointment was a consequence of his extensive knowledge and

[142] These two departments had two separate Heads of Department until May 2013 when they were merged.

experience in the field of agriculture[143]. On being questioned about his reference in his CV relative to the specialist knowledge he had acquired of the Constitution and its provisions, he explained that he had intermediate knowledge of the Constitution, section 25 of the Constitution and Schedule 4 thereof[144].

448. In discussing the responsibilities of an accounting officer, Mr Thabethe's evidence was that an accounting officer becomes accountable for *"all activities including the budget of that department, reporting responsibilities and operational activities, ...accounting to the Legislature, accounting to Treasury and accounting to the National Department of Agriculture and the Department of Rural Development"*[145]. In his affidavit[146] he describes these responsibilities as including *"ensuring effective service delivery within the legal mandates of the Department and the Free State Provincial Government"*. He also confirmed that the legal mandates referred to are informed by the Constitution, the PFMA, Treasury Regulations, Instruction Notes, and Practice Notes, among others.

449. Mr Thabethe further explained that, though he attended meetings of the Provincial EXCO by invitation, his direct line of report was to the MEC of DARD. In addition he attended Government lekgotla's so as to be informed of the issues pertinent to other spheres of government, in particular key deliverables and implementation imperatives[147].

450. Concerning the drafting of strategic plans, Mr Thabethe conceded that the Department had a legal responsibility to prepare strategic plans. He explained that the Mohuma Mobung Agricultural Development framework document, which he confirmed was also

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[143] Record – Transcript 15 August 2019 day 145p 18

[144] Record – Transcript 15 August 2019 day 145 p 23-24

[145] Record – Transcript 15 August 2019 day 145 p 29-32

[146] Record – Thabethe Affidavit dated 5 August 2019 p 7 para 18

[147] Record – Transcript 15 August 2019 day 145 p 33-34

called a strategy, was drafted in June 2012, and "*was developed to provide a framework under which we will then operate in terms of dealing with specific issues of agriculture development*"[148].

451. Mr Thabethe said that the idea of a dairy farm was developed by the Department of Rural Development as a new mandate for the province. Thereafter the Mohuma Mobung strategy was developed.[149] Mr Thabethe explained that the name Mohuma Mobung "*was given by the MEC [i.e. Mr Zwane] but the thinking behind the document came from the HOD*", meaning MEC Zwane and himself[150].

452. Mr Thabethe testified that he worked with a team from the Department of Public Works. On being asked whether he found Dr TJ Masiteng and Ms S Dhlamini already working in the Department of Rural Development he explained that Ms Dhlamini was there as the CFO, and Dr Masiteng was in the Department of Agriculture. In essence, Ms Dhlamini reported to him and to the HOD of Agriculture, but Dr Masiteng was not involved in his conceptualisation of the strategy document.

453. The next aspect that Mr Thabethe was asked to address was his approval of the SCM Policy which he signed off on 1 April 2012. He confirmed that he was familiar with the contents of that document and understood its import as he had been exposed to its content whilst it was being developed for both the Department of Agriculture and Rural Development. Mr Thabethe conceded that the provision in the SCM Policy that dealt with procurement was aligned to section 217 of the Constitution, and supported by the PFMA, Treasury Regulations and Instruction Notes as well as Treasury Practice Notes. He testified, however, that in certain exceptional circumstances, the procurement

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[148] Record – Transcript 15 August 2019 day 145 p 37-39

[149] Record – Transcript 15 August 2019 day 145 p 40 -41

[150] Record – Transcript 15 August 2019 day 145 p 42-43

provisions of clause 3.3.1 of the SCM Policy could be deviated from. Clause 3.3.1 prescribes that: *Competitive bids should be invited for all procurement above R500 000.* He pointed to clause 3.4 of the SCM Policy in justification of this exception[151].

454. With specific reference to the deviation from the SCM Policy, Mr Thabethe had no difficulty with having been the initiator of the deviation as well as the final authority who approved and took the decision to deviate[152]. His view was that there are occasions when he as HOD would approve a deviation without having followed all the required SCM Policy procedures. When the issue was probed further in relation to the HOD requesting a junior official to initiate a request for a deviation, as happened with the Vrede Dairy Project, Mr Thabethe responded that the decision on who should initiate a deviation depended on the purpose for which the budget for the deviation was located, as his office did not have such budget allocations[153].

455. Mr Thabethe's interpretation of clause 3.5 of the SCM Policy was explored[154]. This clause permits a deviation from bid procedures in prescribed circumstances. However, the observation was made that, though the provision provides that, if it is impractical to invite competitive bids, e.g., in urgent or emergency cases, or in case of a sole supplier, an original affidavit from the company stating that it is the sole supplier of the goods or services offered must be provided. The various SCM policy clauses are summarised as follows:

> "Clause 3.5: Deviation from bid procedures
>
> The Accounting Officer may dispense with the prescribed processes and authorise the acquisition of any goods or services through any convenient process.

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[151] Record – Transcript 15 August 2019 day 145 p 52-56

[152] Record – Transcript 15 August 2019 day 145 p 52 – 57-62

[153] Record – Transcript 15 August 2019 day 145p 64 – 66

[154] Record – Transcript 15 August 2019 day 145 p 70-73

> 3.5.1 If in a specific case it is impractical to invite competitive bids e.g. in urgent or emergency cases or in case of a sole supplier, the goods or service may be procured in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the Accounting Officer.
>
> 3.5.2 In the case of a sole supplier, an original affidavit from the company stating that it is a sole supplier of the goods offered must be provided with the offer.
>
> 3.5.3 In exceptional cases such as repairs and maintenance of equipment, plumbing services, school uniform, medical services and medicines, school activities, burial services and gasoline for equipment, where it is impractical to follow the prescribed procedures one quotation is required."

456. Further, the issuance of a public notice advertising the bid or competencies required, this might elicit the kind of competitive bid process that the SCM Policy requires. In other words, there must be a modality for the HOD to verify the sole supplier assertion made, justifying the deviation from the prescribed bid procedures[155]. Mr Thabethe responded by differentiating between a supplier and a distributor.

457. The legal prescripts supporting the SCM policy were referred to, in particular, Instruction Note of 2011 which dealt with enhancing compliance, monitoring, transparency and accountability in matters of procurement. This is a legal prescript that is provided for in the PFMA. Mr Thabethe's evidence in relation to clause 3.1.1 of this Instruction Note was that he was not aware of this Instruction Note as it was the preserve of the CFO, and that the CFO had a responsibility to advise him on the contents of the Instruction Note.[156]. Clause 3.1.1 reads:

> ""Submissions of procurement plans in respect of advertised competitive bids [demand management]. Accounting Officers of departments and its constitutional institutions must submit to the relevant Treasury by 30 April of each year. A procurement plan containing all planned procurement for the financial year in

[155] Record – Transcript 15 August 2019 day 145 p 74-75

[156] Record – Transcript 15 August 2019 day 145 p 84-87

> respect of procurement of goods, works and or services which exceeds R500 000. All applicable taxes included. This procurement plan must be approved by the Accounting Officer or his or her delegate prior to its submission. For the 2011/2012 financial year the said plan must be submitted to the relevant Treasury by not later than 31 August 2011."

458. Later when dealing in greater depth on the deviation from set procedures, Mr Thabethe testified that they, i.e., DARD, had agreed that, because the implementing agent was the funder of the project and the expertise they required was within the remit of the implementing agent, no tender would be issued. He testified that Dr Masiteng, the Chief Director responsible for District Services, was a party to that decision[157], which Dr Masiteng denied by. He testified that the third reason for deviating was that the funding intended for this project was allocated under transfers and not under goods and services[158].

459. The explanation tendered by Mr Thabethe was that the convention was that DARD would agree on the appointment of an implementing agent with the farmer. The implementing agent would deliver the project on behalf of the farmer and the DARD would transfer the funding to the implementing agent. In the case of the Vrede Dairy Project, because the implementer was both the funder and implementer, DARD decided to deviate from the normal procurement processes[159].

460. Later in his evidence Mr Thabethe confirmed that the agreement entered into with Estina was not a Private Public Partnership ("PPP") agreement[160].

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[157] Record – Transcript 20 August 2019 day 148 p 4 – 5 ; p . 7 - 8

[158] Record – Transcript 20 August 2019 day 148 p 8 -11

[159] Record – Transcript 20 August 2019 day 148 p 9

[160] Record – Transcript 16 August 2019 day 146 p 69

461. Mr Thabethe continued to give extensive evidence with respect to how Paras and Estina were selected as the strategic and implementing partners of the Vrede Dairy Project[161]. He testified that it was his initiative to contact Paras[162].

462. Mr Thabethe said, in essence, that Paras was selected because first, the Provincial Government wanted to address the question of small milk producers in the Free State closing. Second, the objective was to bring Black farmers and emerging farmers as participants in dairy farming. Third, the DARD's intention was to establish a dairy processing plant as a value-add proposition in the dairy farming industry[163].

463. Mr Thabethe explained that the main feature that made Paras attractive to the DARD was the fact that they collected milk from small dairy producers. This milk would then be processed locally[164]. He conceded that there were milk processing plants in the Free State but asserted that those plants were not in a position to assist the DARD.

464. This evidence was challenged, with reference to the evidence of Mr Dawie Maree and the exclusion of local dairy producers in the search for a strategic partner. Mr Thabethe's response was that those producers were not interested in assisting the DARD[165]. Later in his evidence, when it was pointed out that local dairy producers had submitted affidavits that they were not invited to participate in this venture, Mr Thabethe had no convincing response.

465. His visit to Paras in India was authorised by the Premier. The MEC for DARD, Mr M Zwane, allocated one Mr Ashok Narayana to accompany him. His intention had been

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[161] Record – Transcript 15 August 2019 day 145 p 94 – 98

[162] Record – Transcript 16 August 2019 day 146 p 12

[163] Record – Transcript 15 August 2019 day 145 p 98

[164] Record – Transcript 15 August 2019 day 145 p 102 – 105; 107-111

[165] Record – Transcript 16 August 2019 day 146 p 38 – 40; Transcript 16 August 2019 day 146 p 8090

to go to India alone given that all he sought to establish was the existence of the company and the activities that it engaged in[166]. Mr Thabethe's evidence was that he did not know why Mr Narayana had been selected to accompany him. The DARD paid for Mr Narayana's travel to India[167]. He conceded that he did not raise a concern with MEC Zwane on the necessity of Mr Narayana accompanying him to India at the expense of this Department.

466. The letter of motivation to the Premier included a paragraph that indicated that a budget of R17 million had been allocated for the completion of three dairy projects, i.e., the Vrede Dairy Project, the Setsoto Dairy Project in the Ficksburg area and another in QwaQwa[168].

467. The next aspect dealt with the documentation that Mr Thabethe relied on in pursuing Paras as a strategic partner. One such document was the Memorandum of Understanding between the Government of the Republic of India and the Government of the Republic of South Africa. A discussion ensued regarding Mr Thabethe's understanding that this document was an agreement as opposed to it being a memorandum of understanding. Further still it was a memorandum of understanding that had no legal standing due to the inconclusiveness of the discussions between the parties[169]. It was put to Mr Thabethe that the importance of the legal status of this memorandum was pertinent because his superiors and possibly Paras[170] relied on his assurance that there was a legal framework for the submissions he made to them. Later in his testimony, he conceded that the only document in the possession of the DARD

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[166] Record – Transcript 16 August 2019 day 146p 19

[167] Record – Transcript 15 August 2019 day 145p 116 – 127

[168] Record – Transcript 15 August 2019 day 145 p 136- 145

[169] Record – Transcript 16 August 2019 day 146 p 45-70

[170] Record– Transcript 16 August 2019 day 146 p 55, 59, 62

that Estina and Paras had signed was the MOU, and that document had been valid for one year only.[171]

468. Mr Thabethe testified that he raised his concern regarding a South African partner with Paras[172]. He testified that Paras confirmed to him that Estina was its partner in South Africa[173]. He testified that, when they checked the CIPRO company registration documents for Estina these indicated that it was registered for agriculture, farming and related activities[174]. He conceded that, prior to October 2012, Estina's main business was not that of agriculture, farming or related activities[175]. His further explanation was that the expertise he wanted was in Paras, and that he was not really interested in what Estina was involved in[176]. He later conceded that he should have done more than simply establish that Estina was tax compliant[177].

469. The agreement with Estina was explored. That agreement was signed on the 5th and 7th June 2012 by the respective parties, i.e., Estina and DARD. Mr Thabethe confirmed that the original agreement was drafted by Estina. He further confirmed that his understanding of interacting with Estina was that he was communicating with Paras as Paras had identified Estina as their local partner. He was not aware of anybody from Paras being involved in the drafting of the agreement[178].

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[171] Record – Transcript 20 August 2019 day 148 p 99
[172] Record – Transcript 16 August 2019 day 146 p 74 -
[173] Record – Transcript 16 August 2019 day 146 p 90
[174] Record – Transcript 16 August 2019 day 146 p 93
[175] Record – Transcript 16 August 2019 day 146 p 96
[176] Record – Transcript 16 August 2019 day 146 p 97 - 107
[177] Record – Transcript 16 August 2019 day 146 p 107
[178] Record – Transcript 16 August 2019 day 146 p 113 - 116

470. When it was pointed out to him that the Memorandum of Understanding ("MOU") between Estina and Paras, signed on 11 April 2012[179], indicated that Estina would be an agent of Paras, he agreed. He disavowed any knowledge, however of the terms of the Memorandum that required Estina to look for business opportunities for Paras.

471. When the relevant clause 4 in the MOU was read into the record, he agreed that it recorded that Estina would identify and secure opportunities for Paras to participate in project implementation in both the Government and private sector.

472. On being shown the first partnership agreement between Estina and DARD which is dated June 2012 Mr Thabethe confirmed that at that stage DARD had not acquired the land that was going to be used for the Vrede Dairy farm. It was also put to Mr Thabethe that he had committed the DARD to a funding liability before the EXCO had given its approval[180]. The second issue dealt with was the informality of the list of beneficiaries. He conceded that the processes for formalising the participation of the beneficiaries had not taken place when the agreement of June 2012 was signed.

473. In giving his evidence[181] Mr Thabethe explained the three sources of funding for emerging farmers (the beneficiaries of projects), viz, the Provincial equitable allocation which would be allocated for farmer support, and the DAFF conditional grants called the Conditional Agricultural Support Programme and the Ilima/Letsema programme. Theses conditional grants would be allocated under transfers[182]. DAFF would make it a condition that, prior to releasing their funding, the DARD would have to provide a list

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[179] Comment by us – Trip to India was in early March 2012. By 11 April 2012 Paras had identified Estina as a South African partner.

[180] Record – Transcript 20 August 2019 day 148 p 49; This approval was only given on 13 July 2012 by way of an EXCO resolution

[181] Record – Transcript 16 August 2019 day 146 p 137-178

[182] Record – Transcript 16 August 2019 day 146 p 137 – 162. The issue of transfer payments has been dealt with in the memorandum on implementing agents that was submitted to the Chairman in December 2020.

of beneficiaries[183]. In explaining the role of implementing agents in the implementation of the project, Mr Thabethe made it clear that, although funds were transferred to the implementing agent, it (the implementing agent) was not the owner of the assets[184].

474. His understanding was that those formalities would only be concluded once the National Department ("DAFF") was involved. He further disagreed that Estina was the only beneficiary at that point in time, i.e., June 2012. His explanation was that Estina was a beneficiary for one year, after which the beneficiaries would be registered. On his version, the registration of the beneficiaries stalled as a result of the project stalling[185]. Zayna Investments (Pty) Ltd was intended to be the company in which the shareholding of the beneficiaries would be located[186].

475. When questioned about the milestones that had been achieved in terms of the agreement and as of 18 January 2013, he conceded that the process of including the beneficiaries in Zayna Investments had not been achieved. In other words, the intended beneficiaries had not been included in the Agri-BEE entity and any entry or assertion to the contrary was incorrect[187].

476. He was advised that the first agreement did not protect the State, particularly as the intention was to immediately, in June 2012, fund the project in the amount of R30 million [188]. Consequently, the second agreement that was drafted was given to the Provincial State Law Advisors for their advice.

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[183] Record – Transcript 16 August 2019 day 146 p 161- 162

[184] Record – Transcript 16 August 2019 day 146 p 162

[185] Record – Transcript 16 August 2019 day 146 p 124- 125

[186] Record – Transcript 16 August 2019 day 146 p 126- 127

[187] Record – Transcript 16 August 2019 day 146 p 176-177

[188] Record – Transcript 16 August 2019 day 146 p 183- 185 It is shocking that Mr Thabethe did not recall paying the first R30 million in June 2012. This is a significant amount of taxpayer money.

477. In further explanation of his interaction with the State Law Advisors, Mr Thabethe stated that, after the Provincial Treasury had raised some issue about the agreement of 5 June 2012, in a letter dated 25 June 2012, [189]he asked the State Law Advisors to advise him on the matter.[190]

478. Mr Thabethe confirmed that, when this interaction with the State Law Advisors took place, the first R30 million had not been paid to Estina. This money was only paid on 9 July 2012. On his version, the money was for the items on Annexure A of the Agreement, i.e., for the feasibility study, the EIA, etc. to be conducted. Having read the letter from Mr I Moses into the record[191] his comment was that he took the concerns of National Treasury and those of the State Law Advisors to heart and had a new agreement drafted.

479. In relation to the agreement of 5 July 2012, he testified that he had been advised that the beneficiaries should only be included in the project once it was complete[192]. On completion of the project, it would then be transferred into the structure established to benefit the beneficiaries. Once the project was operational, the department would then embark on a capacity building exercise and train the beneficiaries with the understanding that they would take over the operations of the project.

480. On being asked how he reconciled this advice with the mode that had attracted him to taking Paras as a strategic partner, he stated that he was persuaded by the advice of the State Law Advisors that the project be handed over to beneficiaries once it was

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[189] Record – Exhibit HH Reference Bundle D p. 1331- 1332

[190] Record – Transcript 20 August 2019 day 148 p 59-62

[191] Record – Exhibit HH Reference Bundle D p 1364; Transcript 20 August 2019 day 148 p 68 – 70; p 100

[192] Record – Transcript 20 August 2019 day 148 p 71

operational[193]. He said that the DARD's plans were thwarted by the difficulties that were encountered in the first year of implementation.

481. The funding of the project was interrogated with Mr Thabethe[194]. He confirmed that the original amount that was budgeted in 2011/2012 for the implementation of the Mohuma Mobung programme was R30 million. Included in this budget was an allocation of approximately R13 million for the Vrede Dairy Project. He also confirmed that, when the Premier was approached about the three projects in Qwa-Qwa, Ficksburg, and Senekal (Setsoto), the proposal was that R17 million would be spent on the three projects. These three projects were amalgamated under the Mohuma Mobung programme. Thereafter all the funding (i.e., R30 million) was allocated to the Vrede Dairy project[195].

482. Mr Thabethe testified that in the 2011/2012 financial year, R30 million had been spent on the Mohuma Mobung project, but all those funds were spent on the Vrede Dairy project[196]. In June 2012 another R30 million was requested by DARD. In explaining this request within the context of a second adjustment budget process, he testified that the department had requested additional funding in the 2011/2012 financial year, but the funds were not allocated.

483. He was able to confirm Ms Anna Fourie's evidence that in June 2012, R30 million was requested from the Provincial Treasury. Mr Thabethe also confirmed that the money was for land acquisition, the environmental impact assessment, the feasibility study, water reticulation, electricity connection applications, the identification of beneficiaries, the establishment of the Agri BEE entity and the identification of stakeholders.

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[193] Record – Transcript 20 August 2019 day 148 p 74-75

[194] Record – Transcript 20 August 2019 day 148 p 11-50

[195] Record – Transcript 20 August 2019 day 148 p 13-14

[196] Record – Transcript 20 August 2019 day 148 p 18 – 19; p.37

484. In addition , those funds were also to be used to draw up the project plan for phase two, and to determine the date for the capital injection by Estina[197]. On being referred to the monthly report of September 2012 and the entry that the R30 million was retained for the purpose of purchasing a milking parlour and not for Estina's obligations in the first phase, Mr Thabethe said:

484.1. what was in the monthly report may not necessarily be what was in fact implemented.

484.2. the department had provided for the R114 million required for the first year of the project in the 2012/2013 budget.

485. When it was pointed out to him that they had not provided for the R114 million in the 2012/2013 budget, he agreed and stated that he had in fact meant that R30 million had been provided for in the 2012/2013 budget. He also conceded that in the 2012/2013 financial year the department had a R84 million shortfall in respect of the Vrede Dairy Project[198]. This was why the EXCO resolution of 13 July 2012 authorised the department to source additional funding of R84 million for that financial year from the province[199]. One of the methods of sourcing the additional R84 million was through a bidding process. Another was by seeking aid from the Free State Development Corporation.[200]

486. When asked about the Setsoto project and the allegation that he stole the idea for the Vrede Dairy Project from them, Mr Thabethe stated that all information belonged to the DARD. He said that, therefore it could hardly be said that the idea was stolen.[201] The

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[197] Record – Transcript 20 August 2019 day 148 p 39 –40 ; p 100

[198] Record – Transcript 20 August 2019 day 148 p 45-46

[199] Record – Transcript 20 August 2019 day 148 p 46

[200] Record – Transcript 20 August 2019 day 148 p 46 - 50

[201] Record – Transcript 20 August 2019 day 148 p 55-58

QwaQwa project continued to be supported under CASP, not under Mohuma Mobung. He conceded that the department did not support the Setsoto project. His view was that it could still be supported by the department.

487. The 5 July 2012 agreement that ultimately determined the relationship between DARD and Estina and Estina's participation in the project was traversed. Estina's lack of knowledge of and experience in agriculture was referred to. Mr Thabethe's response was that on that area of expertise the DARD relied on Paras. The appointment of Mr CP Prasad, who did not have an agricultural background, was discussed. Mr Thabethe's response was that he did not check on whether Mr Prasad was qualified to run a dairy farm[202].

