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## STATEMENT TO THE INQUIRY INTO STATE CAPTURE

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I,

**LUNGISA FUZILE**

State as follows:

**INTRODUCTION**

- 1 I have consulted with the legal team of the Commission of inquiry on State Capture chaired by Deputy Chief Justice Raymond Zondo and have agreed to provide this statement to assist the Commission in carrying out its investigation.
- 2 As the former Director General (“DG”) of the National Treasury (“National Treasury” or “Treasury”), I have knowledge of projects and events, discussions and decisions that occurred during my tenure that have implications for the country or that impacted certain persons in consequential ways.
- 3 I was also told about discussions and events that occurred in my absence, but which had relevance to and implications for my work as DG. Some of these appear to have led to some of the people I mention in this submission being summarily and, in some cases, unceremoniously removed from their positions.
- 4 During my tenure as DG at the National Treasury I witnessed the growing dissatisfaction by President Zuma with the National Treasury – in particular Minister Gordhan and Minister Nene. There were several issues that were central to this dissatisfaction especially since these Ministers were unwilling

to sign-off on decisions that risked jeopardising the country's fiscus and sovereignty. This statement deals with the following issues:

- 4.1 nuclear procurement;
  - 4.2 a purchase of shares in the oil and petroleum company Engen by PetroSA;
  - 4.3 the financial and governance decisions being taken by SAA;
  - 4.4 the social security grant contract;
  - 4.5 the Denel Asia matter;
  - 4.6 the closure of Gupta accounts by the banks; and
  - 4.7 the events leading to my resignation as DG.
- 5 All of these issues either involved significant spending by the government or would place the fiscal and financial integrity of the government at risk. When these events are viewed together, they build a picture of how:
- 5.1 The Ministry of Finance and the Treasury became a stumbling block to the erosion (corruption) of due process in policy and decision making in the state;
  - 5.2 The Ministry of Finance and Treasury (sometimes with support from some members of Cabinet and officials in relevant departments) played a role in stopping or delaying some of the (poor or bad) decisions that would have had dire consequences for South Africa,

fiscally and otherwise, including by elevating the debt burden on future generations; and

- 5.3 In selected cases, processes of making decisions in government were changed or manipulated deliberately to get specific outcomes or decisions which were not in the national interest or the interest of the institutions concerned (in the case of SOCs). Had some of the decisions been taken and executed the country would most likely have been bankrupt at some point in the future.
- 6 I use some examples to illustrate my point as part of helping the Commission to do its work. I hope this will also help the nation to draw lessons from my experience.
- 7 At the outset, I would emphasise that like the running of any institution with a vast and complex mandate such as Treasury, no single person can provide a full picture of all events, developments, policy issues and decisions involving Treasury and the national fiscus.
- 8 The statement (in large measure) corroborates evidence already provided by my former political principals Mr Gordhan, Mr Nene and Mr Jonas. It also adds elements of what occurred among officials (at a technical level) on some of the matters that the former Ministers and Deputy Minister had presented before the Commission.
- 9 My history at National Treasury, in brief, is as follows,
- 9.1 I joined National Treasury in January 1998 as a Deputy Director in what was then called the Department of Finance. The Department

was later merged with the Department of State Expenditure in 2001 to form the National Treasury of today.

9.2 As I had summarised during my first appearance, over time, I rose within the ranks until I was appointed as DG in May 2011. At that time Mr Gordhan was the Minister. I continued in that role until May 2017 when I exited the civil service.

9.3 Although I exited when Mr Gigaba was the Minister, I had resigned a few days before his appointment, on 29 March 2017, and was serving notice of about six weeks after he got appointed.

9.4 As the above summary of my timeline at the Treasury indicates, I served in the administrations of Presidents Mandela, Mbeki, Motlanthe and Zuma. I had the opportunity to work closely with and observe how each one of these Presidents related with their Ministers of Finance and Treasury. Obviously, the regularity of such interactions and their intensity increased as one rose within the ranks of the civil service.

10 To put my submission into proper perspective, I first set out the role of the National Treasury, and more importantly, the role of the DG of the National Treasury before turning to the events I refer to in paragraph 4.