488. In the context of responding to questions on Mr Prasad's qualification to operate the dairy farm and the testimony of Mr W Basson, Mr Thabethe acknowledged that there were malnourished cattle on the farm. He attributed this to a lack of funds, not to Mr Prasad's in competence. The reason for the lack of funds he attributed to media reports[203].

489. Asked about the lack of any reference to Paras in the 5 July 2012 agreement or the role it was expected to play, Mr Thabethe's response was that he had been made to understand that the obligations in the agreement could only be directed at a South African company, and one that had an agreement with Paras. He could however not remember whether they had given the agreement between Paras and Estina to the State Law Advisors.

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[202] Record – Transcript 20 August 2019 day 148 p 80-83

[203] Record – Transcript 20 August 2019 day 148 p 87 - 89

490. In further discussing the material clauses of the July 2012 agreement, in particular clause 6.1 that dealt with Estina's obligations, Mr Thabethe stated that the agreement was for the DARD to make money available for phase one of the project to be set up. This included ensuring milk was made available through the project. Thereafter, Estina was expected to establish the milk processing plant using its own funds. This latter part would form the basis of phase two of the project.

491. Mr Thabethe was referred to the bank statements of Estina, in particular the bank balance of 4 July 2012 which reflected the amount of R16.98. What this means is that one day before Mr Thabethe's Department entered into the agreement of 5 July 2012 with Estina in regard to a project involving millions of the taxpayers' money that would be paid to Estina for its intended role running a big Dairy farm project, Estina's bank balance was a mere R16,98 and yet, the following day, Mr Thabethe's Department concluded an agreement with it in terms of which Estina was obliged to invest millions or rands into the project. This was scandalous on the part of Mr Thabethe and his Department. I cannot imagine worse negligence. He was reminded that he had signed the July 2012 agreement on 5 July 2012. The pertinent issue under discussion was Estina's ability, as strategic partner, to fund this project.

492. Mr Thabethe's response to a question relating to how confident the DARD was about Estina's financial contribution was twofold. First, he asserted that he was aware that the investment in the project was to be funded by Paras not Estina. Second, he stated that it was a standard term of agreement that implementing agents would not mingle their other business with the department's business. They were advised to keep a separate bank account for the activities of the projects. He conceded, however that the DARD had not done a due diligence on Estina's accounts[204].

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[204] Record – Transcript 20 August 2019 day 148 p 101 – 105; p 114 line 19-20

493. He also stated that the department understood that the agreement did not bind Paras but contended that, where Estina's signature appeared they understood that signature to represent Paras. He further referred to the presentation he did to the Exco as evidence of who the funders of the project were[205].

494. The presentation/submission that Mr Thabethe made to EXCO was interrogated. The purpose of that submission was for additional funds to be allocated to the department for this project. The submission recorded that the total projected investment in the project was R570 million. It recorded the initial grant by the DARD of R30 million and the payment of R114 million per financial year. The DARD's total commitment for the three-year period of investment was R340 million. Mr Thabethe pointed to a paragraph in the submission that recorded that Estina was to provide the required capital injection as well as the tactical know-how "which will be provided by Paras". His understanding of this paragraph was that Paras would provide the capital injection and technical know-how through Estina[206].

495. When the terms of the project proposal were pointed out to him, which included a provision that Estina would endeavour to fund the entire project itself, Mr Thabethe persisted in stating that his understanding was that Estina was also talking on behalf of Paras. On a further probing of the issue, Mr Thabethe conceded that the department could not have any recourse against Paras and could only against Estina[207]. The business plan also referred to Estina funding the dairy processing plant. There was no evidence of any obligations being placed on Paras. This fact concerned me a great

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[205] Record –Transcript 20 August 2019 day 148 p 106 – 107

[206] Record – Transcript 20 August 2019 day 148 p 108 – 111

[207] Record – Transcript 20 August 2019 day 148 p 114 – 115

deal, as it evinced a lack of appreciation by Mr Thabethe as the Head of Department of the risk to which he exposed DARD to.[208]

496. Mr Thabethe also conceded that the beneficiaries would only start seeing the financial benefits of this project after 4 years, i.e., in 2016. He believed that this explanation had been given to the beneficiaries.

497. With respect to acquiring the land for the dairy farm Mr Thabethe conceded that a formal presentation to the Phumelela Local Municipality was only made after the agreement of 5 June 2012 (the first illegal agreement) had been signed. He stated that he only became aware during the implementation of the project that it was not only the land required for the dairy farm but the entire town of Vrede that was part of the 4 400 hectares that the department intended to lease to Estina.[209] Later in his testimony he stated that when, he signed the lease agreement in December 2012, he was not aware that what had been ceded to DARD was the entire town of Vrede, including its cemeteries[210].

498. When asked whether he knew what expertise had been brought on to the farm by Estina, Mr Thabethe responded that he did not know nor had he heard about the substandard material that was brought on to the farm. In addition, he did not check on which experts Estina and/or Paras had brought into the project to do the work[21].

499. His evidence on the value for money proposition that Mr. D Maree testified about was that, because the project was not completed, it was difficult for him to make a comment. With respect to the observations of Mr D Maree that were brought to his attention, Mr

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[208] Record –Transcript 20 August 2019 day 148 p 119 - 121

[209] Record –Transcript 20 August 2019 day 148 p 132 – 133

[210] Record – Transcript 20 August 2019 day 148 p 133

[21] Record – Transcript 20 August 2019 day 148 p 138 - 142

Thabethe asked if he could submit a supplementary affidavit in which he would address those issues.[212]

500. His response to the investigators from National Treasury was debated. His evidence was that he did try to cooperate with them, but that he could not give them documents that he in fact did not have in his possession. With respect to why he did not give his assistance when the investigators sought to interview Mr K Vasram of Estina, at first Mr Thabethe's version was that he had asked Mr Vasram to interact with the investigators.

501. When the contrary version of National Treasury was put to him, and Mr Vasram's response that he required permission from the department, Mr Thabethe again changed his evidence. He stated that it was Mr Vasram who had indicated that he was averse to meeting the investigators. He also invoked the confidentiality clause in the agreement as a reason not to accede to the investigators request. With respect to his refusal to permit the investigators to interview the department's attorney, Mr Thabethe's evidence was that the investigators did not need his permission, and that in any event he did not refuse them access[213].

502. His evidence on the extent to which Estina had met its obligations to build the milk processing plant was that the department stopped Estina from proceeding until the investigation of the project had been concluded. He had last visited the project in 2015/2016 and believed that it could still be salvaged[214].

503. The Free State Development Corporation ("FDC") was appointed as an implementing agent on 14 August 2014 to manage the project after the agreement with Estina had

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[212] Record – Transcript 20 August 2019 day 148 p 164 – 166

[213] Record – Transcript 20 August 2019 day 148 p 157 – 162

[214] Record – Transcript 20 August 2019 day 148 p 174 – 177

been terminated. According to Mr Thabethe, the FDC did not go through a competitive process prior to its appointment because it was a state-owned entity to which the State could allocate duties and responsibilities[215].

504. He testified that he had taken advice from the State Law Advisors on how to involve the FDC in the project. This advice included advice on which legal prescripts he could rely on. The State Law Advisors drafted the agreement with the FDC[216]. With respect to the inventory of assets that was handed over to Estina, Mr Thabethe testified that the department relied on comparing the list that Estina had given them with the amounts spent on the operations of the farm as listed in the monthly reports they received from Estina[217].

505. Mr Thabethe was asked to comment on Mr Zwane's affidavit, filed in response to being an implicated party in the Estina matter. He agreed with Mr Zwane's proposition that the implementation of the project, and the Mohuma Mobung development framework, lay with the Accounting Officer, i.e., with Mr Thabethe himself[218]. The department gave input to Mr Zwane on the Mohuma Mobung development framework. The Vrede Dairy project was but one project under Mohuma Mobung.

506. With regard to the selection of Paras as a strategic partner, his evidence was that as a member of the provincial executive council, Mr Zwane did approve the selection of Paras. Similarly, with the budget, Mr Zwane sought the approval of the Legislature. This meant that he was satisfied with what he was presenting. He stated that, once

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[215] Record – Transcript 20 August 2019 day 148 p 179 – 180

[216] Record – Transcript 20 August 2019 day 148 p 180 – 181

[217] Record – Transcript 20 August 2019 day 148 p 192

[218] Record – Transcript 3 October 2019 day 176 p 19, p 25-26

that approval had been given by the Legislature, the administrators would take on the responsibility of implementing the project[219].

507. According to Mr Thabethe the project failed because it was not given the opportunity to develop as planned. He said that the investigations that ensued caused the project to falter[220]. In particular, the instruction from DAFF to stop using its funds on the project led to the numerous problems that were experienced. At some point Mr Thabethe blamed the media articles for the lack of progress in the project. These propositions were challenged and ultimately Mr Thabethe pointed to funding as the primary cause of the problems experienced.

508. There was a short discussion on whether Mr Zwane had identified the land that was to be used for the dairy farm. Mr Thabethe's final word was that Mr Zwane advised them that Vrede had land identified for that purpose[221].

509. The next aspect that Mr Thabethe dealt with related to the visit to Paras in India. He confirmed that Mr Zwane recommended that he travels to India and that Mr Narayana accompany him. He also stated that he did not know why Mr Zwane might have been under the impression that he was meeting other government officials in India, because the supporting documentation that he had submitted to the MEC made the purpose of his visit to India clear[222].

510. He also stated that he had no input in the development of criteria for the selection of beneficiaries for the dairy project as this function would have been discharged by junior

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[219] Record – Transcript 3 October 2019 day 176 p 35 –37

[220] Record –Transcript 3 October 2019 day 176 p 42-50

[221] Record – Transcript 3 October 2019 day 176 p 68-69

[222] Record – Transcript 3 October 2019 day 176 p 70-82

officials[223]. Mr Thabethe insisted that, when the CASP grant was withdrawn, the NAP already had the beneficiary list[224].

511. With regard to inviting South African companies to participate in the Vrede Dairy Project Mr Thabethe testified that though the presentation document used was a generic one that did not specifically address the dairy project, the correct information would have been given to interested parties at the actual presentation[225].

512. Mr Thabethe testified that at no stage did he intend to establish a partnership with Estina[226]. He also confirmed that the only prevailing document binding Paras was its Memorandum of Understanding with Estina. There was no agreement between Paras and the department. He also accepted that in terms of the agreement between DARD and Estina, the latter was the sole provider of services[227]. It is incomprehensible how a whole Head of Department of a Provincial Government could think his department was entering into partnership agreement with one entity by concluding an agreement with a different entity that was not an agent of the first mentioned entity. One can simply not understand how somebody with no understanding or appreciation of something so basic could have risen to the position of Head of Department of a Provincial Government in charge of millions of taxpayers' money.

513. His response on how the department intended holding Estina to account was that the department monitored progress on a monthly basis. He confirmed that monthly and quarterly financial reports were submitted to the department. Mr Thabethe said that the Auditor-General also monitored this and did an assessment on an annual basis. He

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[223] Record – Transcript 3 October 2019 day 176 p 86-89

[224] Record – Transcript 3 October 2019 day 176 p 90

[225] Record – Transcript 3 October 2019 day 176 p 93- 106

[226] Record –Transcript 4 October 2019 day 177 p 8 - 9

[227] Record – Transcript 4 October 2019 day 177 p 11 – 12 ; 26 -32

testified that in effect monitoring mechanisms were in place both internally and externally[228].

514. Mr Thabethe explained that Estina was only entitled to charge a management fee after it had handed over the completed project. He said that in the meantime, it could only recover "direct costs"[229]. The other benefit to Estina was that it had a shareholding in the project once the project was complete[230]. He also confirmed that any sub-contractors employed by the implementing agent had to be vetted by the department[231].

515. When asked again why he refused the National Treasury investigators access to Mr K Vasram, Mr Thabethe responded that he was prepared to give them access if the department was present at that meeting. His difficulty was that the National Treasury investigators wanted exclusive access. He did not want to be seen to be giving investigators the right to investigate private company. When his response was interrogated further, Mr Thabethe conceded that he did not have a problem with the investigators speaking to Estina but could not understand why they needed permission from him. When it was pointed out that the agreement provided for him to give Estina permission, he stated that with his current understanding he would give permission[232].

516. When I pointed out to Mr Thabethe that he seemed to be more concerned with protecting Estina rather than the department, Mr Thabethe at first denied this but ultimately conceded that it was Estina's intellectual property that he was trying to protect. On further questioning he explained that he was trying to protect the intellectual property of Paras which was in the hands of Estina[233]. In other words, he was trying to

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[228] Record – Transcript 4 October 2019 day 177 p 14 – 15; 32-39

[229] Record – Transcript 4 October 2019 day 177 p 17-18

[230] Record – Transcript 4 October 2019 day 177 p 19-21

[231] Record – Transcript 4 October 2019 day 177 p 24

[232] Record – Transcript 4 October 2019 day 177 p 45-53

[233] Record – Transcript 4 October 2019 day 177 p 58-67

protect the interests of an entity to which he or his Department had no legal obligation and one that itself had no obligation towards his department.

517. When the content of the emails of 1 December 2013 between the ENS investigator and Mr Vasram was put to Mr Thabethe, in particular Mr Thabethe's communication that Mr Vasram refused to meet the investigators, Mr Thabethe denied he had said this. He reiterated that his concern had been with Paras' intellectual property rights. Mr Thabethe had no cogent response when I asked why the investigators would have been interested in intellectual property rights. This question arose from the fact that Mr Thabethe was saying he refused the investigator's permission to speak to Mr Vasram because he was protecting Paras intellectual property. His final answer was that he did not know why the investigators would have been interested in intellectual property rights[234]. In other words, when the investigators wanted to see Mr Vasram, he refused their petition because he sought to protect Paras' intellectual property rights and yet he could not explain why the investigators would have been interested in Paras' intellectual property. His explanation for refusing the investigators permission made no sense. It shows that he was not co-operating with the investigators.

518. Mr Thabethe denied that he had not given the investigators adequate information and access to the financial documentation relating to the dairy project. He also lamented the fact that he had not been given the opportunity to comment on the report prepared by the investigators[235].

519. When discussing the report of Mr D Maree in the context of the feasibility studies undertaken by the department and Estina, Mr Thabethe accepted that the number of milk producers in the Free State province had declined between 2006 and January 2012

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[234] Record – Transcript 4 October 2019 day 177 p 68-72

[235] Record – Transcript 4 October 2019 day 177 p 85-87

but qualified his answer by saying it was a national decline. He said that one of the reasons for setting up the Vrede Dairy Project was to address this decline in the province. He thus agreed with the statistics but not the reasoning of Mr D Maree's report. He failed to understand that the decline was based on the fact that milk producers had found that this type of business was too risky if operated in the Free State as opposed to coastal regions in Kwazulu-Natal and the Eastern Cape.

520. He also stated that with the investment by Estina in building a milk processing plant, the costs of, among others transport would be reduced. He asserted that water rights had been secured by way of licences and agreed that water was key in establishing a dairy farm[236].

521. With regard to the costing of the project, Mr Thabethe testified that what they had initially provided were cost estimates. During implementation the actual costs were presented by way of monthly reports[237].

522. With regards to the way the department complied with section 38(1)(j) of the PFMA, Mr Thabethe testified that the manner of reporting transfer payments in the annual financial statements was against the project and not against the implementing agent even though it was the implementing agent to whom the funds were transferred. He said that this was the accepted manner of reporting money gazetted for a project.[238] Section 38(1)(j) of the PFMA reads: "when transferring funds in terms of the annual Division of Revenue Act, must ensure that the provisions of that Act are complied with".

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[236] Record – Transcript 4 October 2019 day 177 p 90 - 109

[237] Record – Transcript 4 October 2019 day 177 p 110 - 111

[238] Record – Transcript 4 October 2019 day 177 p 126 - 130

523. When questioned further about why the name of the entity to which the funds were transferred was not recorded, and thereafter the purpose for which the funds were used noted in the appropriate column of the annual financial statements, Mr Thabethe conceded that it was wrong not to disclose the name of the person or entity to which the money was transferred[239].

524. When exploring the amounts that were paid to Estina, Mr Thabethe agreed that the first R30 million was paid on 9 July 2012. On 18 April 2013 Estina received R34 950 000. On 26 April 2013 it received R30 million. On 3 May 2013 Estina received R19 050 000 and on 20 December 2013 it received R29 950 000. The contract was cancelled on 25 July 2014. After the contract had been cancelled Estina was paid R60 million, this was on 8 May 2015. On 5 May 2016 it received R46 252 652. The total disbursed was R250 202 652.[240]

525. When I asked Mr Thabethe whether, throughout the period until cancellation of the agreement Estina had made any payment in terms of its investment obligations, Mr Thabethe at first stated that it had. However, on being referred to the entries by Estina in the monthly reports, he then changed his mind[241]. He agreed though that Estina was to invest R228 million on the milk processing plant. I wanted clarity on whether Estina had paid any funds into the project at all and if so, when it did so and how much it paid.

526. In response to this question, the monthly and quarterly reports from Estina were traversed. The obligations of Estina as recorded in the agreement were noted. The 30 September 2012 report from Estina noted the commencement date of the project as 5 July 2012 with an additional note that its obligations could only commence from the date

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[239] Record – Transcript 4 October 2019 day 177 p 131- 134

[240] Record – Transcript 4 October 2019 day 177 p 147- 148

[241] Record – Transcript 4 October 2019 day 177 p 149- 155

of official handover of the land to Estina. The lease for the land was only signed on 14 December 2012[242].

527. When asked whether the shelf company that had been registered to hold the interests of the beneficiaries had been deregistered after the State Law Advisors had advised that the 5 June 2012 agreement was invalid, Mr Thabethe stated that the department took responsibility for this deregistration[243]. He further explained that Estina had done the original registration.

528. Thereafter, there was a name change to Mohoma Mobung Dairy Project (Pty) Ltd which was registered on 11 October 2013 with its registered address being that of Mr Vasram[244]. The sole director was Mr Vasram. Mr Thabethe agreed that this was the company that was supposed to house the beneficiaries' interests but stated that this was a holding position until the beneficiaries had been identified[245].

529. Mr Thabethe said the same circumstances pertained with the appointment of Ms Soo Young Jeon as director. His further evidence when told that Ms Jeon took over in 2015 and was not a South African national was that the FDC took over the running of the project in 2014[246].

530. The next series of questions dealt with whether Mr Thabethe as HOD had interrogated the monthly and quarterly accounts that Estina had presented to the department. The cash flow position as recorded in the 31st October 2012 report of Estina was traversed. In that report Estina recorded that it had injected R250 000 and again R3.75 million into

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[242] Record – Transcript 4 October 2019 day 177 p 157 – 159

[243] Record – Transcript 4 October 2019 day 177 p 166

[244] Record – Transcript 4 October 2019 day 177 p 168 - 171

[245] Record – Transcript 4 October 2019 day 177 p 172

[246] Record – Transcript 4 October 2019 day 177 p 174

the dairy project[247]. This statement was interrogated within the context of Estina having been shown to have had only R16.00 in its bank account the day before it concluded its agreement with the DARD and Mr Thabethe's evidence that they had agreed that Estina's funds would not be co-mixed with those of the project.

531. On being questioned about the R29 million that Estina had reserved for milk parlour equipment instead of being used as intended for Estina's Phase 1 obligations, Mr Thabethe said that he questioned this decision by Estina and was told that it was imperative to reserve that equipment.

532. When asked why he did not wait for the full feasibility study to be concluded before permitting such a large sum of money to be placed out of the reach of the Department, he had no cogent or convincing answer other than to say that up to that point they had relied on the preliminary feasibility study, and the explanation he got from Estina on the reservation of the R29 million was reasonable[248].

533. When Mr Theron's evidence on the cost of parlour equipment was put to Mr Thabethe, his response was that what Estina was supplying was more than what Mr Theron had referred to. Having said that, he was not able to explain the additional elements of the parlour equipment that Estina had reserved[249].

534. When asked if he understood why US$5 million was paid for the feasibility study to consultants from outside South Africa, Mr Thabethe's response was that this was an exercise that fell within Estina's remit. The department had charged Estina with doing the feasibility study. He went further to state that the department had to be open to new innovation in respect of how the project could be implemented, hence its reliance on

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[247] Record – Transcript 4 October 2019 day 177 p 176-177

[248] Record – Transcript 4 October 2019 day 177 p 187 –201; Transcript 28 October 2019 day 183 p 10; 49-50

[249] Record – Transcript 28 October 2019 day 183p 11-12

Estina. He emphasised that he was not personally responsible for monitoring the project but rather the officials on the ground were. They gave him reports. They certified that the payments requested were due as the work had been done. He was prepared to take accountability but asserted that he could not be expected to tick each and every box[250].

535. In further interrogation of the US$5 paid for the feasibility study Mr Thabethe was referred to the evidence of Ms Mtshiza regarding the NAP's recommendation in 2013 that a proper feasibility study be conducted. After much debate about which feasibility report Ms Mtshiza was referring to, Mr Thabethe's response was that he was surprised that the DAFF sat with a report for almost a year before complaining about its quality[251].

536. He further stated that the US$5 million is what the original R30 million advanced to Estina was to pay for. When it was pointed out that the US$5 million came to R49 million for the feasibility study, and that R29 million of the R30 million that the department had advanced to Estina in July 2012 had been reserved for parlour equipment, Mr Thabethe's answer was that "how themoney was managedafter we received the work done – I don't know. That is my problem Chair, because I wouldn't know what they (sic) have used the money for because the work that we have requested from them had been delivered"[252].

537. When asked if he knew what the money spent on the Gateway Limited report represented in terms of value, he responded that he did not know. He also did not know what feasibility study the Gateway Limited report referred to. He knew the October

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[250] Record – Transcript 28 October 2019 day 183 p 18-25

[251] Record – Transcript 28 October 2019 day 183 p 27-41

[252] Record – Transcript 28 October 2019 day 183 p 43 -44

2012 feasibility report as the final feasibility study[253]. He did not know who the creditors were who were being paid by Estina. He thought that the director who was earning R48 000 was Mr Prasad. It was pointed out to him that Mr Prasad was a project manager earing R65 000 per month[254]. He conceded that he could not assist the Commission with the payments made in October 2012. He also agreed that the payments that Estina said it had made were made prior to the land being secured, as this was only done in December 2012[255].

538. When asked what the next payment of R34 950 000 was to be used for, Mr Thabethe responded that it was for the implementation of the project, inclusive of the parlour equipment, the tractors etc. He testified that the entre R84 million that was paid in the 2013/2014 financial year should have covered the work done until April 2013[256].

539. With regards the letter from Gateway limited dated 9 July 2013 requesting funds to place final orders for pasteurising equipment, which items fell within the investment remit of the processing equipment that Estina was obligated to purchase, Mr Thabethe stated that he did not know about the letter. What he knew was that Estina was supposed to make its investment in Phase 2 of the project[257].

540. Mr Thabethe was asked to comment on the cancellation agreement and the amount of R106 252 652 that was paid to Estina on cancellation of the agreement. He explained that in part the department was paying for the processing plant that Estina had put up. When the content of the Diomart report was put to him, which report commented on the substandard quality of the processing plant equipment and which report he accepted

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[253] Record – Transcript 28 October 2019 day 183 p 50-51

[254] Record – Transcript 28 October 2019 day 183 p 53-55

[255] Record – Transcript 28 October 2019 day 183 p 57

[256] Record – Transcript 28 October 2019 day 183 p 71-72

[257] Record – Transcript 28 October 2019 day 183 p 75-77

as correct in its assessment, Mr Thabethe's essential answer was that the amount paid was right in terms of the plans and designs of the processing plant. He accepted the content of the report but stated that he could not put a monetary value to that assessment[258].

541. With respect to paragraph 5 of the letter written to Estina by Mr Thabethe on not raising a tax invoice in part or in full, Mr Thabethe's response was that he took advice from the State Law Advisors. He could not give a clear and cogent response to the question relating to what exactly he was asking Estina to hold back on, or why on the VAT payment he appeared to be protecting SARS.[259] Paragraph 5 of Mr Thabethe's reads as follows:

> "As such we would request you not to raise the tax invoice in part or full for the hand-over of the assets until the complete payments, as per the agreement is transferred to your account. As soon as the payment is done, you may raise a tax invoice for the full value of the project to the entity that will be intimated to you at the time."

542. On being questioned about the appointment of the FDC and the payment of R32 million to E'tsho Civils, Mr Thabethe's evidence was that the department had signed an agreement with the FDC at an agreed amount of R20 million per annum for a period of 3 years starting in the 2014/2015 financial year up to and including the 2016/2017 financial year. His understanding was that the R32 million paid to E'tsho Civils was for a period of 3 years, not per annum [260]. When asked if E'tsho Civils had the competency to run a dairy farm he deferred to the appointing agent, the FDC, in respect of the

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[258] Record – Transcript 28 October 2019 day 183 p 84 - 92

[259] Record – Transcript 28 October 2019 day 183 p 94 - 114

[260] Record – Transcript 28 October 2019 day 183 p 115 - 119

selection of an appropriate service provider to assist in the execution of the FDC's mandate.

543. When Mr Thabethe was asked about the 99-year lease agreement he signed with Estina, his response was that he understood that this land would ultimately be transferred to the beneficiaries[261].

544. With regard to his meetings with the Gupta family, Mr Thabethe was evasive on the dates on which he might have had interactions with members of this family, and who exactly he had interacted with. He confirmed that he had met them at some of the business breakfast shows. He also confirmed attending a meeting with one of the Gupta family members sometime in 2013. In that meeting they discussed technical assistance to Estina. There was one meeting that he recalled where he was asked to assist with work permits[262]. He admitted to discussing matters relating to the payment of funds with Mr K Vasram and Mr Gajendra Kumar[263].

545. During re-examination Mr Thabethe gave reason for him to have a meeting at Saxonwold and stated that the Gupta family members had no role in the entire scheme concerning the dairy project.[264] Of course, this was plainly false. This was a project of the Gupta family. The evidence of Ms Rockman and that of Mr Theron makes this clear. Furthermore, the inexplicable decision by Mr Zwane and probably the Premier, Mr Ace Magashule, that Mr Narayan should accompany Mr Thabethe on his trip to India supports that conclusion because Mr Narayan was an associate of the Gupta family. HE appears to have been employed by Mr Magashule as his advisor but his appointment was not as yet effective when he left for India with Mr Thabethe. His role

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[261] Record – Transcript 28 October 2019 day 183 p 121- 125

[262] Record – Transcript 28 October 2019 day 183 p 126 – 149; 189

[263] Record – Transcript 28 October 2019 day 183 p 150 - 167

[264] Record – Transcript 28 October 2019 day 183 p 188

in that trip was vague and there was no good and lawful reason for him to accompany Mr Thabethe and for taxpayers' money to be used to fund his trip.

546. The last part of Mr Thabethe's evidence dealt with transfer payments and the justification for these. These are dealt with in the implementation memorandum.

547. Mr Thabethe undertook to file a supplementary affidavit[265] to deal with certain aspects that he relied on in deviating from the supply chain management policy.] That supplementary affidavit was not filed with the Commission. He has also not filed a supplementary affidavit disputing the contents of the National Treasury investigator's report despite being given the opportunity to do so.

Implementing Agents

548. The essence of the evidence presented by various witnesses on matters relating to the Vrede Dairy Project revolves around the appointment of Estina as an implementing agent for this project, Estina's relationship with Paras Dairy, a dairy company based in India that became the strategic partner in the implementation of this project, as well as the conduct of relevant public officials who facilitated conduct that led to questions being raised about this project.

549. The use of Estina as an implementing agent and managing agent for the Vrede Dairy project is at the centre of the allegations of state capture, corruption and fraud that various officials in the Free State Provincial government have presented evidence on before this Commission. In other words, the act of appointing Estina as an

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[265] Record – Transcript 28 October 2019 day 183 p197 to p199

implementing agent for non-existent beneficiaries, and as a strategic partner to DARD relative to the investment of R228 million that Estina undertook to invest in the project, is the focal point of the inquiry by this Commission.

550. What compounds the issue was the role of Paras which the department regarded as using Estina as a conduit to be able to do business in South Africa[266]. This raises the question – who exactly was intended to be the implementing agent? Estina, the *de jure* entity with which DARD entered into an agreement despite its lack of agricultural expertise, or Paras, which was the entity with the requisite expertise but not the entity with the legal obligation to perform to the required standard? If Paras was intended to be the *de facto* implementing agent because of its expertise, what measures did DARD put in place to monitor their participation and output?

551. Last, to what extent did the investment promise made by Paras influence DARD's oversight of the performance and value add in respect of the project, of the implementing agent, whether Estina or Paras?

Overview

552. This particular part of the Report records the legal authority that provides for the use of implementing agents by organs of state, and in particular, their use by the Department of Agriculture and Rural Development in the Free State Province. In addition, the legal team has reviewed the evidence tendered by various witnesses on the appointment of Estina as an implementing agent for the Vrede Dairy project.

553. There is some tension in the concept of an implementing agent and a managing agent in that witnesses interpret these two roles to be different aspects of the services

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[266] Record – Transcript 16 August 2019 day 146 p 97

provided by Estina. The key issue in understanding the role of Estina in the Vrede dairy project is that of the fusion of roles that were integrated into the manner in which this dairy project was established and implemented. In relation to whether DARD received value for money expended on this project, again the role of the implementing agent, the manner in which it accounted for funds transferred to it, and the oversight role of DARD, are brought into sharp focus.

554. The evidence traverses the role of Estina as the counterpart of Paras, its appointment as the sole provider of services, and the fusion of these roles with that of Paras being the strategic partner of DARD. Specific focus is given in the evidence of the conflict of interest that arose in the appointment of Estina as an implementing and managing agent. In addition, attention is drawn to the inability of DARD to hold Paras to account in any manner, despite the expressed reliance on the expertise of Paras.

555. In this context, the deviation that enabled the appointment of Estina is a central issue. Of significance to the question of deviations is the fact that not all deviations that are approved by an Accounting Officer are accepted by the Provincial Treasury and Auditor-General to whom the deviation must be reported within ten (10) working days of the deviation decision[267]. In this instance, no such approval was sought or granted[268].

556. In her testimony Ms E Rockman deals with the auditing of the discretion of an Accounting Officer who has taken a deviation decision[269] and the consequence management that the Public Audit Amendment Act is intended to introduce[270] .

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[267] Treasury Regulation 16A.6.4; Clause 3.4 of National Treasury Practice Note No. 8 of 2007/2008

[268] Record – HH16 – SSD 25 - Affidavit Ms. S Dhlamini para 11.2.3

[269] Record – Transcript 17 October 2019 day 182 p. 52 of 68

[270] Record – Transcript 17 October 2019 day 182 p. 56 of 68

557. In considering the matters highlighted herein, the oversight functions of National and Provincial Treasury, the Department of Agriculture Forestry and Fisheries, and the Head of Department, Mr Thabethe, come into sharp focus. The role of the State Law Advisors who were located in the office of the Premier, also has a bearing on the decisions taken in relation to the agreement entered into between Estina and DARD.

558. The competency and capacity of the Free State Development Corporations (FDC) to assist in the implementation of the dairy project, and the ultimate Exco decision that was taken regarding the operations of the dairy project after the agreement with Estina was cancelled, is another aspect that raised eyebrows in the Free State[271].

559. The original estimate cost of R13 million for the establishment of the Vrede Dairy project as opposed to the amended cost projection of R572 000 000 is a material issue in understanding the dual role of Estina as implementing agent and strategic partner/investor. Costs against value for money are at the heart of this aspect. In addition, the transfer of funds paid to Estina by the DARD which funds were then presented as Vrede dairy farm funding is central to this aspect.

560. In giving consideration to the funds that were transferred to Estina as implementing agent, there is also the question of aligning the funds paid to Estina to the initial estimate of R17 million for the preparation of three dairy plans, as presented to the Premier in March 2012. Questions arise relative to the first R30 million that was paid to Estina in July 2012, R34 950 000 that was paid on 12 April 2013, R30 000 000 that was paid on 26 April 2013 and R19 050 000 that was paid on 3 May 2013. In addition, an explanation is sought for the subsequent payments of R29 950 000 on 20 December

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[271] Record – Transcript 22 July 2019 day 137 p. 64–65 of 185

2013, R30 000 000 on 25 July 2014, R60 000 000 on 8 May 2015 and R46 252 652 on 5 May 2016.

561. There is also the alignment of the estimated cost of the dairy parlour and processing facility. The original estimate was that the dairy parlour and processing facility would cost R13 million, giving rise to the question: when did this quantum balloon to R572 000 000?

562. As a consequence of the conduct of the parties to these relationships, the proceedings before the Commission traversed matters[272] relating to:

562.1. the deviation that facilitated the appointment of Estina as an implementing agent and partner to DARD;

562.2. the qualification of Estina, an IT company, as an implementing agent;

562.3. the relationship between Estina and Paras;

562.4. the procurement processes that were undertaken in the implementation of the dairy farm project, in particular the employment and payment of sub-contractors and related service providers to the project;

562.5. the manner in which the funds expended by DARD were used;

562.6. the authority of DARD to make transfer payments to Estina, including the manner in which these transfer payments were accounted for in the Annual Financial Statements of DARD;

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[272] This memorandum explores most of these issues as highlighted in the evidence of witnesses. The remainder will be dealt with in the summary of evidence report on the Vrede dairy project.

562.7. whether Estina, as a strategic partner and in implementing the project, paid any investment funds at all into the project; and

562.8. the value for money derived from the funds expended by the DARD;

562.9. the basis on which the balance claimed by Estina on the termination of the contract was paid to it.

563. The relationship between the Gupta family and/or its associate companies/ and or its associates and Estina, and their involvement in the Vrede Dairy Project is an aspect that links into the role of Estina as implementing agent of the dairy farm. In the result, this aspect will also form part of the material presented in this part of the Report.

564. In addition to the above, literature on how organs of state have utilised the services of implementing agents for purposes of giving an overview on the mechanism of implementing agents and some of the criticisms of contracting government services to these agents.

565. It has become apparent that the merits of this mechanism of implementing agents cannot be analysed without reference to the classification of transfers and subsidies and the classification of goods and services. In context and where appropriate, it is of essence to note the significance of the National Treasury classifications of transfers and those relevant to goods and services and the amendments introduced to these classifications in 2018.

The Legislative Framework relevant to the appointment of and use of implementing agents

566. Briefly, the constitutional and statutory framework that authorises the use of, and payment to, implementing agents can be found in the following prescripts:

566.1. Sections 6(2), 38(1)(j), and 76, read with section 89 and 91 of the PFMA;

566.1.1. Section 6(2) reads:

"6. Functions and powers. —

(2) To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury—

(a) must prescribe uniform treasury norms and standards;

(b) must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;

(c) must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;

(d) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;

(e) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;

(f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and

(g) may do anything further that is necessary to fulfil its responsibilities effectively."

566.2. Section 38(1)(j) reads:

"38. General responsibilities of accounting officers. —

(1) The accounting officer for a department, trading entity or constitutional institution—

...

(j) before transferring any funds (other than grants in terms of the annual Division of Revenue Act or to a constitutional institution) to an entity within or outside government, must obtain a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, render the

transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems;

566.3. Section 76 provides:

"76. Treasury regulations and instructions—

(1) The National Treasury must make regulations or issue instructions applicable to departments, concerning—

(a) any matter that must be prescribed for departments in terms of this Act;

(b) the recovery of losses and damages;

(c) the handling of, and control over, trust money and property;

(d) the rendering of free services;

(e) the writing off of losses of state money or other state assets or amounts owed to the state;

(f) liability for losses and damages and procedures for recovery;

(g) the cancellation or variation of contracts to the detriment of the state;

(h) the settlement of claims by or against the state;

(i) the waiver of claims by the state;

(j) the remission of money due to the Revenue Fund, refunds of revenue and payments from the Revenue Fund, as an act of grace;

(k) the alienation, letting or other disposal of state assets; and

(l) gifts or donations by or to the state.

(2) The National Treasury may make regulations or issue instructions applicable to departments, concerning—

(a) any matter that may be prescribed for departments in terms of this Act;

(b) the charging of expenditure against particular votes;

(c) the establishment of and control over trading entities;

(d) the improvement and maintenance of immovable state assets;

(e) fruitless and wasteful, unauthorised and irregular expenditure;

(f) the determination of any scales of fees, other charges or rates relating to revenue accruing to, or expenditure from, a Revenue Fund;

(g) the treatment of any specific expenditure;

(h) vouchers or other proofs of receipts or payments, which are defective or have been lost or damaged;

(i) assets which accrue to the state by operation of any law; or

(j) any other matter that may facilitate the application of this Act.

(3) Regulations in terms of subsection (1) or (2) may prescribe matters for which the prior approval of a treasury must be obtained.

(4) The National Treasury may make regulations or issue instructions applicable to all institutions to which this Act applies concerning—

(a) any matter that may be prescribed for all institutions in terms of this Act;

(b) financial management and internal control;

(c) the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(d) audit committees, their appointment and their functioning;

(e) internal audit components and their functioning;

(f) the administration of this Act; and

(g) any other matter that may facilitate the application of this Act.

(5) A treasury regulation or instruction in terms of this section may—

(a) differentiate between different categories of—

(i) institutions to which this Act applies;

(ii) accounting officers; or (iii) accounting authorities; or

(b) be limited in its application to a specific category of—

(i) institutions to which this Act applies;

(ii) accounting officers; or

(iii) accounting authorities."

566.4. Section 89 reads as follows:

89. Functions of Board. —

(1) The Accounting Standards Board must—

(a) set standards of generally recognised accounting practice as required by section 216 (1) (a) of the Constitution, for the annual financial statements of—

(i) departments;

(ii) public entities;

(iii) constitutional institutions;

(iv) municipalities and boards, commissions, companies, corporations, funds or other entities under the ownership control of a municipality; and

(v) Parliament and the provincial legislatures; [Sub-para. (v) substituted by s. 44 of Act No. 29 of 1999.]

(b) prepare and publish directives and guidelines concerning the standards set in terms of paragraph (a);

(c) recommend to the Minister effective dates of implementation of these standards for the different categories of institutions to which these standards apply; and

(d) perform any other function incidental to advancing financial reporting in the public sector.

(2) In setting standards the Board must take into account all relevant factors, including—

(a) best accounting practices, both locally and internationally; and

(b) the capacity of the relevant institutions to comply with the standards.

(3) The Board may set different standards for different categories of institutions to which these standards apply.

(4) The standards set by the Board must promote transparency in and effective management of revenue, expenditure, assets and liabilities of the institutions to which these standards apply."

566.5. Section 91 provides:

"91. Regulations on accounting standards of Board—

(1) The Minister, after consulting the Auditor-General, may make regulations—

(a) concerning the qualifications, remuneration, term of office and removal of members of the Accounting Standards Board, the filling of vacancies, the chairperson of the Board, and the finances and administration of the Board;

(b) prescribing the standards set by the Board in terms of section 89; and

(c) concerning any other matter that may facilitate the proper functioning of the Board or the implementation of those standards.

(2) The Minister must consult the Board on the implementation date of a regulation made in terms of subsection (1) (b).

(3) Different regulations may be made in terms of subsection (1) (b) for different categories of institutions to which the standards set in terms of section 89 apply.

(4) Draft regulations prescribing standards in terms of subsection (1) (b) must be published for public comment in the national Government Gazette before their enactment."

566.6. Treasury Regulations, including TR 6.7.1(b) and 18.2.

Analysis

567. The Terms of Reference of the Commission inform the parameters of the investigation undertaken. The salient allegations that the Commission is mandated to investigate are those of state capture, corruption, and fraud.

568. The question is whether the establishment of the Vrede Dairy Project was a stratagem that was intended to divert state resources and funds to the Guptas or their associates to benefit select decision makers in government or members of their families, whether direct or indirect in nature. The evidence by Dr Kaufman and Hellman is relied upon in assisting in this part of the analysis.

569. In this analysis focus is placed on the following key issues. Firstly, interrogating the compliance with legal prescripts and/or whether the content of relevant legal prescripts was deliberately misconstrued for purposes of enabling state capture, corruption and fraud. Secondly, highlighting whether and if so to what extent the key deliverables for this dairy project were realised, alternatively subverted to achieve state capture, corruption and fraud. Thirdly, the credibility of witnesses particularly where the

evidence they have tendered differs in material respects to that tendered by other witnesses, is considered.

570. In their written submission to the Commission titled "State Capture in Transition" academics, Dr J Hellman and Dr D Kaufmann define state capture as the "effortsof individuals or firms to shape the *formation* of laws, policies and regulations of the state to their own advantage by providing illicit private gains to public officials. The key distinction of this typology is not the size of the bribe not the level in the political system where the bribery occurs, but rather whether the corruption is directed to distort the intended*implementation* of laws or to*shape* the formation of the lawsthemselves"[273].

571. In his statement Mr Mathebula who was the Deputy Chief Procurement Officer at National Treasury makes the following fundamental points. First, that "governmentis the single largest procurer of goods and services". Second, that "government has taken a policy decision to leverage public procurement to support the achievement of broader socio-economic objectives". Third, that "thesize of governmentspend does,however, giverisetothe unintendedbut considerable potential forabuse of thesystem"[274].

572. Sections 217and 195 of the Constitution are central constitutional tenets that inform the conduct of officials in the public sector including organs of state[274]. All laws and regulations that give effect to these provisions form part of the legal and governance framework that public officials obliged to comply with. This analysis of evidence will explore whether the prevailing legal framework regulating procurement in the public sector was or continues to be open to manipulation by decision makers, and if so, in what respects.

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[273] Record – Submission of Dr Joel Kaufmann and Dr Daniel Hellman to the Commission dated 29 August 2018 p. 32 para 7

[274] Record – Statement of Mr NW Mathebula, Acting Chief Procurement Officer, National Treasury, dated 15 August 2018 p. 10 – 14 para 4.5

573. In context, the legal and governance framework, including the statutory obligations that required compliance with directives and instructions issued by National Treasury, forms the backdrop to the analysis of the evidence of the principal witnesses. i.e., Mr PM Thabethe, the HOD, Ms S Dhlamini, the CFO, Ms E Rockman, MEC of Finance, Dr TJ Masiteng, Chief Director District Services, Mr AJ Venter, Senior State Law Advisor, and Ms E Mtshiza, Chairperson of the National Assessment Panel of the DAFF.

574. The essence of the evidence presented by various witnesses on matters relating to the Vrede Dairy Project revolves certain topics that are dealt with below:

The deviation

574.1. The HOD, Mr Thabethe, who motivated and approved a deviation from the normal procurement procedure that requires a competitive tender process to be complied with. This deviation enabled the appointment of Estina as an implementing agent, managing agent and funder for the Vrede Dairy Project.

574.2. The extent to which the Executive Authority and/or department's officials and those who either advised them or participated in decisions taken relative to the Vrede Dairy Project, complied with the legal prescripts that regulate procurement in the public sector. In this context the spotlight is on the conduct of relevant public officials, in particular, the HOD as the Accounting Officer of the department and the CFO, Ms Dhlamini, on whose advice he said he acted. The spotlight is also on:

574.2.1. Estina's dormant relationship with Paras, which company purportedly became the strategic partner in the implementation of this project;

574.2.2. Estina's relationship with members of the Gupta family and/or entities associated with the Gupta family that was designed to benefit financially directly from Estina; and

574.2.3. the value for money proposition relative to the public funds spent by the department.

575. Witnesses whose evidence was led confirmed the basic complaint of Mr Jankielsohn, and the evidence of independent witnesses, that:

575.1. on termination of Estina's participation in this project, the intended beneficiaries had not been brought into the project, and up until the time of the hearings into this dairy project the beneficiaries had not formally been included in this project.

575.2. Estina had not made its contribution of R228 million.

575.3. the project itself was struggling to be viable.

575.4. management was under unqualified for the job at hand

575.5. there had been some political interference in the project.

575.6. there had been little or no oversight or accountability on the part of political principals.