## **THE ROLE OF THE NATIONAL TREASURY**

11 The role and function of the National Treasury is set out in the statement by former Minister Nhlanhla Nene, in paragraphs 11 to 21. In summary, he points out that the National Treasury is established in terms of Chapter 13 of the

Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Constitution sets out the role of the National Treasury in driving the budget process, procurement, borrowing, treasury norms and standards, the management of the National Revenue Fund, the division of revenue between the three spheres of government and overseeing financial management in all three spheres of government, including state-owned and public entities.

- 12 The National Treasury is not constitutionally independent of government .It is an integral part of the national government. Whilst it is expected to provide objective and critical assessment of government proposals, and assess for any fiscal or long-term sustainability impact, it defers to the policies adopted by Cabinet, where such policies are legal.
- 13 Of direct relevance to some of the matters ventilated in this submission is section 217 of the Constitution which directs that organs of state must contract for goods and services “... *in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*”.
- 14 The Public Finance Management Act, 1999 is the law that gives expression to section 216 and other sections of the Constitution with regard to establishing the National Treasury. The PFMA is also the law that set out legal requirements on matters such as government guarantees and procurement both of which are relevant to this submission.
- 15 The PFMA is complemented by its regulations and other pieces of legislation such as the *Preferential Procurement Policy Framework Act, 5 of 2000* and the Regulations and instruction notes governing procurement in giving full expression to the spirit and letter of the Constitution insofar as the role of the

National Treasury is concerned. The National Treasury also supports the Minister in formulating the laws governing the financial sector such as the Financial Sector Regulation Act; the Financial Intelligence Act, etc.

- 16 The effect of the legislative framework that governs National Treasury is that it is involved in multiple government processes, across departments, and it is required to oversee financial matters and fiscal sustainability of all organs of state to ensure that they comply with all relevant prescripts. As explained by the former Ministers before this Commission, this makes National Treasury unpopular at times. For example, the imposition of taxes, user payments, allocation of budgets and the enforcement of compliance with budget law, procurement and the PFMA and MFMA means that the Treasury often has to deliver difficult decisions including tough action against an organ of state or specific officials, which does not earn Treasury friends: this is the nature of the role. Such difficult decisions became even more unpopular when there was persistent low economic growth, as was the case for much of 2009 and after, following the 2008 global financial crisis, and during the Presidency of Mr Zuma when few difficult decisions were made, and the budget constraints were seen as a mere irritant.

## **THE ROLE OF THE DIRECTOR - GENERAL OF THE NATIONAL TREASURY**

- 17 The Director - General of the National Treasury is the accounting officer of the Department. An accounting officer's role in any government department is primarily to implement policies that are required by the law, guided by Minister as executive authority. It is also about running the Department: ensuring that it has internal policies, systems, processes, the people and other resources it

requires to deliver on its mandate and that legislation, especially the PFMA, is complied with.

- 18 The DG of the National Treasury may be described as the “chief advisor” to the Minister. He/she works with the rest of the experts in the Treasury to, amongst others, undertake rigorous, evidence-base technical analysis and research to understand the impact of macroeconomic policy changes (especially changes in taxes and expenditure) and microeconomic policy changes on the entire economy and the citizens.
- 19 Examples of such research would include the study titled “the long-term fiscal report” which modelled various scenarios for Gross Domestic Product (GDP) growth and overlaid these with changes in social policies such as social security and the National Health Insurance (NHI) among others. I attach an example of these long-term fiscal reviews hereto as annexure “**LF1**”.
- 20 Such work assists the Treasury staff to advise the Minister of Finance and the government broadly on what our government can afford, sustainably, under different economic contexts – the amount of debt that it can put on its books and afford to service as opposed to what would lead to the country falling into what is often called the debt trap.
- 21 I would like to emphasise that while such technical work is rigorous, it relies, as all forward-looking assessments must, on assumptions and judgment calls. Sometimes these have to be made based on the limited information that is available at that point in time. It also draws on the experience of other nations and technical work by other experts the world over. While reality, as it unfolds,



may deviate from what was expected, it would be unwise to dismiss it without clear evidence or arguments to counter it.

## **The Budget Process**

22 Potentially the most important function of the Treasury is to produce an annual national budget and to ensure that government always has money (cash) so that:

22.1 It can pay salaries, social grants and other spending commitments that arise from its daily activities; and

22.2 It can service its debts and not default on any interest payments or payments of the principal debt, which in turn avoids triggering an acceleration of all debt. Most governments run deficits and run up debt, which ideally is to fund infrastructure which enables economic growth and makes such debt sustainable. Nations that indebt themselves to fund consumption expenditure almost invariably end up in a debt trap. This requires that countries have to undertake painful reforms to return to sustainability and if not, can end up on an IMF programme and might lose their sovereignty.

23 The DG of Treasury (and his/her team led by the DDG in the Budget Office) coordinates the year-long process of producing the annual budget and any in-year adjustments to it.

24 Over the years, concerted and deliberate effort went into developing mechanisms for ensuring alignment of the budget to the priorities as set by government as well as to ensure the necessary buy-in and ownership of this very important process. To this end, successive Ministers of Finance have sought to:

- 24.1 Make the budget process more participatory and consultative by providing for broader and deeper political oversight and leadership of the budget process. This was done by establishing structures such as the Ministers' Committee on the Budget which is chaired by the Minister of Finance and comprises of Ministers appointed by the President on recommendation from the Minister of Finance. Other structures established are the Budget Council and Budget Forum, to facilitate participation of provinces and organized local government. These committees are all supported by a technical committee of officials, chaired by the DG of Treasury (or sometimes a DDG) and involving Directors-General of other departments or heads of provincial treasuries;
- 24.2 Introduce a so-called "Budget strategy paper", before the start of the annual budget process, the aim of which was to provide a platform for a focused political and strategic conversation that would arrive at a few priorities that can be used effectively to guide the resource allocation process. Unfortunately, this did not yield the intended outcome; and
- 24.3 Prepare and present transparent and comprehensive budget documents that allow the South African public, analysts, labour, organised community formations, rating agencies and investors to assess the country's fiscal stance and creditworthiness, among other things.
- 25 In my view, the coordination of the budget process has been the most difficult part of the work of the Treasury for the following reasons:
- 25.1 First, where government does not have a proper, well-calibrated and disciplined process for setting priorities, *everything* is a priority.

Sometimes new programmes get adopted with insufficient attention to their financial consequences. Consequently, the trading off of one priority against the other/s is left to the various budget - making structures (technical and Ministerial) with the Treasury and the Minister of Finance and his deputy being “the face” of those processes.

25.2 Second, unlike the situation where the Treasury is assigned the job of producing the budget, there is no institution assigned the very important role of setting a few priorities and removing programmes that are deemed to be of low or no priority. The National Development Plan sets out a long-term vision for the country but provides limited guidance on how resources should best be allocated where they are limited. Likewise, broad election promises tend not to specify priorities. The difficult job of deliberating on and making the trade-offs involved in allocating scarce resources is largely left to the Ministers’ Committee on the Budget, the Budget Council and the technical officials.

25.3 Thirdly, traditionally departments are responsible for determining how to prioritise spending across their programmes within their budget allocations, including deciding where to scale down or close low priority programmes or change services delivery models to reduce costs. Nevertheless, departments still frequently seek additional funding, which they expect the National Treasury to find. Moreover, despite consultation between Ministers and their accounting officers, there may not always be consensus on the priorities. On occasion, Ministers would be surprised that their departments have submitted proposals to scale back one and

not the other programme. Often when there is disagreement the Treasury would be conveniently blamed.

25.4 Fourth, the budgeting process provides for consultation across departments with a view to reaching agreement on where savings can be made by one department to allow another department to implement a higher priority programme. However, the incentives for departments to propose where they can make sacrifices is sometimes limited, again leaving the National Treasury (and its provincial and local government counterparts) to play a key role in identifying potential savings and proposing to Ministers the reprioritisation of spending.

26 I should add that the problems enumerated above were not unique to President Zuma's administration. What was unique, though, about President Zuma's administration was that:

26.1 President Zuma's era was characterised by protracted constrained economic growth and poor revenue performance which implied that resource allocation was even more challenging.

26.2 The period was largely characterised by an unwillingness to face up to the reality that budgeting is about making hard choices. Evidently, there was an overriding desire to always announce new programmes without curtailing or terminating old and poorly performing ones. Treasury was repeatedly expected to just find the money to fund more and more new programmes. With the imposition on an explicit expenditure ceiling, it became harder and harder to add new programmes without stopping

others and this bred resentment and saw the Treasury being used as a scape goat for the constrained fiscal situation.