575.7. the total disbursed to Estina by May 2016 was R280 202 652, i.e., for services rendered by Estina between July 2012 and April 2014 when the agreement was cancelled, a period of less than 2 years. These funds and services were

intended to benefit the farmer/beneficiary[275] but they went into Estina and the Guptas and Gupta associates. The Diomart report evaluated the processing plant equipment on the farm as being of substandard quality.

575.8. in relation to irregular expenditure, Ms Rockman testified that the dairy project incurred R311 000 000 irregular expenditure.[276]

Findings and conclusions

575.9. Mr Zwane and Mr Thabethe played a pivotal role in driving the establishment and implementation of the Vrede Dairy Project. Mr Ncongwane had approached the Municipality in or about November 2011 with a request that it give his organisation of farmers land to start a dairy farm. The testimony of Dr Masiteng also confirms that the driving force behind this project was Mr Thabethe.

575.10. In appointing Estina as an implementing and managing agent for the dairy project, Mr Thabethe failed to comply with the department's SCM Policy which gives effect to section 217 of the Constitution, the PFMA and the Treasury Regulations. More specifically he failed to comply with the requirements of section 38(1)(a)(iii) of the PFMA and those of Treasury Regulations 16A.3, 16A.6. These prescripts require that an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective is maintained by the accounting officer.

575.11. Section 38(1)(a), (b) and (2) of the PFMA reads:

> "(1) The accounting officer for a department, trading entity or constitutional institution—

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[275] Record – Transcript 4 October 2019 day 177 p 147 - 148

[276] Record – Supplementary Affidavit p. 30-42; Transcript 17 October 2019 day 182 p. 50-51 of 68

(a) must ensure that that department, trading entity or constitutional institution has and maintains—

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated."

576. Treasury Regulations 16A.3 and 16A.6 reads respectively:

"16A3 Supply chain management system

16A3.1 The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for–

(a) the acquisition of goods and services; and

(b) the disposal and letting of state assets, including the disposal of goods no longer required.

16A3.2 A supply chain management system referred to in paragraph 16A.3.1 must–

(a) be fair, equitable, transparent, competitive and cost effective;

(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);

(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and

(d) provide for at least the following: –

(i) demand management;

(ii) acquisition management;

(iii) logistics management;

(iv) disposal management;

(v) risk management; and

(vi) regular assessment of supply chain performance.

16A6 Procurement of goods and services

16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

16A6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for–

(a) the adjudication of bids through a bid adjudication committee;

(b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;

(c) the selection of bid adjudication committee members;

(d) bidding procedures; and

(e) the approval of bid evaluation and/or adjudication committee recommendations.

16A6.3 The accounting officer or accounting authority must ensure that –

(a) bid documentation and the general conditions of a contract are in accordance with–

(i) the instructions of the National Treasury; or

(ii) the prescripts of the Construction Industry Development Board, in the case of a bid relating to the construction industry;

(b) bid documentation include evaluation and adjudication criteria, including the criteria prescribed in terms of the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

(c) bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;

(d) awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised;

(e) contracts relating to information technology are prepared in accordance with the State Information Technology Act, 1998 (Act No. 88 of 1998), and any regulations made in terms of that Act;

(f) Treasury Regulation 16 is complied with when goods or services are procured through public private partnerships or as part of a public private partnership; and

(g) instructions issued by the National Treasury in respect of the appointment of consultants are complied with.

16A6.4 If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

16.A6.5 The accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.

16A6.6 The accounting officer or accounting authority may, on behalf the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors."

576.1. In signing the agreement of 5 June 2012 and the agreement of 5 July 2012 prior to securing the necessary funding, feasibility study, business plan, EIA, water rights, and list of beneficiaries, among others, failed to comply with the requirements of section 38(2) of the PFMA, which prohibits an accounting officer from committing a department to any liability for which money has not been appropriated. These prescripts require that an accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated. He prioritised the interests of

Estina and Paras above those of the department and the black local farmers for whose benefit he said the project had been initiated.

576.2. In failing to do a proper due diligence exercise on Estina, Mr Thabethe failed to comply with the requirements of section 38(1)(j) of the PFMA.

576.3. In failing to properly monitor and have due regard and oversight over the expenditure incurred by Estina in the implementation of the dairy project, Mr Thabethe failed to comply with section 39(1)(b) of the PFMA. This sections requires the accounting officer to ensure that effective and appropriate steps are taken to prevent unauthorised expenditure.

576.4. In failing to have effective control over the assets of the dairy project even when the FDC took over the operations of the dairy project, Mr Thabethe failed to comply with section 38(1)(d) of the PFMA.

576.5. The Vrede Dairy Project failed in its first two years of operation, not because of the media enquiries or the National Treasury investigation as suggested by Mr Thabethe, but because of Mr Thabethe's incompetence or because he was carrying out the agenda of the Guptas and cared less about the taxpayers' money and the black farmers. Apart from anything else, Mr Thabethe must be held both criminally and civilly liable for his role in causing the Department to lose so many millions of Rands in taxpayers' money.

576.6. It is recommended that the law enforcement agencies should conduct such further investigations, if they have not already done so, as may be necessary to enable the NPA to consider criminally charging Mr Thabethe for his possible contraventions of the PFMA. If the Provincial Government of the Free State has not already done so, it is recommended that it sues Mr Thabethe for the

recovery of the money lost through this project. If he does not have the money, it is recommended that consideration be given to instituting sequestration proceedings against him so as to make it clear to all that there will be serious consequences for this type of conduct.

577. It has been concluded that Mr Thabethe, working with MEC Zwane, deliberately and intentionally used the modality of implementing agents to distort the implementation of the regulatory framework that gives effect to section 217 of the Constitution and the PFMA.

578. In this way Mr Zwane and Mr Thabethe enabled and facilitated the disaster that was the Vrede Dairy Project which benefitted the Gupta family and its associates at the expense of the intended beneficiaries of the dairy project.

579. Mr Thabethe failed to exercise the duty of care in ensuring the protection of the assets of the department which were under the control of Estina, and optimal use of public funds that were disbursed for purposes of establishing and operating the dairy project.

The evidence of Ms S Dhlamini

580. Ms Dhlamini agreed that she was one of the primary custodians of the SCM Policy of the department. She denied, however that she was the main custodian. In her view the HOD, Mr Thabethe was the main custodian because he approved the SCM policy. What has to be understood from her testimony is that she takes responsibility for ensuring that procurement prescripts are complied with, but not sole responsibility.

581. In giving a fuller explanation on this aspect and her general responsibilities as a CFO, she stated that though she was responsible for overseeing the financial management,

budget and expenditure of the department, and gave advice to the management team and the HOD, the HOD did not always take her advice.

582. In illustrating this point, she referred to the agreements that the HOD signed with Estina. In her view, which she expressed to the HOD, these were PPP agreements. She did not believe that Estina was a sole supplier. She stated that she in fact signed the July 2012 agreement with Estina after the HOD had signed it.

583. She also testified that she did not know why the HOD had signed off on the milestones set out in Annexure A to the agreement between Estina and the department. She indicated that as a general rule any invoice related to the dairy project would have been signed off by District Services as that was the program that managed that expenditure.

584. She testified that she discussed the financial implications of the agreement with Estina with the HOD because she was aware that that the department had only budgeted R9 million for the Vrede Dairy Project. Mr Thabethe told her that he would be re-prioritising the budget in order to accommodate the additional funds required for the dairy project. She knew that this was possible either through an adjustment under the Adjustment Appropriation Act or by requisitioning funds from Treasury.

585. She explained that the department started using implementing agents in 2011/2012. Implementing agents were introduced because the farmer/beneficiaries were mismanaging funds transferred to them and assets acquired for their development. She did clarify though that the implementing agent had no role to play in the absence of a farmer/beneficiary.

586. She gave a full explanation on the use of transfer payments and the reclassification exercise regarding goods and services that was ultimately settled in or about 2018.

587. The reason she signed the deviation submission was that she was convinced that it was not about the provision of goods and services.

588. Ms Dhlamini disputed the versions of Ms A Fourie and Mr D Cele with regard to her conduct as CFO when interacting with them on the dairy project.

Findings and conclusions

589. The above summary of the testimony of Ms Dhlamini gives a clear indication of the manner in which she distanced herself from responsibilities that she believed lay with other officials. The impression given is that she did not assert her authority when her expert views were of fundamental importance to decisions that were being taken. She deferred to the authority of the HOD rather than challenge his thinking.

590. Similarly, she acted on the instruction of MEC Zwane when she went to request the R30 million on 15 June 2012 in circumstances where she had not satisfied herself that the agreement that had been signed was valid and that it protected the interests of the department. In any event, in terms of section 64 of the PFMA, any instruction from an Executing Authority to an accounting officer that has financial implications must be in writing. There was no evidence that the instruction from Mr Zwane was in writing, or that the HOD had delegated the task of executing the instruction from Mr Zwane to the CFO.

591. With regard her disagreement with the versions of Ms A Fourie and Mr D Cele, it is concluded that the circumstantial evidence and factual matrix surrounding their interaction gives more credence to the versions of Ms Fourie and Mr Cele.

592. Contrary to the provisions of section 45 of the PFMA, Ms Dhlamini did not take effective and appropriate steps to prevent the unauthorised expenditure and/or irregular expenditure that occurred relative to disbursements made by the department to Estina.

593. In addition, she did not give appropriate advice to her superiors, even in circumstances where she could have.

The evidence of Ms E Rockman

594. The evidence tendered by Ms Rockman was enlightening in respect of the subscription agreements that were signed by the Free State Province, the classification of transfer payments, and most importantly, the link between the Gupta family and payments made to Estina at the request of Mr Tony Rajesh Gupta.

595. She confirmed that it was unlikely that the HOD, Mr Thabethe would have signed the agreement with Estina without MEC Zwane knowing about this. Her office, including the State Law Advisors, only got to know about this contract on 13 June 2013. Mr Thabethe had failed to comply with the directive from her office that any contracts with financial implications should be reviewed by the State Law Advisors prior to those contracts being signed. She also clarified any misconception about EXCO decisions, stating that EXCO resolutions did not constitute a procurement process.

596. Ms Rockman also testified on the oversight role of the Provincial Treasury in relation to the Vrede Dairy Project. Most significantly, she testified that though there were various investigations into the dairy project, there was no co-ordination of these investigations either at a political level or at an executive level. In her view, the Provincial Treasury raised its reservations with the lack of progress and the absence of value for money relative to the funds that had been disbursed to the dairy project.

597. She confirmed meeting Mr Tony Rajesh Gupta at Saxonwold a number of times. They discussed, among others, the funds that were due to Estina for the Vrede Dairy Project. Provincial Treasury got involved because funding in terms of the budget was being requested. She stressed, though that even where the Legislature has an oversight role in terms of the Annual Performance Plan of a department, the first line of monitoring and evaluation lies with the affected department.

Findings and conclusions

598. With respect to the subscription to the New Age newspaper, it would appear that a political decision to support the Gupta family financially was the prevailing rationale for the Free State Government signing the subscription agreement. The correct procedure, as suggested by the Chairman, would have been for a competitive process to be undertaken as opposed to the deviation from the SCM policies of the Office of the Premier. There was no particular urgency in ensuring that an English language daily newspaper was available in the Free State Province. What is significant about the payments made to Estina in the 2012/2013, 2013/2014 and 2014/2015 financial years is that it would appear that these payments were made after Ms Rockman had held meetings with Mr Tony Gupta. In this regard she facilitated the payment of funds to Estina in circumstances where the monitoring of the use of those funds by the Provincial Treasury was inadequate.

599. Ms Rockman could have played a more effective oversight and advisory role to the department with respect to the Vrede Dairy Project and she could have influenced the mitigation of the financial commitments that were incurred.

Recommendations

600. In making recommendations, it has to be noted that in essence, the key deliverable for the Vrede Dairy Project was to introduce the Paras model of using local farmers to farm dairy cows, process their milk and sell milk products into the provincial and national dairy products market.

601. This objective was to be achieved with the empowerment of local Black farmers from the Memel and Vrede areas. These farmers/beneficiaries had been told about the project by MEC Zwane. The promise made to those farmers/community members was never realised. At best a few members of the community were employed at the dairy project as manual workers. None of the local Black dairy farmers were invited to bring their milk for processing at the dairy farm. None were trained in the methodologies that were applied by Paras in India.

602. All the consultancy work on the dairy project appears to have been undertaken by companies from outside South Africa, which companies had some association with the Gupta family enterprises.

603. The modality of using implementing agents was misused by the department. Areas that require considerable tightening up as recommended below are: (a) the use of transfer payments, (b) the re-prioritisation of budgets, (c) the oversight responsibilities of various officials and structures, (d) the modality for ensuring adequate accountability by implementing agents and the officials whom they reported to, and (e) the keeping of reliable financial records with verifiable inventories of the assets of any project that is funded through an implementing agent.

604. Specific recommendations are made in the section on implementing agents. They appear below.

605. The failure to manage the implementing agent is a theme that runs through the evidence tendered by witnesses. The SCM policy documents that departments are expected to comply with appear to be ineffectual to the extent that they can be deviated from with ease.

606. To the extent that National Treasury has not published standard guidelines on the minimum requirements for the appointment of implementing agents, it is recommended on that the guidelines used by the Basic Education department ought to be used to draft standardised pro-forma guidelines for the appointment of implementing agents. Implementing agents should always be appointed in collaboration with the beneficiaries.

607. It will be noted that the reservations were expressed by witnesses relative to the appointment of the same entity as implementing agent and managing agent. These two roles that should not reside in one entity.

608. Similarly, where a strategic partner is brought into a project, there should be no question about a competitive process being followed, the nature of the agreement entered into and the reporting protocols that would apply in respect of the agreement entered into. They must be subjected to a competitive bidding process.

609. The business plan of a project must determine the deliverables. These deliverables must be monitored by the department and where necessary the department must place their experts at the disposal of the project to do quality control.

610. To ensure the viability of projects, the feasibility report and business plans must be available and be approved prior to any funds being transferred to a service provider. These must be tabled at the Provincial EXCO and the National Assessment Panel ("NAP") of the relevant National Department for approval.

611. The department must provide guidance and administrative support where appropriate. Legislation must provide appropriate management, contracting, reporting and enforcement guidelines for those who implement projects on behalf of government.

612. It has been noted that the DARD failed to ensure that the BBBEE prescripts of government are complied with in the appointment of sub-contractors to the Vrede dairy project. Compliance with the transformation imperatives of government is mandatory and remedial action must be taken, including the cancellation of the contract, where an implementing agent fails to comply with these prescripts.

613. The transfer of funds to an implementing agent has now been addressed by National Treasury. The reporting on the recipient of the transferred funds should be clearly noted in the financial statements of departments so as to enable consequence management where funds have not been used for the purpose for which they were allocated.

614. In the event that the beneficiaries to a project have yet to be identified or secured, and work on the project has been initiated by an implementing agent, it is recommended that those assets be registered with the government agency that appointed the implementing agent until such time as the beneficiaries are brought into the project.

615. It is evident that the amendment to the Public Audit Act seeks to support the measures introduced. It is recommended that all MECs, HODs, CFOs and Treasury officials be sensitised to the significance of these legislative measures.

616. It will be noted that in Part 1 of the Commission's Report recommendations have been made for reforms to public procurement in South Africa. These recommendations must be given thorough consideration and implemented.

617. Ms Rockman testified that the adjusted cost of the dairy project from approximately R13 million to R570 million was not discussed with the Provincial Treasury as it would have been procedural to do. No consequences flowed from this omission. Provincial Treasury must have mechanisms that allow for the consequence management of a recalcitrant HOD or CFO.

618. Finally, it is recommended that the institutionalisation of lifestyle audits for all senior managers, and those officials who are involved in Supply Chain Management (SCM).

619. Executive authorities should also be subjected to lifestyle audits on a periodical basis.

620. The whole Vrede Dairy Project happened because Mr Thabethe dismally failed to do his job and failed to protect the interests and assets of the DARD and to protect taxpayers' money. It also happened because Mr Mosebenzi Zwane as MEC was pursuing the agenda of the Guptas and did not do his job to perform oversight over Mr Thabethe. It also happened because the Premier of the Province Mr Ace Magashule, would have also been pursuing the agenda of the Guptas.

621. In this regard, reference can be made to Mr Mxolisi Dukwana's evidence which Mr Magashule did not challenge before the Commission about his and Mr Dukwana's visits to the Gupta residence where on one occasion Mr Magashule had brought Mr Tony Gupta his (i.e. Mr Magashule's) identity document and Mr Magashule told Mr Dukwana that he was going to be in business with the Guptas through his son. Indeed, Mr Magashule authorised or directed that Mr Narayan, a Gupta associate, should accompany Mr Thabethe on the trip to India even though Mr Narayan was at that time not employed by the Provincial Government. Of course, the evidence heard by the Commission is that Mr Magashule then employed Mr Narayan as his advisor. Furthermore, the Executive Council of the Provincial Government approved the implementation of the Vrede Dairy Project including the appointment of Estina or the

conclusion of an agreement between DARD and Estina in circumstances where there had been no compliance with relevant legal requirements and or due diligence had been done. They also did so without satisfying themselves that the Head of Department had done the due diligence he was reasonably required to have done before his department could conclude the agreement it did with Estina and paying millions of Rand in taxpayers' money to Estina.

622. The Provincial Executive Council should have required Mr Zwane and Mr Thabethe to place before it full documentation which showed that all legal and relevant prescripts had been complied with and that the implementation of the project and the appointment of Estina, would be appropriate and reasonable.

623. The evidence of Ms Rockman that the resolution of the Executive Council (EXCO) that the DARD should implement the Dairy project did not imply any breach of the law in the implementation is rejected. This is so because the resolution said nothing about complying with the legal prescripts. But also the EXCO should have preserved giving approval for implementation until they satisfied themselves that implementation could still be lawful which they did not do. The Premier should have performed his oversight function over the MEC, Mr Zwane, and the Head of Department but failed dismally. In respect of the Free State Asbestos Project the Free State R 1 Billion Housing Project Debacle which is dealt with in Part IV of this Report. Mr Ace Magashule also failed dismally to supervise his MECs and now we see the same failure in respect of the Vrede Dairy Project.

624. It is necessary that there be consequences for people who fail to do their job. Otherwise, this corruption and these acts of state capture are going to continue forever to the detriment of the country and all people. Neither the Provincial Legislature nor the ANC called the Premier to account for the Asbestos Project and the R 1 Billion Housing

Project Debacle. Premiers must know that they must supervise the MECs and their Departments.

625. It is further recommended that:

625.1. The law enforcement agencies conduct such investigations as may be necessary to establish whether Mr Mosebenzi Zwane' and Mr Ace Magashule contravened any law in the roles they played in regard to the Vrede Dairy Project if this has not already been done,

625.2. Consideration be given to seeking legal advice about instituting legal proceedings against Mr Mosebenzi Zwane and Mr Ace Magashule to recover such monies as may be recovered from them that were lost by the DARD in the Vrede Dairy Project as a result of their failure on their part to perform their legal obligations.

625.3. The law enforcement agencies conduct such further investigations as may be necessary, if they have not already done so, to whether any of the members of the Gupta family including Mr Tony Gupta. And their associates including Mr Narayan and the director or directors of Estina (Pty) Ltd are guilty of any offence with a view to enabling the NPA to consider bringing criminal charges against any one or more of them if it has not already done so.

OVERALL OBSERVATIONS AND CONCLUSIONS

Appointment of Estina

626. Estina was appointed as the implementing agent for the VDP without the supply chain management process as prescribed by the Public Finance Management act (PF and A) being followed.

627. The HOD gives mixed reasons for not having followed the prescribed process. He and his CFO also contradict each other as to the reasons. After his return from visiting Paras in India, and after some presentation made by Estina to him and senior managers in DARD, there was a decision made on 25 May 2012 for DARD and a contact signed on 7 June 2012 to do business with Estina without any thought being spared for the need to comply without following the supply chain management system which is fair, equitable, transparent, competitive and cost effective. The new contract signed on 5 July 2012, with regard to SCM, a continuation of the decision made in May and June 2012. His mind had already been made as to the entity with which the Department was going to contract.

628. When it came to signing the July 2012 contract, he had already decided not to follow a competitive process. The submission for deviation dated 05 July 2012, which he approved, was a mere formality, prepared on his instruction to validate the decision which he had already taken to deviate. South African milk farmers and operators of milk processing plants were denied the opportunity to tender / compete.

Estina Experience

629. The company had no experience whatsoever in farming, never mind milk farming, or the crucial milk processing prior to its appointment. The core business of the company

on the date of its appointment was still stated as "business consultant." It was only later, after being awarded the contact that it changed to "agriculture, farming and related activities." There is an allegation that its business was in the field of IT prior to the appointment.

630. The company had only one director, one Kamal Vasram, when it was appointed as an implementing agent for VDP. Prior to assuming directorship of Estina, Mr Kamal Vasram was the retail sales manager at Sahara Computers. He had no farming or agricultural experience.

631. The director is the only decision maker within the company. The decision to entrust such a big government project to the decision-making power of a single person simply does not make sense.

632. Evidence, of at least one witness, suggests that its representatives accompanied the senior representatives of DARD on the trip to India. However, the HOD, in his report, makes no mention of representatives of the company having travelled or accompanied him. If Estina went on the trip with government, the question will still be why was it selected for that purpose.

633. The people appointed to manage the VDP farm did not seem to know what they were doing. They seem to learn as they were doing, a method which cost the government a lot of money. This is about the only explanation one can give for the death of many dairy cows at the beginning of the project and the negligent and environmentally hazardous manner in which the carcasses were disposed of.

634. The reason that it was a sole provider for the services procured is unsustainable in the light of the fact that there were and still are milk farmers in the Free State and in the vicinity of Vrede. Even in the case of a sole provider the prescripts for procurement

required certain procedure to be followed, which were not followed. The HOD decided on appointing the company and instructed his juniors to prepare a submission for him to approve the deviation. The decision to deviate was clearly taken before reasons for doing so were identified.

635. Estina was appointed without DARD having conducted any due diligence about it.

636. According to the HOD, Estina was in fact appointed by the CEO of Paras to represent Paras in SA and in contracting with DARD. He says the company he actually wanted to contract with was Paras. He was therefore less concerned about the competence of Estina and believed that through it he secured the expertise in Paras. If indeed he wanted to secure a relationship with Paras, he clearly should have taken legal advice which was available for him. By signing a contract with Estina he did not secure any obligation by Paras towards DARD or the Free State Provincial government. The MOU to which he referred did not secure a relationship between Paras and the government.

637. Assuming in any event that he intended to contract effectively with Paras when he appointed Estina, the process he followed is still open to question. Probably at more level than one. Through desktop research he identifies one company in India, visits that company for one day and makes up his mind to appoint it. Nothing competitive, transparent, equitable and fair. No cost comparison either. He went, saw and decided. His mind was closed from then onwards.

638. The absence of any monitoring mechanism over the utilisation of public funds once they were paid into Estina makes matters worse. The attitude of the CEO is that a particular file with some invoices given to DARD by Estina constituted all the accounting by Estina. If that is not ridiculous, I do not know what it is. And to achieve that DARD used a questionable 'transfers' budgeting or budget gazetting on the basis of which he maintained once the money has been paid over to a farmer beneficiary, then the

government has discharged its obligation as the money then belongs to the beneficiary. Estina was neither the targeted small-scale farmer nor a 'beneficiary' of government programs. The contract made it a beneficiary, which was clearly a deliberate misnomer or part of a scheme to syphon public funds out of the government purse to benefit chosen private entities.

639. The reasonable suspicion is that its director, and there was only one, had some close relationship with someone in government who had an influence on the decision to appoint the implementing agent.

640. The company was given a carte blanche with powers to conduct a feasibility study, develop a business plan an event to find and register beneficiaries. It became an implementing agent while at the same time it was a partner with the government. The partnership relationship gave it authority to make profit, while its role as an implementing agent or management company entitled to payment for its services. Completely contradictory positions.

641. The shareholders of the company have not been identified. Could some in government have been sleeping shareholders? The company had only one director at all material times, but DARD entrusted it with the power to manage a R500 million project.

642. DARD was prepared to pour public funds into the entity without exercising authority or monitoring on how the funds were expended.

643. The agreement of 7 June 2012 was signed without the approval of Exco. It is not clear whether the MEC for Agriculture had approved but it is most likely that at the very least he was informed and had no difficulties. Was this in order?

644. The agreement was signed and the government was committed to expend funds for which there was no provision in the budget. The HOD took a decision alone that funds would be redirected from other projects and on that basis signed the agreement. By the time the Executive Council approved by resolution on 13 June 2012, the agreement had already been signed on the basis of the approval by the HOD.

645. The proposal that was made to DARD at first and subsequently by DARD to Exco put forward the Indian company, Paras, at the centre. The profile of the presenting company was that of Paras and not of Estina, which was eventually appointed. Estina was mentioned only in one or two lines. If that proposal was the basis for its appointment, it constituted the biggest fraud committed against the government because it induced the government to commit a project of half a R1 billion and eventually made payment to an entity which did not at all qualify to be appointed.

646. However, the HOD of DARD had himself undertaken the trip to India and knew exactly where the expertise lied. There is nothing which Estina knew about Paras which he did not know. Estina thus presented to DARD, represented by him and his senior managers, something which knew. He could only be defrauded if he submitted voluntarily to the "fraud". If it is the expertise that government contracted for then there was a clear obligation to ensure that the contract signed secured the expertise for the VDP.

647. The HOD suggest that he is the one who advised Paras to make the presentation through a South African registered company. If he did not introduce Estina to Paras than he had a duty to ensure that the South African registered company was properly qualified to execute the process. If it relied on external expertise, the logical thing would have been to secure guarantees by the custodian of the expertise. After all the expertise was core, in that event to the granting of the contract.

648. Similarly, if the reason for appointment of the company was the promise for financial contribution by way of investment, the contract should have had at its core the securing of the investment/contribution to funding.

649. In the final analysis if fraud was committed against the government, then the HOD as head of DARD, must have been the perpetrator or core perpetrator because he could not have been defrauded when he knew the truth. He visited Paras, met its CEO, became aware of its expertise, secured its commitment and represented to government that it was safe for it to approve.

650. Absent fraud committed against the government, then all those involved collaborated and colluded in siphoning and channelling public coffers to an incompetent entity without a shred of accountability. The official decision makers become the fraudsters.

Beneficiaries

651. In theory, VDP was started for the benefit of black smoke stayed milk farmers and those in similar positions interested in milk farming. They were invited to and did listing their names with DAR D to signify their interest. Promises were made to them that were never fulfilled. Some who might have found in beef or other forms of farming, were persuaded to return to milk farming under promises made for usually government support.

652. However, they were side-lined and overlooked in the launching and development of the project. They were never given shareholding or any right to participate in the project until the national DAFF intervened. The company, Zayna Investments Pty Ltd, trading as Mohoma Mobung, was registered or procured as shall company, ostensibly to house the interest in the project. No farmer that was spoken to appear to be aware of even the name of that company. There were certainly not given shares in the company. It is also

not clear whether the company ever had any formal relationship with Estina until the contract between Estina and DARD was terminated.

653. The local black farmers had a structure, the African Farmers Association, led by Mr AM Dhlamini and Mr Ncongwane. These leaders both enlisted their names indicating interest in VDP. If the intention was to benefit and develop these farmers, as has been suggested, it was incumbent on DAR D to consult with the existing structure of the farmers, develop it and empower it were necessary and to involve it in the project.

654. The farmers do not appear to have been consulted about the structure in which they were invited to participate in the project and were by and large left in the dark. They had over rumours about the start of the project, that cattle have been purchased and were already been milked without the inclusion. They were not even offered employment in VDP, which is a project started for them, was in effect theirs.

655. DARD decided to overlook these established small farmers and estate paid the money into a small company with one director, without farming background, who effectively decided on the management of public funds without monitoring by the authorities.

656. Why were Messrs Dhlamini and Ncongwane not qualified to be included at the directorship level in the company that was to represent the farmers. The 2 of them were already leading local farmers in an attempt to develop themselves. Mr Ncongwane had already made an approach to developed white farmers seeking assistance in training to help him develop into becoming a commercial farmer. He did not receive any helpful response from the government; and when the government started its own project, they did not involve him.

657. Small-scale farmers were asked to list their name and submit identity documents more than once without any demonstrable progress. A representative committee formed by

the farmers themselves to interact with the government on the project, under the chairpersonship of Mr Mhlaba was similarly ignored and kept in the dark.

658. A so-called beneficiary agreement which is signed with Dr Masiteng representing DARD was drawn without proper legal advice and was hopelessly deficient. The agreement appeared to have been drawn signed in haste when the national Department of agriculture demanded evidence of involvement of beneficiaries. The truth is as at that stage, around August 2013, no beneficiary was involved in VDP despite the fact that millions and millions of public funds had been poured into the project.

659. The beneficiaries were left with the impression that their names and identity details were used to get money from the Treasury without a real intention to involve them.

Fear and Deaths Threats

660. Beneficiaries heard from rumours that VDP had started and that government had paid money into it. They raised questions which DARD was not able to answer satisfactorily. They were even denied access to the site of the project. This fuelled their suspicion.

661. When they asked more questions and insisted on answers, they were victimised. Some received death threats while others were killed under mysterious circumstances. From the perspective of the beneficiaries a cloud of secrecy covered the VDP and those who tried to remove the cloud were victimised ostensibly at the hands of supporters of those identified with the project.

662. State Capture enabled by Oversight failure and absent Law Enforcement

663. When members of the opposition in the legislature insisted on exercising oversight over the executive and asked questions on the project, satisfactory answers were hardly ever given.

664. Similarly, those in municipal councils, who opposed the way in which VDP was being developed were victimised and even assaulted. Threats were issued openly. Cases of assault reported to SAP were not followed up in the victims were left in the dark.

665. An atmosphere of fear is reportedly hovering over the project, with those who appear to be critical becoming victims at the hands of supporters of political leaders. Specific names of people referred to as "foot soldiers" for political leaders behind the project were given and implicated in the victimisation and assault of critics.

666. There are allegations also that members of the majority party in both the legislator and municipal council protect each other, even against questions formulated by members of the opposition parties in those structures.

667. The practice of members of the ruling party protect each other in the legislature, against the legitimate probe is best described in the evidence of Mr Roy Jankielsohn, when he describes as 'musical chairs', the practice of the speaker of the legislature who protected the MEC of DARD, and when the former MEC became the speaker and the former speaker became MEC, the new speaker took over the role of protecting the new MEC. This was with reference to the change of roles between Ms M Qabathe and Mr M Zwane. They are alleged to have protected each other from any probe on VDP – which would enable state capture.

668. The allegations, if true, point to an atmosphere which will nurture and protect state capture.

Judicial Commission

of

Inquiry into Allegations

of

State Capture, Corruption and Fraud in the

Public Sector Including Organs of State

Report: Part VI

Vol. 1: The Closure of Gupta Bank Accounts

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

THE CLOSURE OF BANK ACCOUNTS OF GUPTA COMPANIES

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THE CLOSURE OF BANK ACCOUNTS OF GUPTA COMPANIES

Relevant terms of reference

669. In December 2015 and 2016 four banks closed the bank accounts of companies owned or controlled by or linked to the Gupta family. They were the First National Bank, Standard Bank, ABSA and Nedbank. The terms of reference of the Commission cover this topic. Term of Reference 7.1 requires the Commission to investigate, inquire and determine:

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

This part of the Report deals with this issue.

Relevant content of the Public Protector's State of Capture Report (SoCR)

670. The Public Protector identified in para xxi(e) of her executive summary an issue which required investigation:

> "Whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies."

671. In paragraph 5 of her "observations" regarding the scope of her report, the Public Protector stated in regard to the question quoted immediately above:

> "Cabinet appears to have taken an extraordinary and unprecedented step regarding intervention into what appears to be a dispute between a private company co-owned by the President's friends and his son. This needs to be looked at in relation to a possible conflict of interest between the President as head of state and his private

> interest as a friend and father as envisaged under section 2.3(c) of the Executive Ethics Code which regulates conflict of interest and section 195 of the Constitution which requires a high level of professional ethics. Sections 96(2)(b) and (c) of the Constitution are also relevant."

672. The Public Protector recorded that one of the complaints pursuant to which she investigated and submitted her Report was that it had been alleged in the media that the Cabinet had decided to get involved in holding banks accountable for withdrawing banking facilities for Gupta-owned companies. The complainant in question wanted to know if it was appropriate for the Cabinet to assist a private business and on what grounds was that happening. He asked if corruption was not involved and specifically asked if such matters should not be dealt with by the National Consumer Commission or the Banking Ombudsman.[277]

673. An Executive Ethics Code was promulgated on 28 July 2000 by the Acting President of the Republic,[278] prescribing how members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils must comply in performing their official responsibilities. The complaint before the Public Protector asserted that the conduct of President Zuma in relation to the issue between the banks and certain Gupta-owned companies may have contravened articles 2(3)(a), (c) and (d) of the Ethics Code. The suggestion was that President Zuma may have exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interests; acted in a way that is inconsistent with his position and used his position or any information entrusted to him, to enrich himself or improperly benefit any other person.[279]

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[277] Para 2.11 of the State of Capture Report.

[278] Proclamation No. R,41 of 2000, in terms of section 2 (1) of the Executive Members' Ethics Act, no 82 of 1998.

[279] Para 2.10 of the State of Capture Report.

The issues that, given the terms of reference of the Commission, need to be determined

674. The issue that the Commission had to investigate, inquire into and determine is the one covered in term of reference 7.1 as quoted above. The focus is on whether any member of the National Executive unlawfully, corruptly or improperly intervened in the matter of the closing of banking facilities of the Gupta owned companies.

675. It is to be observed that the terms of reference do not include an inquiry into the conduct of the ANC or individuals representing the ANC in regard to this matter. The terms of reference require me to consider the conduct of former President Zuma and other Cabinet members and determine whether they improperly interfered in the relationship between Banks and Gupta owned companies, thus giving preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies. I shall, nevertheless, refer to evidence relating to the ANC in so far as it may throw light on President Zuma's conduct and the conduct of Ministers and Deputy Ministers.

Opportunity to be heard

676. Although no Rule 3.3 notices appear to have been served on anybody in regard to the evidence that was led in relation to this topic, Mr Gwede Mantashe, who was the Secretary-General of the ANC at the time of the closure of the bank accounts of Gupta companies, and Mr Mosebenzi Zwane did place their versions before the Commission. President Ramaphosa also explained in his affidavit furnished to the Commission in his capacity as President of the Republic, in which he explained what decisions the Cabinet took about the Task Team that was chaired by Minister Zwane.

Evidence heard

677. The Commission heard evidence about the closure of the bank accounts of Gupta companies. That evidence included the evidence of various witnesses who represented the banks or at least some of the banks involved as well as the evidence of Mr Mosebenzi Zwane and Mr Gwede Mantashe. Mr Mosebenzi Zwane was the Minister of Mineral Resources at the time and chaired a Committee or Task Team that was set up by the Cabinet in response to the closure of the bank accounts of Gupta Companies. The Commission did not hear Mr Jacob Zuma's evidence because he elected not to testify before the Commission.

Evidence of Mr Ian Hamish Scott Sinton

678. Mr IHS Sinton (Head of Compliance at Standard Bank) testified to the manner in which Standard Bank terminated its banking relationship with companies (the Gupta companies) in which various members of the Gupta family and Mr Duduzane Zuma had a direct or indirect interest. He also submitted a witness statement signed on 13 August 2018.

679. Standard Bank gave notice on 6 April, 2016 to the Gupta companies of its intention to terminate the banker-client relationship with them as from 6 June, 2016, a notice period of two months. Then on, 6 June 2016 Standard Bank officially terminated that relationship.[280]

680. Mr Sinton provided a list of the Gupta companies, 27 in all[281] including Oakbay Investments (Pty) Ltd, Westdawn Investments (Pty) Ltd, Sahara Computers (Pty) Ltd, TNA Media (Pty) Ltd, VR Laser Services (Pty) Ltd, Optimum Coal Mine (Pty) Ltd,

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[280] Exhibit H1, p 100, para 9.

[281] Exhibit H2.

Optimum Coal Terminal (Pty) Ltd and Estina (Pty) Ltd. Certain of the Gupta companies operated multiple accounts.

681. This process was not preceded by consultation with the client.[282] Sometimes Standard Bank will consult with the client before terminating and sometimes not. In this case the reasons for termination included:

681.1. Absa had previously terminated its relationships with certain Gupta companies, the Gupta companies' auditors had terminated their relationship with the Gupta companies, former Deputy Minister Jonas had published on the National Treasury website the allegation that the Guptas had offered him benefits if he would do their bidding;

681.2. a former MP, Ms Mabel Mentor, had announced that she had been offered a Cabinet post by the Guptas in exchange for favours;

681.3. Standard Bank provided services to the Gupta group in the media business through two of its own customers and was concerned about being implicated in unlawful behaviour;

681.4. Mr Themba Maseko from the Government Communication and Information Service (GCIS) had announced that he had been instructed to help Gupta entities;

681.5. Minister Zwane had accompanied a Gupta delegation to Switzerland to negotiate the purchase by the Guptas of the Optimum coal mine from Glencore (which Standard Bank believed Minister Zwane had falsely denied), it had been reported in the press that one of the Gupta companies had bound itself as

[282] Transcript 17 September 2018, p 17.

surety for the obligations of a trust in which a wife and son of President Zuma were beneficiaries;

681.6. Estina (Pty) Ltd had been awarded a contract to develop a farm in the Free State but had sent substantial sums of the money paid to it to Dubai instead of using it for the proper purpose;

681.7. the Guptas had attempted to persuade Standard Bank to transfer money held in trust for the rehabilitation of Optimum mine to the Bank of Baroda.

681.8. In addition, Standard Bank's money laundering reporting officer had warned the bank to use extreme caution in dealing with the Gupta companies.[283]

682. On 25 May 2016 Standard Bank received a letter from Oakbay's attorneys threatening an application to compel Standard Bank to keep the Gupta companies' accounts open. Standard Bank rejected the demand and Oakbay withdrew its letter of demand.[284]

683. Mr Sinton testified that the Gupta companies launched a media campaign to induce those banks which had terminated their banking relationships with Gupta companies to reverse their decisions.[285] In addition, the ANC requested the Standard Bank CEO to attend a meeting at Luthuli House to account to the ANC for why it had closed the Gupta accounts. Standard Bank also received a separate request from a committee which described itself as an Inter-Ministerial Committee of Cabinet (IMC) to account to them

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[283] Transcript 17 September 2018, p 26.

[284] Exhibit H1, p 102 para 12.

[285] Transcript 17 September 2018, p 27.

in this regard.[286] Standard Bank regarded these requests as inappropriate but decided to attend the meetings.[287]

684. Three relevant meetings took place after Standard Bank had announced its decision to close the Gupta accounts. The first was with representatives of Oakbay. This meeting was attended by Mr Nazeem Howa, Mr Terry Renson, Mr Trevor Scott, Mr Ashu Chawla and Ms Veronica Ragavan for Oakbay and certain senior Standard Bank officials.[288]

685. Standard Bank was not persuaded by the representations and refused to reverse its decision to terminate the accounts. Indeed, the attempts to explain certain conduct which had led to the decision to terminate the relationship reinforced Standard Bank's perception that it had made the right decision.

686. Mr Sinton referred to certain examples. One of these was that Oakbay, through Ms Ragavan, asked that Standard Bank move R1,456 billion in an Oakbay account from itself to the Bank of Baroda. Standard Bank responded on 22 April 2016 that these funds were held in trust to cover rehabilitation costs in relation to Optimum mine and only the trustees could give this instruction. Two business days later, Oakbay produced letters of authority from the Master, recording that the former trustees had been removed and Gupta appointees installed as trustees. It is common knowledge that the Master's office is notoriously slow; yet Oakbay managed to push this process through in two working days. The explanation from Oakbay for this conduct was that Baroda offered a better rate of interest. Standard Bank did not believe this because it had not

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[286] Transcript 17 September 2018, p 28

[287] Transcript 17 September 2018, p 29.

[288] Transcript 17 September 2018 p 30.

been asked by the Guptas what rate of interest they were paying on the funds held by it.[289]

687. Standard Bank raised the question of the mortgage bond to the trust of which a wife and son of President Zuma were beneficiaries and asked Ms Ragavan if there was any truth in the allegation that a Gupta company, Westdawn Investments, had guaranteed the loan. Ms Ragavan responded that she had never met President Zuma's wife and had not been party to arranging the loan. Ms Ragavan's signature under her maiden name, Govender, was put to Ms Ragavan. After a lengthy pause, Ms Ragavan admitted that she had indeed arranged that loan.[290]

688. Mr Sinton produced an undated letter written by Mr Howa to Oakbay's attorneys stating that Oakbay had requested the intervention of President Zuma and Ministers Zwane, Oliphant and Gordhan (members of the IMC) to investigate the account closures. The letter by Mr Howa was published in the media on 8 April 2016. The IMC was established on 13 April 2016. Mr Howa wrote similar letters to these four members of the executive as well as to Mr G Mantashe, then secretary general of the ANC.[291]

689. Standard Bank further referred to a provision in the agreement in terms of which Glencore sold Optimum mine to Tegeta, a Gupta company. In terms of that agreement Tegeta was obliged to procure the release of Glencore from liability for a claim of R2,1 billion which Eskom had against the Glencore company which owned the mine and dealt with Eskom. Standard Bank asked the representatives of the Gupta companies what consideration they had given Eskom for the release. Their response

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[289] Transcript 17 September 2018, p 33.

[290] Transcript 17 September 2018, p 34.

[291] Exhibit H1, p 104-105, paras 16-17.

was that they had given Eskom no consideration and that Eskom had effectively waived the entire claim of R2,1 billion.[292]

690. On 21 April 2016 the CEO of Standard Bank, Mr Simpiwe Tshabalala, a senior executive, Ms Hannah Sadiki and Mr Sinton attended a meeting at Luthuli House with Mr Mantashe, Ms Jessie Duarte, Mr Enoch Godongwana and others. The ANC delegation said that they accepted that the meeting was not to discuss the relationship between Standard Bank and a particular customer but to gain a better understanding of how Standard Bank entered into and terminated banking relationships. Amongst other things, the ANC representatives asked the Standard Bank delegation how it responded to the accusation that it was coluding with "white monopoly capital" to oppress black-owned businesses in the form of the Guptas and why it allowed construction companies which had been fined for collusion in the construction of stadiums to maintain their accounts while the bank had closed the accounts of the Gupta companies.[293]

691. Mr Sinton said in his statement before the Commission that the fact that the ANC requested the meeting at the behest of Oakbay showed the extent of Oakbay's influence at the highest echelons of political office-bearers and the willingness of the Gupta companies to use their influence to reverse a decision taken lawfully and in good faith in compliance with legal and regulatory obligations.

692. Subsequent to the conclusion of the meeting with the ANC, Standard Bank wrote Mr Mantashe a letter dated 22 April 2016 confirming the gist of the discussion at the

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[292] Transcript 17 September 2018, p35.

[293] Exhibit H1, p 106, para 19.

meeting. As that letter sought to summarise what had been discussed at the meeting between Standard Bank and the ANC, it may be useful to quote it in full. It read:

> "Re: Standard Bank and ANC meeting: 21 April 2016
>
> On behalf of Standard Bank I thank you and your colleagues for our cordial and constructive meeting at Luthuli House on 21 April 2016 and hope you will find this note summarizing what we conveyed to you to be useful.
>
> I confirm that you made it clear that the meeting was requested by the ANC not for the purpose of discussing Standard Bank's relationship with any particular customer(s) but rather to enable the ANC to obtain from Standard Bank –
>
> (a) a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically exposed persons ("PEPs") are involved;
>
> (b) Standard Bank's response to the perception in some quarters that the banks are using their ability to terminate banking relationships to exercise the power of 'white monopoly capital' against black businesses to a degree that should concern policy makers;
>
> (c) its response to the perception that the four large banks are colluding/acting in concert in withdrawing banking services from a common customer.
>
> In summary, Standard Bank responded with the following answers/submissions:
>
> (a) The relationship between a bank and its customer is typically established by an indefinite contract and, as is typically the case in all indefinite contracts, can be unilaterally terminated by either party on notice. As was confirmed in the Bredekamp v Standard Bank Appeal Court judgment, a bank is not obliged to give any reasons should it be the terminating party. More important than the contract terms is the implicit requirement of reciprocal trust between banker and customer, one manifestation being the legal obligation on banks to keep the secret private information of their customers that comes into the banks' possession through the banking relationship. When that trust is lost the relationship needs to be terminated.
>
> (b) Banking is governed by at least 210 different statutes and is highly regulated. This is not a complaint but rather an affirmation that Standard Bank is aware of its legal responsibilities and regards the existence and

application of such laws as a major contributor to South Africa's financial sector being ranked within the top 10 globally for safety and soundness.