- 26.3 What was largely a macroeconomic problem affecting the country was conveniently made out to be the fault of a few individuals, particularly the Treasury and those who served in it. Those who asked tough questions were labelled as enemies of (a somewhat distorted form of) radical economic transformation in an attempt to silence them, even if asking the questions was their core job as is the case for the Minister and Deputy Minister of Finance and the Treasury and the technical and political committees that deal with the budget.
- 26.4 Masked by the rhetoric of promoting transformation was an insidious objective of repurposing of the state to enable rent seeking for themselves.
- 27 One of our last efforts at strengthening the political/executive leadership of the budget process was to propose ***the budget strategy paper***. The aim was to use the paper as a platform for a focused political and strategic conversation that would arrive at a few priorities that can be used effectively to guide the resource allocation process.
- 28 This too did not yield the desired outcome of getting most of government to own the budget process and its outputs. Instead there were new developments which appeared calculated to pile more pressure on the Treasury.

- 29 Evidence from across the world shows that it is often the poorest of the poor who are most negatively impacted when a country becomes over-indebted, as the government is unable to pay for the pro-poor redistributive programmes. Contrary to the assertion that National Treasury was opposed to transforming the economy, it was seized with the need to find ways to ensure that funds were reprioritised to those programmes that would best contribute to promoting real, durable, meaningful and rapid transformation in a manner that was fiscally sustainable, in line with the government priorities.

### **Attempts to move the budget to the Presidency**

- 30 In the second half of 2015, I started to hear rumours that President Zuma was very unhappy with the budget process and the budget.
- 31 In November 2015, three of my colleagues: the DGs of the Department of Planning, Monitoring and Evaluation (DPME), and the Department of Public Service and Administration (DPSA) and the Head of the School of government, did a presentation titled *“Political considerations of budget choices and issues around the macro-organisation of the state”*.
- 32 There were several ironies about this presentation:
- 32.1 First, the Treasury, which ran the budget process had not been asked to prepare an input on its own assessment of the budget and its alignment or otherwise to the political priorities.
- 32.2 Second, two of the DGs who took part in preparing the critique of the budget process and the budget were themselves part of the committee

of officials who advise the Ministers' Committee on the Budget on budget decisions. They were also very experienced DGs who had been DGs for several years longer than me.

32.3 Third, the presentation proposed moving the task of allocating resources to DPME contrary to the Constitution and the PFMA as no other Minister could introduce Budget bills to Parliament.

32.4 Fourth and last, while the DGs might have had genuine concerns about the budget process and whatever flaws they perceived it to have, they appeared oblivious to the broader political context and how the presentation was feeding the narrative that Treasury was the problem that "needed to be fixed".

33 The Treasury was always of the view that the Presidency, and cross-cutting departments like DPME, DPSA should be more involved with the Treasury in guiding the budget allocation process. Resources were also allocated to the Department to help it reinforce its capacity meaningfully to participate in the budget process. However, such departments and their Ministers were reluctant to make the hard choices that had to be made, for fear of being less popular with their colleagues or certain constituencies.

### **The President asks the National Planning Commission to evaluate the budget process**

34 I began to hear that the President was saying that the budget process was not giving expression to the National Development Plan.

- 35 While I did not dismiss this view, I felt it was not a very serious contention because the President had presided over every budget that was produced during my tenure. The budget is a process that involves decisions at various points, and Cabinet itself is required to approve decisions during the various stages of this process (e.g. in May to set priorities, in August/September for MTBPS and, in December for national allocations). Further, every year prior to taking the final budget to Cabinet in February, we (the Minister, the DDG in the Budget Office, the DDG for Public Finance and I) would brief the President and his Deputy on ALL major decisions relating to the budget and would seek his approval/support thereof.
- 36 In November 2015, I met Mr Khulekani Mathe who was working at the National Planning Commission (NPC) at the time. He told me about discussions that had taken place at the Presidency and in the NPC about the budget process and the Treasury.
- 37 In summary it emerged that:
- 37.1 There was wide sharing of sensitive budget documents with persons “outside” government and not involved in the budget process. The documents were intended for internal discussions within government and within the budget-making structures of government. The documents contained market-sensitive information. Sharing them with people other than those for whom they were originally intended could lead to leaks. For this reason, the officials involved in the preparation and handling of the budget documents are required to follow budget-confidentiality conventions and all the documents are classified as ‘secret’ until the



announcement of the budget. In most instances, such documents are taken back at the end of the meeting.