(c) The statutes most relevant to the commencement and termination of banking relationships are the Financial Intelligence Centre Act ('FICA') and the Prevention and Combating of Corrupt Activities Act ('PCCAA').

(d) FICA obliges all financial institutions to (i) undertake KYC (Know Your Client) procedures before establishing any new relationship with a customer, (ii) undertake enhanced due diligence if the KYC indicates that any PEPs (Politically Exposed Persons) have influence over the customer, (iii) monitor every customer's transactions to understand the source and application of all funds and (iv) report any suspicious transactions by customers to the Financial Intelligence Centre ('FIC').

(e) Failure to report a suspicious transaction to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(f) Disclosure to any person that a suspicious transaction report has been made to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(g) As regards the PCCAA, for ease of reference I will deliver a copy of the Act with this letter. You will see that it contains multiple categories of corruption and in Section 20 creates the offence of dealing in property or using property known or suspected to be part of any 'gratification' which is the subject of a corruption offence.

(h) The best and most logical way for a bank to avoid criminal prosecution under FICA for failing to report any suspicious transaction and/or criminal prosecution under PCCAA for dealing in property that the bank ought to suspect is tainted by a corrupt activity is to simply not have any dealings with persons who foreseeably could be or become involved in suspicious transactions generally and corrupt activities in particular.

(i) Standard Bank expends in excess of R500 million per annum and employs in excess of 400 compliance officers in order to ensure that it has the systems and controls necessary to comply with the law generally and its obligations under FICA to detect and report transactions suspected to be related to criminality including money-laundering, terrorism financing, economic sanctions and corruption.

(j) To illustrate the gravity of the risks that it faces Standard Bank disclosed that it had in recent times been cautioned by the USA government against it funding of a customer with a subsidiary in Iran because that subsidiary

was associated with Iran's nuclear program and this could result in Standard Bank itself being subjected to economic sanctions.

(k) Standard Bank also referred to the fact that its group had been investigated by the USA's Department of Justice (for possible bribery of a foreign public official in contravention of the USA's Foreign Corrupt Practices Act) and by the UK's Serious Fraud Office (for possible contravention of the UK's Bribery Act in failing to prevent bribery of a foreign public official) arising from Standard Bank's Tanzania subsidiary having engaged a local company partly owned by PEPs to assist in securing government business. After a 3 year struggle Standard Bank settled those investigations by paying fines and penalties and US$38 million to the government of Tanzania, USA and UK whilst acknowledging that the settlement could be set aside and prosecutions could follow should evidence emerge of any other possible involvement in corrupt activities within the Standard Bank group.

(l) Standard Bank pointed out that the definitions of corruption contained in the PCCAA are no different to those used in the USA and the UK and therefore Standard Bank has, in essence, been put on probation by the USA and UK governments and is compelled to be extra vigilant in its dealings with existing and potential customers who might expose Standard Bank to the risk of being associated with corrupt activities. In this regard Standard Bank opined that, hypothetically, an offer to secure his/her promotion in exchange for favours would be an act of corruption as defined in the PCCAA.

(m) South Africa has a relatively small but open economy that is reliant for its very survival upon international capital and currency flows. If the governments of the UK or USA were to conclude that economic sanctions would be a more effective deterrent than criminal prosecution for perceived repeat offending on Standard Bank's part that could be catastrophic for Standard Bank and South Africa. Standard Bank for its own sake and that of our country simply cannot risk any exposure, direct or indirect, to possibly corrupt activities.

(n) In response to a concern expressed on behalf of the ANC about a perception that race or political affiliation plays a role in Standard Bank's decisions to retain or terminate a relationship, Standard Bank responded that there is no basis for that perception. Standard Bank is committed to transformation, inclusive growth and treating all customers fairly and subjects all existing and prospective customers to the same objective standards for KYC and enhanced due diligence purposes. Standard Bank does not lightly decide to terminate a relationship as evidenced by the fact that so far in 2015 it has terminated just 52 out of its – 11 million customer

relationships; the decision was in each case taken by a competent committee applying objective criteria.

(o) Standard Bank does not decline a customer relationship simply on the grounds that a PEP is involved; for an adverse decision by Standard Bank it must be satisfied that the PEP is in a position to facilitate suspicious transactions and there is a possibility that he/she could do so.

(p) In response to a concern expressed on behalf of the ANC, Standard Bank gave an assurance that it has not colluded or acted in concert with any other bank or banks in its decision to terminate a customer relationship; such would be both unethical and unlawful (in terms of the Competition Act).

(q) In response to a concern expressed on behalf of the ANC that the stringent requirements of FICA are forcing the dishonest into cash transactions outside of the banking system, Standard Bank conceded that to be the case but opined that cash only transactions are restrictive for the parties to them and cannot occur across national borders whereas millions of new (honest) participants have benefitted from entering the financial system since 1994.

(r) In closing may I re-iterate that we are willing to share the above with a wider audience if you so request. I also should re-iterate that we readily agreed to meet with you because we believe in open and honest engagements with all participants in our economy and especially those that have influence over the policies, laws and practices that affect us.

If I have not summarised the meeting correctly, please let me know."[294]

(Underlining supplied)

693. On 1 September 2016 Minister Mosebenzi Zwane told the media that on 13 April 2016 Cabinet had established an Inter-Ministerial Committee to consider allegations that certain banks and other financial institutions had acted unilaterally and in collusion in closing the bank accounts and terminating contractual relationships with Oakbay. It seems that the IMC was also, or more accurately, called a task team. The IMC requested a meeting with Standard Bank and invited the CEO of Standard Bank's group

[294] Exhibit H1, p 138-141.

holding company to attend it. Standard Bank decided that it would be more appropriate for the CEO of Standard Bank, Mr Tshabalala, to attend.[295]

694. The meeting took place on 5 May 2016.[296] On the government side, the meeting was attended by Ministers Zwane and Oliphant and Mr Mzwanele Manyi. Mr Manyi said that he was attending as advisor to the Ministers and remained in attendance throughout the meeting. Mr Zwane said that he was the Chairman of the Committee. Minister Gordhan did not attend. His absence was not explained.[297] The inclusion of Mr Mzwanele Manyi in this Ministerial team was strange because there is no evidence that Mr Manyi worked for Government in 2016. However, it must be remembered that Mr Manyi is the person that President Zuma – possibly at the instance of the Guptas – appointed as a replacement of Mr Themba Maseko at GCIS in February 2011 after Mr Maseko had been removed from the position of CEO of GCIS at the instance of the Guptas. This matter is dealt with in Vol 2 of Part 1 of this Commission's Report. It must also be remembered that Mr Manyi is the person that Mr Zwane wanted to have appointed as Director-General of the Department of Mineral Resources in 2014 or 2015 but did not succeed in getting him appointed because Minister Ramathlodi as Minister of Public Service and Administration blocked that on the basis that Mr Manyi did not qualify for the position of Director-General.

695. Mr Sinton understood the purpose of the meeting to be to discuss the closure of the accounts of the Gupta companies. The Standard Bank delegation stated that it was willing to discuss and explain its policies and procedures regarding account closures but not individual cases because of banker client confidentiality. Mr Sinton explained how the Serious Fraud Office in London had effectively fined Standard Bank UK a very

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[295] Transcript 17 September 2018, p 40.

[296] Exhibit H1, p 108, para 26.

[297] Transcript 17 September 2018, p 41; Exhibit H1, p 108 para 26.

large sum of money for failing to ensure that one of associates did not engage in corruption and placed Standard Bank UK on probation for three years. This required Standard Bank in South Africa to be exceptionally careful about being caught up in bribery and corruption in South Africa.[298]

696. The IMC members argued in favour of the Gupta companies that these companies employed up to 7 500 employees with the result that up to 60 000 South Africans, including the dependents of employees, had been affected by the decision to close the accounts.

697. It became clear to Mr Sinton that the true purpose of the meeting was to secure an outcome favourable to the Gupta companies. The IMC members:

(a) expressed a concern about the criteria used to identify politically exposed persons such as members of the Gupta and Zuma families;
(b) suggested that the Standard Bank had not acted fairly towards the Gupta companies and that the Standard Bank and its competitor banks may have colluded with "monopoly capital" in the way it treated the Gupta companies;
(c) asked the Standard Bank to explain why it continued to provide banking facilities to construction companies convicted of collusive conduct but decide to close the Gupta companies' accounts;
(d) admonished the Standard Bank that it operated under a license from the government and should therefore be responsive to issues raised by them on behalf of the government;
(e) suggested that Standard Bank should have placed the interests of the employees of the Gupta companies above the bank's legal obligations;

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[298] Transcript 17 September 2018, p42; Exhibit H1, p 108 para 27

(f) suggested that the government had the power to change the law to make banks accountable for job losses caused by account closures, including those flowing from the closure of the Gupta company accounts.

698. The meeting closed with Mr Zwane asking what changes Standard Bank would need to see within the ownership and management of the Oakbay Group that would be sufficient to persuade the bank to reverse its closure decision. This was after the Standard Bank delegation had made it clear that they would not discuss the affairs of any specific customer.

699. Mr Sinton concluded that the queries at this meeting were substantially the same as those posed on behalf of the ANC and were all directed at inducing Standard Bank to reverse its closure decision. As the committee was a committee of the Cabinet, it might mean that the Cabinet itself wanted through its committee to achieve a reversal of the closure decision.[299]

700. Although the secretary to the committee was present throughout and took notes, no minutes of the meeting were circulated after the meeting. Standard Bank accordingly wrote a letter dated 6 May 2016 recording what had transpired at the meeting.[300] The response was an email dated 9 May 2016 from the representative of the two ministers on the committee, a Ms Kellerman, thanking Mr Tshabalala for his input. Nothing in the letter from the bank was placed in dispute.

701. The Standard Bank's letter reminded the Ministers that the bank had hoped to keep the meeting about policy and practice and not any particular customers, but that the meeting did go on to discuss particular customers. It summarised all the laws that the

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[299] Transcript 17 September 2018, p46; Exhibit H1, p 109, para 28.

[300] Exhibit H1, p 149-154.

bank said were applicable to them and the risk faced by the bank if it did not strictly adhere to those laws. The letter summarised the experience of dealing with bribery and corruption and then described its process about what considerations it would take into account when considering whether to close a client's account, demonstrating that such decisions were not made arbitrarily or capriciously, but were considered carefully. In response to the query whether there was any possibility of Standard Bank reversing any decisions that could help save the jobs of the employees of the Gupta companies, Standard Bank indicated that it applied the known facts and suspicions as envisaged by PRECA and POCA to the law to reach its decisions and, therefore, if the facts should change, there could be a review of its decision.

702. On 1 September 2016 Mr Zwane issued a media statement announcing that Cabinet had resolved to recommend to President Zuma that a judicial commission of inquiry under s 84(2)(f) of the Constitution be appointed to consider the current mandates of the Banking Tribunal and the Banking Ombudsman, on the ground that, on the evidence presented to the committee, all of the actions taken by the banks and financial institutions against Oakbay were a result of innuendo and potentially reckless media statements and Oakbay had had very little recourse to the law.

703. On 2 September 2016 the Presidency issued a very sharply worded statement confirming that the banking sector was on a sound footing and describing Mr Zwane as being a member of the IMC who had spoken in his personal capacity, that he "does not speak on behalf of Government" and that the Presidency regretted the "unfortunate contents of the statement" and the confusion the statement had caused.

704. However, on 23 November 2016, President Zuma spoke in Parliament in response to a question by an MP. A transcript of President Zuma's response to the question was provided to the Commission.

705. Mr Sinton takes the view in his statement that the remarks in Parliament by President Zuma show that he regarded the banks decision to close the accounts as having been taken without due consideration ("willy-nilly"), that he, believed there may have been collusion between the banks and other financial institutions in that regard, that government would continue to deal with the banks' decisions and that Mr Zwane's unauthorised remarks were still being investigated.[301]

Application to court by Minister of Finance

706. By notice of motion dated 13 October 2016, the then Minister of Finance, Mr Gordhan, brought an application under case no. 80978/16 in the Pretoria High Court (the declarator) with several Gupta companies and South African Banks, as well as the director of the Financial Intelligence Centre, for an order declaring that the Minister of Finance was not empowered or obliged to intervene in the relationship between the Gupta company respondents and the Bank respondents regarding the closing of the Gupta companies' bank accounts. The declarator included a founding affidavit deposed to by Mr Gordhan on 13 October 2016. The relevant part of Mr Gordhan's affidavit reads as follows:

> "The closure of the Gupta bank accounts
>
> 138. In or about April 2016, Oakbay Investments (Pty) Ltd ("Oakbay"), controlled at that time by the Gupta family, announced that its bank accounts had been closed.
>
> 138.1 At around the same time, Mr Nazeem Howa, the Chief Executive Officer of Oakbay, began to correspond with me seeking my intervention to reverse these account closures. I obtained legal advice that confirmed that it would be unlawful and improper for me to intervene in the private contractual relationship between a bank and its client. I conveyed this advice to Mr Howa, but he appeared undeterred and continued to request a meeting with me.
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> 138.2. Together with officials from National Treasury, I held a meeting with representatives of Oakbay (including Mr Howa and Ms Ronica Ragavan) on or about

[301] Exhibit H1, p 114-115, para 37.

24 May 2016 in which we explained the highly-regulated environment in which banks operate and the requirements that they closely monitor and report on suspicious transactions in order to combat money laundering. We also explained the legal impediments to me, or anyone else, intervening in the private contractual relationship between a bank and its clients. I urged him to approach the courts for relief. I knew his father as a highly principled person and asked him directly if he believed his father would be proud of his behaviour.

139. Following a Cabinet meeting on 13 April 2016, at which I was not present, a Ministerial task team (which should not be confused with an Inter-Ministerial Committee ("IMC")), was established to look into the issue of the closure of the Gupta bank account. Mr Zwane, Labour Minister Mildred Oliphant and myself were nominated for this task.

140. Following correspondence received from Mr Zwane purporting to schedule a meeting of the task team (seemingly expanded to include the then Minister of Communications, Faith Muthambi) with the banking institutions, I questioned the purpose and seeming aim of the task team with my colleagues who were nominated to it. I explained the extensive global and domestic legal regulatory framework that governs the financial sector, and cautioned that this framework needed to be understood and considered prior to any engagements with the banking institutions. My concerns were not addressed by the members of the task team.

141. I chose not to attend the meetings of the task team nor to participate in its actions, because I was of the view, confirmed in legal advice, that members of the executive cannot interfere in the contractual relationships between banks and their customers.

142. I do recall further events in Cabinet that I cannot publicly disclose but which I have indicated to the Commission should be investigated, that indicated to me that Mr Zwane had the full backing and support of former President Zuma in pursuing the task team's objective of undermining and maligning the stance adopted by myself and National Treasury to the closure of the bank accounts, this included three reports from the task team, two of which were distributed in Cabinet.

143. On or about 1 September 2016, Mr Zwane issued a media statement, purportedly on behalf of the task team and, I believe, based on its first report, announcing that it, through Cabinet, would recommend to former President Zuma that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa. This statement was effectively abandoned in the days that followed, with a statement issued by the Presidency, to clarify that no such decision had been endorsed as a decision by Cabinet.

144. On or around 14 October 2016, I launched a court application to seek declaratory relief regarding the limitations of my available powers to intervene in various decisions taken by several commercial banks to close the accounts held by Gupta-related firms.

144.1. This application attracted further hostility towards me from supporters of the former President and the Guptas.

144.2. Attached to the application as an annexure was a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports from the various banks relating to suspicious account activity and transactions conducted using the bank accounts that had been closed. This was the first public acknowledgement of suspicions regarding the business affairs of the Gupta entities since the Public Protector's State of Capture report was only released to the public on 2 November 2016 (following litigation aimed at interdicting its release launched by former President Zuma, Mr Zwane and Mr Van Rooyen.

145. I submit to the Commission that it should "follow the money" and request a full account of all transactions by any Gupta-related company and related individuals that has gone through bank accounts. By doing so it will be better placed to determine which activities were related to criminality and malfeasance. This will assist State Owned Enterprises and taxpayers to recover funds lost in this process."[302]

Evidence of Mr Johan Petrus Burger

707. Mr Burger testified before the Commission on 18 September 2018. He made a statement which he signed but did not date. Mr Burger was, during April and May 2016, a director and the CEO of Firstrand Bank Limited. FNB is a division of Firstrand.

708. In his evidence, Mr Burger described the process pursuant to which FNB closed client accounts. He made the point that banks had a legal obligation to scrutinise ("vet") a proposed client before opening an account and to monitor clients on an ongoing basis. He said that FNB not only had such obligations under SA legislation but also pursuant to the UK's Bribery Act and the USA's Foreign Corrupt Activities Act because FNB did not restrict its business activities to the Republic. He said that FNB had to take positive

[302] Exhibit N1.

steps to ensure that it was not being used for money laundering or other unlawful activities.[303]

709. In his oral evidence, Mr Burger further made the point that FNB was careful to avoid reputational and consequent business risk pursuant to its dealings with its own clients.[304]

710. If events external or internal to a client relationship lead FNB to question whether a relationship ought to be maintained, FNB would conduct a due diligence, which would include transaction monitoring for potentially suspicious transactions. This might lead to the next phase of the process, deliberation. FNB has an internal "person of interest ("POI") forum, an independent committee set up to review client relationships in such cases.[305]

711. This process was followed in the cases of Gupta related entities which had accounts with FNB. By letter dated 1 April 2016, FNB notified its Gupta related clients through its attorneys that it had decided to terminate its relationships with these entities with effect from 31 May 2016.[306] The Gupta entities which had accounts with FNB were Tegeta Exploration and Resources (Pty) Ltd, TNA Media (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd (Islandsite) and Sahara Computers (Pty) Ltd. This appears from the application of the Minister of Finance mentioned above in which the three Gupta entities were 4th, 7th, 11th and 14th respondents respectively.[307]

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[303] Exhibit H3, p 10 para 30.

[304] Transcript 18 September 2018, p 18.

[305] Transcript 18 September 2018 p 12.

[306] Transcript 18 September 2016 p 13; Exhibit H3 p 15.

[307] Exhibit H1 p 1-2.

712. The Gupta related entities asked for the reasons for the decisions and FNB's attorney responded in a letter dated 13 April 2016 that the decision had been taken due to associated business and reputational risks.[308]

713. In a letter dated 24 October 2016 to FNB's attorneys, the attorneys for the Gupta entities made allegations against FNB and asked FNB for information. FNB responded through its attorneys in a letter dated 31 October 2016 rejecting the allegations made against it and declined on several grounds, to provide the further information sought.[309]

714. By email on 22 April 2016, Ms Kellerman, who described herself as the Acting Secretary of the Inter-Ministerial Committee requested FNB's CEO to attend a meeting with the committee. FNB had learnt that the committee had been set up to look into certain allegations made against certain financial institutions. On 23 April 2016, in response Mr Burger asked amongst other things for details of who would be attending on behalf of the committee, what specific allegations had been levelled against FNB and what the nature and scope of the committee's process would be.[310]

715. Ms Kellerman responded on 24 April 2016 that she was not mandated to respond to questions. On 24 April 2016 FNB declined to attend the meeting.[311] On 4 May 2016 Ms Kellerman again invited FNB to a meeting with the committee. After further correspondence, during which Mr Burger raised questions and Ms Kellerman responded that she was not authorised to answer questions, FNB again declined to meet the committee.

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[308] Exhibit H3 p 26.
[309] Exhibit H3 p 27-30.
[310] Burger statement paras 1, 4 and 5.
[311] Burger statement paras 6 and 7.

716. On 18 or 19 April 2016 Mr Burger received a call from Mr E Godongwana, who was trying to set up a meeting between bank CEOs and the SG of the ANC in regard to the closure of client accounts. After some correspondence, during which Mr Burger enquired who would be attending the meeting and what its agenda would be, to which Mr Burger received no response, Mr Godongwana notified Mr Burger by text message that the meeting was off.

717. Mr Burger accordingly did not meet the members of the committee or the ANC in regard to the alleged irregularities or the closure of client accounts. Mr Burger stated that in his 32 years in banking, this was the first time ever that he had received requests from a political party or an inter-ministerial committee to discuss bank-client relationships and that the involvement of the Minister of Mineral Resources (Mr Zwane) in relation to the operations of financial institutions was worrying. The proper organs for that purpose are the Minister of Finance and other regulatory bodies conducting oversight in relation to the financial sector.[312]

Evidence of Ms Yasmin Masithela

718. In 2016 Ms Yasmin Masithela was Head of Compliance at Absa Bank Ltd. She testified before the Commission in 2018 when she was Absa's Chief Executive: Strategic Services.

719. Ms Masithela explained that Absa was a subsidiary of Barclays Africa Group Ltd, which itself was a subsidiary of Barclays PLC. As such Absa was obliged throughout the world to comply with laws pertaining to the combatting of money laundering and terrorist financing and fell squarely within the regulatory ambit of financial authorities in all major countries. She stated that Absa had risk management policies to ensure that Absa was

[312] Transcript 18 September 2018 p 36-37.

not used for unlawful activities. She testified that Regulation 36 of the Regulations made under the Banks Act required banks to have in place mechanisms to prevent this happening.[313]

720. In about November 2014, as part of Absa's normal annual review process, the relationship between Absa and what Ms Masithela described as the Oakbay companies, i.e. those Gupta related companies which held accounts at Absa, came under review. An organ within Absa, its politically exposed persons (PEP) review committee decided that Absa should exit the relationship with its Gupta controlled customers.

721. In December 2015 Absa gave notice of its intention to close the bank accounts of various Oakbay companies and related parties. In February 2016 Absa closed the accounts concerned.[314]

722. The Absa review committee concluded that the Oakbay companies were not using ABSA as their primary or dual bank and were apparently moving their banking accounts elsewhere to other financial institutions. As a consequence, ABSA was limited in its ability to monitor appropriately and understand the transactional activity in those accounts. There was also evidence of large unexplained transfers of funds between the Oakbay companies and related parties at other banks. ABSA was unable to account for these transfers in accordance with its obligations. Furthermore, the revenue received by ABSA from the portfolio at the time had declined materially over the years and the costs of fulfilling its monitoring obligations in respect of this account had accordingly been significant. Ms Masithela also said that there was also adverse media that was in the public domain regarding the Oakbay companies and related parties which increased

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[313] Transcript 18 September 2018 p 46.

[314] Exhibit H1 p 187.

the reputational and conduct risk arising from a continued relationship with these companies and ABSA.[315]

723. Ms Masithela confirmed the identities of 33 linked companies and individuals which or whom Absa considered to be Gupta linked and thus hit by the decision to terminate. These included Oakbay itself, Sahara Computers, Tegeta, Shiva Uranium, TNA Media, Westdawn, Mr Duduzane Zuma, Mr Rajesh Gupta, Mr Atul Gupta, Ms Chetali Gupta, Mr Varun Gupta, Mrs Shivani Gupta and Mrs Arti Gupta.[316]

724. On 20 April 2016 and at the request of the National Executive Committee of the ANC, a meeting was held at Luthuli House between representatives of Absa and representatives of the NEC of the ANC. The ANC was represented by Mr Gwede Mantashe, its Secretary-General, Mr Enoch Godongwana, Ms Jesse Duarte and Mr Krish Naidoo, the ANC's legal representative. Absa's team was led by its CEO Ms Ramos and included Ms Masithela.

725. The stated purpose of the meeting was to discuss the judgment in *Bredenkamp and Others v Standard Bank of SA Ltd*,[317] which provided certain guidelines about how a bank ought to go about terminating its relationship with its own client and to enable the ANC to understand the regulatory framework applicable.

726. Absa made clear, and the ANC appeared to accept, that Absa would not discuss the affairs of any specific client. Despite this, the ANC also raised the allegation or

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[315] Transcript 18 September 2018 p 51.

[316] Exhibit H5.

[317] 2010 4 SA 468 SCA.

perception that the banks had colluded in effecting the closures of the accounts of the Gupta related entities.[318]

727. On 22 April 2016 Absa received an email from Ms Kellerman requesting Absa to attend a meeting with the IMC on 25 April 2016 to gain clarity on current media reports relating to allegations against certain financial institutions. Absa requested further information regarding the nature of the proposed meeting. The information sought was not provided to Absa's satisfaction and Absa sent an email on 24 April 2016 declining the invitation to the meeting.

728. By email sent on 4 May 2016, Ms Kellerman extended a further invitation to Absa to a meeting with the IMC to discuss the deterrent effect the closure of client bank accounts might have on potential investors in South Africa. On the same day, Absa declined the request to meet the IMC.

Evidence of Mr Michael William Thomas Brown

729. Mr Brown made a statement to the Commission and gave evidence. When he testified, he was the CEO of Nedbank Limited, the banking entity in the Nedbank group.

730. Mr Brown testified that in February 2016 Nedbank began reviewing its relationship with the Gupta family and associated entities, following a request by Mr Brown to Nedbank's Chief Risk Officer to escalate reviews of Gupta-related accounts. Mr Brown perceived at the time that Nedbank's relationship with the Gupta-linked entities posed an increased reputational risk to Nedbank. Of particular relevance was a statement on Ministry of Finance stationery containing an allegation from the then Deputy Minister of

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[318] Masithela statement para 14.

Finance that members of the Gupta family had offered him the position of Minister of Finance to replace the then Minister, Mr Nhlanhla Nene.[319]

731. On 4 April 2016 Mr Brown saw both media reports and reports from the underlying companies confirming that both KPMG who were the auditors to these companies and SASFIN who at that stage were the sponsoring broker, had terminated their relationships with the Gupta family. Mr Brown considered, from a Nedbank point of view again, that these were particularly significant terminations, because he regarded it as likely that the auditor of a set of companies was privy to information that Nedbank, who were not the main transactional bankers to the Gupta family, would not have had. He took the view that there must have been a reason for them to make their decision. Mr Brown noted that the then CEO of KPMG was quoted as saying that the association risk was too great for them to continue. While there was no direct quote from the sponsoring broker, Mr Brown considered it likely that Sasfin would have had access to more information than Nedbank at that stage.

732. Nedbank proceeded to convene a meeting of a sub-committee of its executive committee which was mandated to review Nedbank's relationships with the Gupta family. That sub-committee concluded that because of the reputational and business risks associated with doing business with the Gupta family, Nedbank should give notice to terminate the accounts held at Nedbank by these entities. Accordingly, on 7 April 2016 - Oakbay, Islandsite, Confident Concept (Pty) Ltd and Sahara Computers (the 1st, 11th, 12th and 14th respondents in the application brought by the Minister of Finance), were given 30 days' notice of termination. Termination letters were tendered to a representative of the Gupta entities at a meeting on 7 April 2016. The representative refused to accept the notices. Thereafter, the notices were delivered by registered post.

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[319] Transcript 19 September 2018 p 6.

On 4 May 2016 notice of termination was given to a further Gupta company, VR Laser Services (Pty) Ltd, the 10th respondent in the application brought by the Minister of Finance.[320]

733. On 14 April 2016 Mr Howa of Oakbay requested an urgent meeting with Nedbank. Mr Brown did not attend this meeting but learnt that the meeting was held between Mr Howa and officials of Nedbank, that Mr Howa urged Nedbank to reconsider its closure decision and that Nedbank refused to do so.[321]

734. On 20 April 2016 Mr Brown attended a meeting at Luthuli House at the request of Mr Mantashe, Ms Duarte, and Mr Godongwana, to enable them to get a better understanding of the process banks followed to close customer accounts. Mr Brown was told that complaints had been made by the general population that banks were able just to close accounts unilaterally. This was the first time that Mr Brown had ever been asked to attend a meeting to discuss the closure of Nedbank's customer accounts. He testified that Mr Mantashe and Ms Duarte attended the meeting. Mr Brown was not sure whether Mr Godongwana attended.

735. Mr Brown explained that Nedbank's closure decisions were made without consulting other banks but on reasonable notice, after Nedbank had assessed the situation. He testified that, if the client wanted to discuss the matter, Nedbank would be prepared to listen to what the customer had to say and may, in a proper case, reverse its closure decision.

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[320] Transcript 19 September 2018 p 9.

[321] Exhibit H6. Transcript 19 September 2018 page 13.

736. Mr Brown did not feel that the ANC had sought to place him under any pressure to reopen the Gupta accounts.[322]

737. On 4 May 2016 Nedbank received an email from Ms Kellerman to say that an IMC had been established by Cabinet to look into certain allegations made against certain financial institutions. Mr Brown testified that he understood the IMC to consist of the Minister of Mineral Resources, Mr Zwane, the Minister of Finance, Mr Gordhan, the Minister of Labour, Ms Oliphant and the Minister of Communications, Ms Muthambi.[323]

738. The purpose of the meeting was said to be to gain clarity on the media reports and public statements made by Nedbank with regard to the closing of bank accounts and/or termination of bank/client relationships. The meeting was held at the offices of the Ministe r Zwane in Pretoria. Mr Brown said that before this meeting he had not met government at the offices of the Minister of Mineral Affairs in relation to banking matters.[324]

739. On 5 May 2016 Ms Kellerman informed Mr Brown that she was unable to confirm who from the IMC would be attending the meeting as it was an ad hoc meeting. The meeting was attended on the government side by Mr Zwane, Mr H Mkhize as Ms Oliphant's representative and two other persons who were not introduced. Mr Brown asked if the meeting was quorate and Mr Zwane assured him that it was.[325]

740. A letter put up by the Minister of Finance in the application, written by Mr Gordhan to Mr Zwane and dated 22 April 2016 was drawn to Mr Brown's attention. The letter stated,

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[322] Transcript 19 September 2018 p 18.

[323] Transcript 19 September 2018 p 20.

[324] Transcript 19 September 2018 p 21.

[325] Transcript 19 September 2018 p 25.

amongst other things, that Mr Gordhan had established from the Cabinet secretary by reference to Cabinet minutes, that:

740.1. the date on which Mr Zwane had announced that the Cabinet had met and authorised the constitution of the IMC, April 2016 was incorrect because no Cabinet meeting had been held that day;

740.2. No IMC had been established;

740.3. three Ministers were nominated: Finance, Labour and Mineral Resources;

740.4. no one Minister had been designated as convenor in contradiction of Mr Zwane's announcement that he had been appointed to chair the IMC;

740.5. the financial services sector was not "already distressed" as Mr Zwane's letter indicated and care had to be taken not to compromise financial stability.326

741. In response to a request from Nedbank, Ms Kellerman said in an email on 9 May 2016 that the following had attended the meeting on behalf of government: Mrs F Muthambi as well as her advisors, Mr Z Manyi and Z Nene, Ms M Oliphant as well as her advisors, Mr H Mkhize and DDG Mr V Seafield, Mr Zwane and his advisor, Ms S Kellerman.[327] However, Mr Brown testified that this was inaccurate as Ms Muthambi, Mr Manyi and Ms Oliphant had not attended the meeting.

742. Mr Zwane began the meeting by saying that the IMC had been constituted by Cabinet and was not there to represent any particular company or family but to resolve apparent issues of investor confidence and reported potential job losses. In response Mr Brown affirmed that Nedbank would not discuss individual cases. He went on to explain the

[326] Transcript 19 September 2018 p26; Exhibit H1 p 144.
[327] Transcript 19 September 2018 p28; Exhibit H1 p 207.

regulatory environment. He quoted from a JP Morgan report which dealt with reputational risk and in which JP Morgan disclosed publicly that it had closed 18 000 accounts. He said that Nedbank had similar experiences. In the year ending in June 2016 Nedbank had closed about 100 accounts for reputational reasons.[328]

743. Despite Mr Zwane's assurance that individual closures would not be raised at the meeting, several questions were asked about the triggers for the closures of the Gupta accounts including a reference to a recording of a Nedbank staff member talking to a client about the Gupta accounts.[329] Mr Zwane also observed that Nedbank was not the main transactional banker to the various Gupta entities and went on to suggest that Nedbank might step in to save jobs and come to an amicable solution.

744. Mr Brown found the request strange and reminded Mr Zwane that Nedbank could not discuss specific customer matters.[330] At the conclusion of the meeting, Mr Zwane thanked Nedbank for its attendance and remarked that he found it surprising that other banks had refused to attend the IMC meetings considering that banks received their licences from the government. Mr Brown perceived this as a threat. After the meeting, Nedbank asked for a set of minutes of the meeting, but no minutes were provided.[331]

745. Mr Brown left the meeting with the impression that the IMC was focused on two key issues: to try to determine whether there had been collusion amongst the banks in relation to the Gupta account closures and to see whether Nedbank would be prepared to become the Guptas' primary transactional banker.[332]

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[328] Transcript 19 September 2018 p 30 line 15 and p 32.

[329] Mr Brown investigated this allegation and established that it was not true. He reported his findings to the IMC.

[330] Transcript 19 September 2018 p 35.

[331] Transcript 19 September 2018 p 36. Banks are licensed by the Reserve Bank, not the government.

[332] Transcript 19 September 2018 p 36.

Evidence of Mr Samson Gwede Mantashe

746. Mr Mantashe submitted an affidavit which he signed on 11 November 2018 on behalf of the ANC. In 2016 he was the Secretary-General of the ANC. Mr Mantashe testified that the ANC met with Standard Bank, Absa and Nedbank but not with FNB.[333]

747. Mr Mantashe said in his statement that the purpose of the meeting convened by the ANC with the Standard Bank (and, therefore, by extension with the other banks as well) was not to discuss the bank's relationship with a "particular customer" but to "obtain a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically-exposed persons are involved".[334] In his oral evidence he said that Oakbay's argument for the ANC to intervene with the banks was that the termination decisions had caused job losses. The ANC had two meetings with Oakbay. The first meeting was to explain the structure of the company and the second focused on job losses.[335]

748. Mr Mantashe admitted that at the meeting with Standard Bank, the ANC expressed a concern that there was a perception that race or political affiliation played a role in Standard Bank's decisions to retain or terminate relationships with its customers.[336]

749. Mr Mantashe admitted that at the meeting, the ANC expressed a concern about possible collusion between Standard Bank and other banks.[337]

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[333] Transcript 27 November 2018 p 89.

[334] Exhibit H6 p 4 statement para 1.18.1.

[335] Transcript 27 November 2018 p 90.

[336] Exhibit H6 p 4 para 1.18.2.

[337] Exhibit H6 p 4 para 1.18.2.

750. Mr Mantashe stated that the ANC made the point at the meeting with Standard Bank that stringent FICA requirements could force the dishonest into cash transactions.[338]

751. On 8 April 2016 Mr Howa, the CEO of Oakbay, sought a meeting with Mr Mantashe to discuss job losses in the group arising from the banks' decisions to close accounts. Mr Howa said in a letter to Mr Mantashe that he believed that the terminations were anti-competitive and politically motivated, designed to marginalise the Gupta entities. The ANC was concerned about the impact of such action on the employment situation and the serious nature of the allegations. It held two meetings with executives of Oakbay. The second such meeting was held after the account closures. Arising from these meetings and the allegations made by Mr Howa, the high office bearers of the ANC directed Mr Mantashe to meet the four banks involved and "some of the relevant Ministers". The decision to create the IMC however rendered it unnecessary for Mr Mantashe to meet the Ministers.[339]

752. Mr Mantashe went to the meetings with the banks armed with a "framework of principles" developed by its officials for the engagement. The principles were:

752.1. the ANC had to be mindful that banks were not permitted to share information about their customers with a third party. The engagement, therefore, had to be about principles and general facts.

752.2. the ANC sought clarity on how "consistent is the principle of account closures applied" and how "widespread is the practice of account closures in the banking sector".

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[338] Exhibit H6 p 5 para 1.18.4.

[339] Exhibit H6 p 6 - 7 para 2

752.3. the ANC sought to enquire whether the "internal debate on corporate capture in the ANC having an impact on the banks' decision-making processes in relation to closure of accounts".

753. This framework was extended, "emanating from certain quarters in the ANC", to seek clarity on:

753.1. whether the banks were using their ability to terminate banking relationships to exercise the power of "white monopoly capital"[340] against black business "to a degree that should concern policy makers"; and

753.2. whether the four large banks were "colluding or acting in concert in withdrawing banking services from a common customer".[341]

754. On 23 May 2016 the officials of the ANC reported the essence of their discussions with Oakbay to the ANC's National Working Committee (NWC) and Mr Mantashe reported on his meetings with the banks. Following these reports, the NWC observed that:

754.1. the "coordinated action of the banks smacks of collusion"; the power of the banks to "close businesses without being required to explain their action" was a threat that these powers could be abused for various reasons, including possible resistance to transformation;

754.2. the potential for job losses had to be raised sharply without the ANC being seen as the spokesperson for any particular company;

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[340] The quotation marks are those of Mr Mantashe.

[341] Exhibit H6 p 7 para 2.

754.3. the government had to ensure that there was broad understanding at government level of the legislation in question; it would serve a good purpose if leaders and public representatives of the ANC were made to understand the concept of politically exposed persons (PEPs) and the moral stigma attached to PEPs, "i.e. that they are morally corrupt until proven otherwise";

754.4. the ANC had to always be sensitive to public perceptions and appreciate the need to reassure society that its interventions were genuine;

754.5. with hindsight, the engagement with the banks would have been more effective if conducted through the regulator; any other approach carried the risk that the ANC would be seen to be talking from a biased position without acquainting itself with the facts; as the ANC raised the issue of possible job losses, the ANC had to emphasise the importance of businesses complying with law.[342]

755. At its meeting of 28-30 May 2016 the National Executive Committee of the ANC adopted the report of the NWC and resolved that the decision of the ANC to meet with the banks had been driven by loss of jobs, perceptions that the banks were colluding and perceptions that the banks were exercising the power of "white monopoly capital" against black businesses.[343]

756. Mr Mantashe conceded that at the time this resolution of the NEC was passed, it was public knowledge that President Zuma had a relationship with the Guptas, that Mr Duduzane Zuma had a business relationship with the Guptas and the facts and allegations around the purchase of Optimum mine from Glencore by Tegeta were being aired in the media. The media were also reporting that Tegeta had been awarded a

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[342] Exhibit H6 p 9-10 para 5.

[343] Exhibit H6 pp10-11 para 6.

contract worth R4 billion to supply coal to the Majuba power station in Mpumalanga. It was also known by the ANC that Mr Jonas had publicly announced that he had been offered the position of Minister of Finance by the Guptas (although Mr Mantashe doubted that this was true). The ANC was also aware that Mr Themba Maseko had claimed that President Zuma had requested him to help the Guptas. Mr Mantashe said Mr Maseko was one of the eight ANC members who came forward to the ANC with allegations that efforts had been made to corrupt them in favour of the Guptas.[344]

757. In his oral evidence Mr Mantashe said that during the meetings the banks explained the processes they followed in complying with the law. Mr Mantashe said that in the end "we understood the basis of banks closing accounts and that was the essence of our meeting."[345] After the meetings, Mr Mantashe said, the ANC reported telephonically to Oakbay that while their argument regarding job losses was attractive, the ANC could not help the Guptas because "people must comply with regulations and rules".[346]

758. At the same NEC meeting, the ANC created a process by which persons could report conduct by the Gupta family amounting to what is now called state capture. Mr Mantashe noted that eight ANC members came forward with information and noted these members' preference was for their submissions to be made to an independent body.

759. Mr Mantashe's statement concluded with the quotation of a resolution passed by the ANC at its national conference in December 2017 declaring unanimously its resolve to combat corruption and an observation that this Commission was appointed by Present Zuma a month later, i.e. on 23 January 2018.

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[344] Transcript 27 September 2018 p 126.

[345] Transcript 27 November 2018 p 103.

[346] Transcript 27 November 2018 p 127.

Evidence of Mr Mosebenzi Joseph Zwane

760. Mr Zwane was the Minister of Mineral Affairs in 2016. In 2021 he was a member of Parliament and was no longer a Minister. He was invited to respond to the evidence in relation to the account closures and did so in an affidavit he signed on 31 May 2021 in response to questions sent to Mr Zwane by an evidence leader. The affidavit was one of a series of affidavits responding to allegations and testimony before the Commission. The affidavit in question also dealt with other matters, not germane to the present topic.

761. Mr Zwane's answer to the evidence that he put pressure on the banks to reverse their closure decisions was that he did so in an effort to forestall job losses. This, he said, was also why he travelled to Switzerland to attend a session of the negotiations between Glencore and Tegeta relating to the acquisition by Tegeta of the Optimum mine. He never, he said, ever discussed Cabinet business with third parties. Mr Zwane confirmed that an IMC was constituted of which he was the chair.[347]

Evaluation

762. The facts show that there were four banks which provided banking facilities to the Guptas: namely, Standard Bank, FNB, Absa and Nedbank.

763. Standard Bank gave notice to terminate on 6 April 2016; FNB gave notice on 1 April 2016, Absa gave notice in December 2015. Nedbank gave notice on 7 April and 4 May 2016.

764. Each of the banks' representatives gave his or her bank's reasons for terminating the relationship. Absa, described by one of the witnesses as the main transactional bank

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[347] Zwane affidavit sworn on 31 May 2021 paras 19 and 22-27.

used by the Guptas, was the first to terminate. Ms Masithela gave those reasons as the Guptas appeared to be moving their accounts away from Absa, which limited its ability to monitor the character of transactions, there were large unexplained transfers of money between the Oakbay companies and related parties, the costs of monitoring the account were significant and there had been adverse reports in the media regarding the Guptas.

765. Some four months later, the other three major banks followed suit in short order.

766. Mr Sinton gave Standard Bank's reasons for its closure decision. He said that Absa had previously terminated its relationships with certain Gupta companies; the Gupta companies' auditors had terminated their relationship with the Gupta companies; former Deputy Minister Jonas had published on the National Treasury website the allegation that the Guptas had offered him benefits if he would do their bidding, a former MP; Ms Mentor had announced that she had been offered a Cabinet post by the Guptas in exchange for favours; Standard Bank provided services to the Gupta group in the media business through two of its own customers and was concerned about being implicated in unlawful behaviour; Mr Themba Maseko had announced that he had been instructed to help Gupta entities; Minister Zwane had accompanied a Gupta delegation to Switzerland to negotiate the purchase by the Guptas of the Optimum coal mine from Glencore (which Standard Bank believed Minister Zwane had falsely denied); it had been reported in the press that one of the Gupta companies had bound itself as surety for the obligations of a trust in which a wife and son of President Zuma were beneficiaries; Estina (Pty) Ltd had been awarded a contract to develop a farm in the Free State but had sent substantial sums of the money paid to it to Dubai rather than using it for the proper purpose; the Guptas had attempted to persuade Standard Bank to transfer money held in trust for the rehabilitation of Optimum mine to the Bank of

Baroda. In addition, Standard Bank's money laundering reporting officer had warned the bank to use extreme caution in dealing with the Gupta companies.

767. Mr Burger gave FNB's reasons for its decision to close the accounts as reputational and consequent business risk pursuant to FNB's dealings with its own customers.

768. Mr Brown gave Nedbank's reasons for the termination of the bank-client relationships as the resignations of the Gupta companies' auditor and sponsoring broker, and reputational and business risks as determined by the sub-committee of its executive committee mandated to review Nedbank's relationships with the Gupta family.