37.2 To my knowledge the Minister of Finance's permission was never sought before sharing his department's information beyond the members of the Ministers' Committee on the Budget. Yet at every meeting Ministers were reminded that the information in the documents circulated in the meetings contained market-sensitive information that had to be handled with due care relative to the applicable classification.

37.3 These documents which were intended for MinComBud were, in my view, inappropriately used to show misalignment between the budget and the NDP.

38 Mr Mathe said that in the discussions that had taken place where President Zuma was involved, he had expressed grave unhappiness at the Treasury. The President suggested that the Treasury was treated like the best department, yet it was failing to align the budget to the NDP.

39 Mr Mathe said the President asked the NPC (sub-committee) to present him with evidence that confirmed that Treasury was failing him, indicating that he will not hesitate to act. Apparently, he used the metaphor that he *"will shake the tree, if it must fall, so be it"*.

40 I asked Mr Mathe what he understood this to mean. He said that he thought the President was readying himself to fire Mr Nene and possibly some of us (senior members of the Treasury). From the way Mr Mathe said this it was as though it might happen soon.

- 41 Given that it was November, I thought it was implausible. I was clearly wrong. Mr Nene was removed about a month later. Mr Mathe's assessment was right.

## **EVENTS THAT OCCURRED DURING MY TENURE AND THE REMOVAL OF MINISTERS**

### **Nuclear procurement**

- 42 Former Finance Ministers Gordhan and Nene testified before the Commission in relation to what became known as "the nuclear deal". I agree with the statements made by these former Ministers. In order to avoid repetition, I refer the Commission to paragraphs 38 to 49 of Mr Gordhan's written statement and paragraphs 58 to 98 of Mr Nene's written statement. In what follows I add to their statement by describing the events that I was personally witnessed to, and I give the context of these events from my perspective.
- 43 South Africa's energy development is guided by the Integrated Resource Plan (IRP). For the period covered in this submission, the relevant IRP would be the one referred to as the IRP 2010, which was promulgated in March 2011. The plan was for the period 2010 to 2030. Appropriately, the plan is clear on the need to approach its implementation with circumspection and due care as technology in this area is changing very fast.
- 44 In this regard, the plan required that there should be biennial reviews to assess its (the plan's) continued relevance and appropriateness.
- 45 When I assumed my role as DG at Treasury, I was broadly aware of government's energy plans. I was acutely aware of the role of Eskom in the

execution of the plan because, in my previous capacity as the DDG for Asset and Liability Management (ALM), I chaired the Fiscal Liability of Committee ("FLC"). The FLC is a committee comprising of a number of the National Treasury's DDGs that was established by the Minister of Finance to, *inter alia*, advise on any guarantee applications that are received. In this capacity I had been closely involved in the Minister of Finance's decision to provide Eskom with a guarantee facility of about R176 billion as well as the decision to increase it to R350 billion. This followed on from the R60 billion subordinated loan that had been provided to Eskom prior to my assuming the role of DDG: ALM. When I was DG government also had to allocate a further R23 billion to reinforce Eskom's balance sheet which had been determined to be very weak. This was financed by selling the government's remaining share in Vodacom.

- 46 From around 2007/08 electricity tariffs had increased quite markedly, in the initial (three) years by about 23-25 per cent on average per annum. As these raised the cost of doing business and the cost of living for households, there was understandable reluctance to raise tariffs as a means of funding the build programme.
- 47 Moreover, this happened in the wake of the 2008 global financial crisis, where government had sought to mitigate the negative impact through increasing government spending. While South Africa had had strong fiscal metrics prior to the global financial crisis (where SA had significantly reduced debt to GDP to about 22 per cent and ran a fiscal surplus), the country had quickly accumulated substantial amounts of debt relative to GDP after 2009. There was limited capacity for the state to inject additional funding into Eskom at that point in time.