769. There is no reason to doubt the veracity and cogency of this evidence. The suggestion that these banks might have terminated, or did terminate, for reasons of racial prejudice and jealousy (all embraced within the manufactured public relations tag of "white monopoly capital") demands that it be accepted that these banks decided to cut themselves off from a lucrative income stream and, for some unexplained motive, decided to suspend their participation in this competitive market to achieve some other unstated goal.

770. Not only is there no evidence on which to disbelieve the witnesses who explained the conduct of the banks, but the probabilities are strongly against the white monopoly capital, anti-competitive, collusion narrative. From the abundant evidence before the Commission, it is clear beyond any reasonable doubt that the Guptas, and their politically connected enablers, had embarked on a coordinated campaign to loot the South African state coffers and, until the banks stopped them from doing so, were using the banks as their vehicles for this purpose. It is equally clear that, when this looting became notorious in the public sphere, the banks were obliged by law to act against the Guptas and did so for that reason.

771. The banks should, therefore, not be criticised for acting against the Guptas. If anything, the three banks which delayed their closure decisions until April 2016 might have been interrogated as to why it had taken them so long to act.

772. Although some doubt exists as to whether Cabinet ever constituted an IMC to enquire into the reasons surrounding the termination decisions was raised by Mr Gordhan in his letter dated 24 May 2016,[348] Mr Gordhan himself in his founding affidavit in the declaratory application disclosed that he had instructed counsel, for the purposes of an opinion, that there had, as at 25 April 2016 (the date of the opinion) been a recent delegation by Cabinet of three members, the Ministers of Labour, Mineral Resources and Finance, to engage a number of major SA commercial banks to open constructive talks to find a lasting solution after the termination decisions.[349] Mr Gordhan's letter to Mr Zwane dated 28 April 2016 suggests that the date of the relevant Cabinet decision was 13 April 2016.[350]

773. The application for a declaratory order was launched after Mr Howa had persistently sought to place Mr Gordhan as Minister of Finance under pressure to intervene on behalf of the Gupta companies to procure the reversal of the termination decisions. To this end, Mr Howa engaged in correspondence and met with Mr Gordhan. This correspondence was attached to Mr Gordhan's founding affidavit in the High Court application. For example, on 8 April 2016, Mr Howa wrote that the termination decisions, and indeed the termination decision of their auditors as well, were the result of an "anti-competitive and politically motivated campaign designed to marginalise our businesses."[351]

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[348] Exhibit H1 p 144.

[349] Exhibit H1 p 26; counsels' opinion dated 25 April 2016 para 3.

[350] Exhibit H1 p 144.

[351] Exhibit H1 pp 11 and 21 declarator founding affidavit para 9.

774. In response, Mr Gordhan obtained counsel's advice that nothing in law authorised governmental intervention with the banker-client relationship arising by contract. In a letter dated 24 May 2016, Mr Gordhan communicated this advice to Mr Howa and pointed to the highly regulated environment in which banks operated and to the legal impediments to banks discussing client related matters with the Minister of Finance and suggested that Oakbay exhaust its legal remedies.

775. Nonetheless, Mr Howa, while acknowledging that the termination decisions were unassailable in a court of law, persisted with his requests that Mr Gordhan as Minister of Finance somehow assist him to achieve the reversal of the termination decisions.

776. The pressure exerted by Mr Howa was the reason stated by Mr Gordhan for his decision to institute the application for a declaratory order. It is overwhelmingly probable, however, that Mr Gordhan was faced with pressure from some of his colleagues in the Cabinet and the ANC to place pressure on the banks to reverse their termination decisions. I say this for these reasons:

776.1. It is likely that Mr Howa, having unsuccessfully sought to pressurise the Minister of Finance into an interaction with the banks, placed the same pressures on the ANC and government.

776.2 It is similarly probable that the ANC and the government acceded to Mr Howa's request. Never before, in the lengthy experience of the bank officials who testified had the ANC or government sought or held meetings with banks to discuss, at least by implication criticise, their decisions relating to a single client and exert pressure on banks to reverse or modify their termination decisions.

776.3. Mr Gordhan did not attend any of the meetings convened by government to pressurise the banks. This reinforces the conclusion that Mr Gordhan was not prepared to do something counsel had advised him was unlawful.

776.4. Both the Cabinet and the ANC had decided to place such pressure as they could on the banks to reverse their decisions. It is highly unlikely that Mr Gordhan, having been made a member of the IMC which had been constituted for this single purpose and having decided not to interact with the banks, would not have disclosed to his colleagues the legal advice which rendered it unlawful for the government to intervene in the dispute and which justified his stance.

776.5. It is therefore probable that both the ANC and government tried to place pressure on the banks to reverse their closure decisions even though they knew that they had no legal right to intervene in individual banker-client relationships.

776.6. This is reinforced by the acknowledgement of both the ANC and Mr Zwane to the banks at the various meetings that they were not entitled to intervene in, or receive information about, the circumstances of and context within which the termination decisions had been made in respect of any client clients of the specific banks.

776.7. Nevertheless, other members of the National Executive, particularly Mr Zwane in his statement that the President had decided to establish a Commission of Inquiry to investigate the banks, had chosen publicly to perpetuate the narrative that the termination decisions had been taken on improper grounds. Although Mr Gordhan does not say so in his application to Court for a declarator, the proper inference is that there was a faction within Cabinet which was actively supporting the Gupta companies in their campaign to get the banks to reverse the termination decisions and that Mr Gordhan wished by means of a

declaratory order to distance himself politically from such and compel this faction to cease what Mr Gordhan had authoritatively been advised was unlawful conduct. That there was such a faction within the Cabinet would be consistent with the evidence given by Mr Gordhan, Mr Nhlanhla Nene, former Minister of Finance that in regard to the Nuclear Deal and other transactions that the National Treasury resisted which were not lawful or appropriate, certain members of the Cabinet adopted a hostile or negative attitude towards National Treasury.

776.8. The evidence of the bank officials makes plain that, while both the ANC and Mr Zwane paid lip service to the principle that there could be no discussion of the relationships between the Gupta account holders and the banks, the conversation at the meetings was constantly steered in that direction and the bank officials were left in no doubt that they had incurred the displeasure of the ANC and of government and would only regain their good opinion by restoring banking facilities to the Guptas.

776.9. Indeed, Mr Zwane did not deny that he used what he mistakenly believed to be the government's power to interfere with banking licences in an effort to pressurise Standard Bank to bend to government's will.

776.10. While concern over job losses was a legitimate focus of both the ANC and the IMC, their focus on this aspect was no more than a cover for their attempts to pressurise the banks into reversing their termination decisions. It was hypocritical to focus on job losses: there was no suggestion that there was a campaign mounted by the banks to remove banking facilities from any employer other than the Guptas. Indeed, the complaint of the Guptas was not that there was a campaign on the part of the banks against any class of

employer client but that they, the Guptas, had been singled out for this oppressive treatment.

776.11. When Mr Zwane's attempts at the meetings to impose the Guptas' will on the banks through government failed, his next move was to announce that the President would appoint a Commission of Inquiry to investigate conduct that did not remotely display any of the negative characteristics both the ANC and government sought to attribute to it. It seems to me highly unlikely that Mr Zwane would just have made up the story about the presidential commission. After all, he was not known for his lack of support for President Zuma. It is far more likely that the fallout from Mr Zwane's announcement was such that President Zuma decided to exercise the politician's power to deny that which could not readily be proved and to sacrifice Mr Zwane on the altar of public opinion.

776.12. The Presidency proceeded to issue a statement repudiating Mr Zwane. It appeared from the text of the statement that even the suggestion that such a commission was to be appointed had disconcerted the markets. However, when President Zuma was questioned on the subject in Parliament, President Zuma gave answers which would enable him to jump either way; either to establish such a commission or to repeat the repudiation of Mr Zwane, by so doing casting doubt on the assertion in the statement that Mr Zwane's utterance had been unauthorised and unfortunate.

776.13. At some stage while answering questions about the Government's reaction to the closure of the bank accounts of the Gupta entities in Parliament on 23 November 2016, President Zuma said:

"We wanted to look into that matter and get to the bottom of it because we cannot say, at any other time any business person will be dealt with and the government will just stand and look. [Interjections.] We were not dealing with the company but the actions of the bank. That is what we were dealing with and we will continue to do so. [Applause.]

We are responsible because we are government of this country. There is nothing that sounds very suspicious that we are going to look at and do nothing. That is the reason why we acted on this one. Thank you, Madam Speaker. [Applause.]"

776.14. Later on President Zuma was asked in the same session whether what the four big banks had done was an attempt by "these imperialists to dictate and control the financial sector that they have done pre-apartheid days and his answer was:

"That is precisely the reason why government cannot ignore such an action. The action looks suspicious and as government responsible to govern this country, we certainly have to investigate this. We started very politely by sending a team to meet the banks to investigate what is happening. The banks did not say, these are the faults that this company has done or what led to our actions. So, up to now we do not know. We have laws in this country. If, let us say, any company violates the laws, there are enforcement institutions that you will report to. Just to stand willy-nilly and close simultaneously a number of banks as well as other financial institutions, it does not look innocent. That is a problem we have. Thank you, Madam Speaker. [Applause.]"

776.15. Conspicuous by its absence from President Zuma's answers and remarks was any concern about the possibility that the banks may have taken the decisions they took because his friends, the Guptas, were involved in suspicious transactions. When it came to the conduct of the banks, he said when there was "action" that looked "suspicious", as a responsible government governing this country, they had to investigate, and yet there had by 2016 been a lot of allegations of criminality and wrongdoing on the part of the Guptas and yet this government as a responsible government that governs this country, as he put it, had not seen fit to investigate the Guptas, in fact as the evidence heard by

this Commission in relation to the State Security Agency revealed, he and his then Minister of State Security, Dr Siyabonga Cwele, showed every sign that they disapproved of the plan by Ambassador Maqethuka, Ambassador Mo Shaik and General Gibson Njenje to pursue an investigation into the Guptas. This evidence is dealt with in the part of this Commission's Report that relates to the State Security Agency.

776.16. Finally, on this subject, there is the reaction of the NEC of the ANC to what they must have regarded as the banks' intransigence. Without any evidence to back them up, they adopted as the party position a stance which characterised the actions of the banks as racially motivated mischief ("white monopoly capital"), anti-competitive and collusive. There is not a word in the resolution of the NEC which recognises the right of the banks to manage their own businesses if they do so in good faith. Indeed, the tone of the resolution conveys the strong impression that the ANC had decided that the banks had not acted in good faith. Nor is there any reference to the wrongdoings of the Guptas which had been reported at the highest party level from within their own ranks.

776.17. Nevertheless, the ANC recognised that their support for their members, the Guptas, might backfire on them. So they included in the resolution of the NEC a reference to the anxieties of some of their own comrades about the conduct of the Guptas and a vague reference to a process by which the anxieties might be redressed.

777. Although Mr Mantashe said that the ANC's engagement with the banks was about understanding the process pursuant to which the accounts had been closed we know that there were accusations coming from the ANC side directed at the Banks that their actions were driven by "white monopoly capital". If the government and the ANC had

genuinely wanted to understand these processes, they would have sought clarification from their own experts or engaged the banks at a much lower profile level. There would also have been no urgency for the urgent meetings that the ANC held with the banks.

778. The option of a high profile campaign was, as I see it, selected partly to appease President Zuma who must have wanted what the Guptas also wanted and, in that way, also appease the Guptas and; partly to put pressure on the banks. The regret expressed by the ANC about the decision to take on the banks publicly and directly was not a moral regret; it was a regret that the tactic employed had not born political fruit. This conclusion is reinforced by the suggestion in the assessment of the ANC, testified to by Mr Mantashe, that the "engagement with the banks would have been more effective if conducted quietly *and done through the regulator*."[74]

Conclusions

779. The accusation that the termination decisions to close bank accounts were taken to advance the agenda of white monopoly capital, was entirely unjustified on the facts of this case. There is absolutely no evidence to support that accusation. The decisions of the banks were taken in the light of their legal obligations when a client appears to be involved in suspicious transactions that could cause a bank reputational damage.

780. It is quite clear with regard to the meetings that representatives of various banks had with the Inter-Ministerial Task Team chaired by Mr Zwane that that Task Team's focus, as they seem to have understood it themselves, was to get the banks to reverse their decisions to close the bank accounts of the Gupta-owned companies. Therefore, that Task Team improperly intervened in the matter of the closing of the bank facilities of the Gupta owned companies to advance the cause of the Guptas. That is why in one or

[74] Exhibit H6 p11 Mantashe statement para 7.

more of the meetings Mr Zwane effectively asked bank representatives what the Guptas would need to do in order for the banks to reverse their decision.

781. President Zuma may have issued a media statement repudiating a statement that had been issued by Mr Zwane to the effect that the Cabinet had decided that a judicial commission of inquiry would be appointed to investigate the conduct of the banks concerned. However, if one reads the transcript of the proceedings of the National Assembly on 23 November 2016 when President Zuma was answering questions on, among others, the Government's reaction to the closure of the bank accounts of the Gupta-owned companies, one wonders to what extent what Mr Zwane had articulated may have been something that Mr Zuma would also have wanted but had felt that he would not have enough support for it. I say this in part because the transcript of those proceedings on that day reveal that President Zuma said that as Government they wanted to investigate the conduct of the banks. A Commission of inquiry conducts an investigation. Subsequently, President Zuma does not seem to have pursued the idea of an investigation once the idea of a Commission of Inquiry had been rejected. So, it may well be that the investigation that President Zuma talked about in Parliament was intended to be conducted by a Commission of Inquiry as Mr Zwane had announced but the idea was not pursued once it was clear that there would be a lot of criticism against the Government if it was pursued.

782. In this regard it must be remembered that President Zuma was the President of the ANC and the country in 2016. He still had strong support both in the ANC and in the Cabinet. It must also be remembered that the evidence heard by the Commission was to the effect that his friendship or bond with the Guptas was very deep. This was part of the evidence that was given by Mr Rajesh Sundaram when he testified about the relationship between Mr Zuma and the Guptas. We have seen in the evidence heard by the Commission that President Zuma's relationship with the Guptas was so deep

that he was even prepared to fire his own ANC comrades in Government if that is what the Guptas wanted. We saw that when he removed Mr Themba Maseko from GCIS because Mr Ajay Gupta wanted him removed. We can see in this Report that he was prepared to fire Minister Nene who was doing a good job as Minister of Finance simply because he was not prepared to work with the Guptas and was not prepared to approve transactions that he believed were not in the interests of the country.

783. Given all the above and all evidence heard by the Commission in relation to President Zuma, there can be no doubt that he wanted the Inter-Ministerial Committee to come to the assistance of his friends, the Guptas, which would have been and was an improper interference in the relationship between the banks and their clients. That conduct on his part was also in breach of section 96(2)(b) of the Constitution. That section reads:

> "2. Members of the Cabinet and Deputy Ministers may not -
>
> ...
>
> b. act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests..."

784. It was also in breach of section 2 of the Executive Members' Ethics Act. That Act reads:

> "Code of ethics
>
> (1) The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.
>
> (2) The code of ethics must—
>
> (a) include provisions requiring Cabinet members, Deputy Ministers and MECs—
>
> (i) at all times to act in good faith and in the best interest of good governance: and
>
> (ii) to meet all the obligations imposed on them by law; and
>
> (b) include provisions prohibiting Cabinet members, Deputy Ministers and MECs from—

(i) undertaking any other paid work:

(ii) acting in a way that is inconsistent with their office;

(iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;

(iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person:

(v) and acting in a way that may compromise the credibility or integrity of their office or of the government."

785. When one also has regard to the statements he made in Parliament on the matter, it is quite clear that he sought to improperly interfere in the matter of the closing of the banking facilities of the Gupta owned companies in order to assist his friends.

786. There is no doubt that Mr Zwane used his position as Chairperson of the Committee to try and assist the Guptas and get the banks to reverse their decisions. His intervention was improper and he should not have played that role. It would appear that Rule 3.3 notices were not served on other members of the Committee. For that reason, it would not be fair to make any adverse findings against them.

787. Mr Zwane was vested with the public power and used public resources in an effort to get done what the Guptas wanted. The Constitution requires public power to be exercised in good faith and for a proper purpose.[352]President Zuma also used the power of his office to improperly intervene in the matter of the closure of the banking facilities of Gupta-owned companies in order to assist the Guptas.

788. Article 2.1 of the Executive Ethics Code prescribes that:

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[352] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 SCA para 34, citing with approval the following passage from *T Bingham* The Rule of Law (2010) at 60: "Ministers and public officials at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably."

"Members of the Executive must to the satisfaction of the President or the Premier, as the case may be

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfil all the obligations imposed upon them by the Constitution and law; and

(c) act in good faith and in the best interest of good governance; and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government."

789. Article 2.3 of the Code prescribes that Members of the Executive may not:

"(c) act in a way that is inconsistent with their position;

(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;

...

(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests."

790. I have concluded that President Zuma and Mr Zwane misused their public power in an attempt to achieve a benefit for the Guptas, not because their case was a deserving one which ought to enjoy the protection of the state but because of the power and influence which the Guptas were able to wield in the South Africa of those times.

791. In my view this conduct on the part of Mr Zuma and Mr Zwane ought to be deplored and condemned both as a violation of the powers vested in him by the Constitution and as a breach of the provisions of the Executive Ethics Code which I have quoted.

792. The ANC tried to say that it held the meetings that it held with the banks not because they wanted to assist the Guptas but because they wanted to understand the process and the circumstances under which a bank would terminate a banker-client relationship or because they were concerned about job losses. The terms of reference do not require me to make findings in relation to the ANC. Therefore, I will not do so. Nevertheless, I raise the following questions:

792.1. if the ANC wanted to understand the process relating to a bank closing a client's bank account, why did they refer to politically exposed persons in their questions to the banks when we know that the politically exposed persons they were really having in mind were the Guptas? Furthermore, if they just wanted an understanding of the bank processes, why could they not deal with the issues in the normal course? What was the urgency in the matter? They wanted to understand the process or reasons and then do what after the banks had explained? Why did they report back to Oakbay after their meetings with the banks if they simply wanted to understand the reasons and processes of the banks when in general they close client's bank accounts?

792.2 if they were concerned about job losses or the workers, why did they not leave this issue to their ally COSATU which deals with labour issues all the time? If they were concerned about workers, it is Oakbay which approached the ANC and not the workers – at least on the evidence heard by the Commission. If they had been approached by the workers, would they have called the meeting with the banks as they did or would they have referred the workers to COSATU?

793. As far as the Cabinet is concerned, it was improper for it to get involved in the matter of the four banks closing the accounts of the Guptas. Minister Gordhan was the Minister of Finance at the time. The banks fall under his portfolio. He was dead against the Cabinet and anybody getting involved in the relationship between the banks and their clients. He sought a legal opinion which made it clear that it would be improper for government to get involved. Mr Gordhan boycotted the committee that was chaired by Mr Zwane. It is highly unlikely that Mr Gordhan would have stayed away from that Committee without having explained to the Cabinet that it would be unlawful for the Cabinet to get involved. The Cabinet should have left this matter to the relevant regulatory body.

Recommendations

794. Some of the banks which closed the bank accounts of the Gupta companies were prepared to have a discussion with their clients before they could terminate their relationship with them but others appeared not to have been prepared to have such a discussion and thought that all they needed to do was to give their client a reasonable notice of the termination of the relationship. In *Bredenkamp and Others v Standard Bank of SA Ltd*[353] the Supreme Court of Appeal decided that a bank was not obliged to hear its client's side of the story before the bank could terminate the relationship. It seems that the Supreme Court of Appeal's basis for this decision was that the relationship between a bank and a client is a contractual one.

795. Representatives of Banks who testified before this Commission revealed that the banking industry is regulated or is subject to many laws. Banks possess an enormous amount of power. This would become very clear if all the banks were to refuse that you hold an account with them. You would not be able to run any serious business without being able to open a bank account. If you already had a bank account and all the banks in which you have accounts terminated their relationship with you that would be devastating. If you were running a serious business, you would need to close down that may result in job losses. Depending on the size of the business one may be talking about hundreds or thousands of people who would lose jobs. The workers would have to suffer serious consequences even though they may not have done anything wrong themselves.

796. In this day and age in South Africa it is unacceptable that an institution as powerful as a bank should have no obligation to hear – whether in a discussion or in writing what a client has to say before the Bank may close that client's account on suspicion that the

[353] [2010] ZASCA 75; 2010 (4) SA 468 (SCA); 2010 (9) BCLR 892 (SCA); [2010] 4 All SA 113 (SCA) (27 May 2010).

client may be involved in illegal or corrupt transactions. It does not appear to be in line with the kind of society that our Constitutional democracy envisages. A decision to close a client's bank account on those grounds is a decision that could have far reaching consequences for the client and others and it is only fair that banks be required to afford their clients the opportunity to be heard or to make representations to show if they are able to, that there are no grounds for the bank to be concerned. The bank may be persuaded or it may not be persuaded. The bank would need to afford the client a proper opportunity to be heard and should not just go through the motions or pay lip service to the principle of audi alteram partem (hear the other side).

797. The fact that the relationship between a bank and a client may be contractual is neither here nor there because there are other relationships which are or were at some stage contractual in nature and Parliament intervened in order to infuse the notion of fairness in the relationship. The first of those is the employment relationship. Under the common law an employer had all the power to terminate an employment relationship for a good reason or for a bad reason or for no reason at all and there was very little that an employee could do about such a termination. Labour legislation was enacted to infuse fairness into the employer-employee relationship and, now, an employer must have a fair reason to terminate the relationship and must follow a fair process to do so. The same applies to certain leases. Some legislation requires that certain tenants be treated fairly. Illegal occupiers of land also need to be treated fairly. In our legal system even those who are accused of rape and murder are not sent to jail without being given an opportunity to tell their side of the story. There is no reason why Banks should not be required to observe this basic principle.

798. It is therefore recommended that relevant existing legislation governing banks be amended to introduce this requirement of fairness or, if warranted, a new piece of legislation be enacted which will make this a requirement.