This is illustrated in the table of deficits, debt and guarantees from 2008/09 through to 2016/17 below:

<b>Total debt of government</b>									
R million	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17
Gross loan debt	626 975	804 929	990 572	1 187 790	1 365 689	1 584 758	1 798 915	2 018 971	2 232 889
Net loan debt	525 626	673 040	820 409	989 731	1 181 607	1 379 454	1 584 207	1 804 638	2 008 274
<b>Total as percentage of GDP</b>									
Gross domestic debt	22,0%	27,7%	31,6%	34,8%	37,4%	39,9%	42,2%	44,1%	45,9%
Net domestic debt	17,8%	23,5%	27,7%	30,6%	34,2%	36,5%	39,1%	41,4%	43,4%
Gross foreign debt	4,0%	3,9%	3,5%	3,8%	3,8%	4,0%	4,3%	4,8%	4,7%
Net foreign debt	4,0%	2,9%	1,4%	1,6%	1,3%	1,6%	1,9%	2,4%	2,4%
Gross loan debt	26,0%	31,5%	35,1%	38,6%	41,1%	43,8%	46,5%	49,0%	50,7%
Net loan debt	21,8%	26,4%	29,0%	32,2%	35,6%	38,2%	41,0%	43,8%	45,6%

Source: Various NT Budget Reviews

R million	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Total revenue	481 197,0	582 844,4	616 999,2	586 113,1	672 751,5	745 291,3	800 142,2	887 368,2	965 456,9	1 076 234,4	1 137 886,4	1 194 585,0
Total expenditure	470 192,5	542 219,0	640 237,4	747 868,0	805 978,1	889 911,5	965 495,6	1 047 758,6	1 131 900,1	1 244 622,9	1 305 485,7	1 411 929,9
Main budget balance	10 228,9	20 425,4	-23 238,3	-161 754,9	-133 227,7	-144 620,2	-165 353,3	-160 392,4	-166 443,2	-168 388,5	-167 589,3	-217 344,9
Percentage of GDP	0,8%	1,0%	-1,0%	-6,3%	-4,7%	-4,7%	-5,0%	-4,4%	-4,3%	-4,1%	-3,8%	-4,6%

Source: Various NT Budget Reviews

- 48 It was against this backdrop that fiscal policy was being calibrated during the period I was DG.

### The draft co-operation agreement with Russia

- 49 Around September 2013, I received a call from the then DG of Energy, Ms Nelisiwe Magubane asking for my advice on how to handle a part of a draft agreement between South Africa and Russia relating to nuclear cooperation, including the design, construction, operation and decommissioning of nuclear power plants in South Africa.
- 50 She sought my advice because parts of the agreement related to proposed tax exemptions for the nuclear programme.

51 My response to her was in two parts:

51.1 First, I gave her a preliminary view about the proposed tax exemptions using my previous experience of how we dealt with such proposals in the past, namely that as a country we did not like giving such exemptions as they compromise the integrity of the tax system by allowing too much discretion and risks eroding the tax base by allowing too many exclusions which undermine the equity/fairness of the tax system. We had had to deal with similar challenges during the 2010 World Cup. We were very unhappy with what we considered to be FIFA undermining the country's sovereignty in demanding tax exemptions purely because we wanted to host the world cup. Importantly, it is only the Minister of Finance who can grant such exemptions.

51.2 Second, I expressed misgivings about the extent to which the process that was being followed was complying with relevant South African legal prescripts and regulations of which Treasury is the custodian.

52 Having raised these concerns, I asked that she should send a formal request for the advice or approval sought. It is important to add that the conversation was very easy in that Ms Magubane and I were agreeing.

53 Around 21 August 2013 the Department of Energy officials shared the draft agreement with officials at the National Treasury in order to get their inputs, specifically on the proposed tax exemption. However, when the detail of the agreement was reviewed, the National Treasury's concerns extended far beyond just this matter. Consequently, I sent a detailed letter to Ms Magubane 13 October 2013 setting out all the issues, which included highlighting the

requirement that the Department of Energy must adhere to the provisions of the Constitution, PFMA, Treasury Regulations, PPPFA, Broad Based Black Economic Empowerment (BBBEE) Act and Electricity Regulation Act when undertaking any procurement. Moreover, the importance of ensuring a proper public consultation process was underlined. I attach a copy of this letter as annexure “**LF2**”.

- 54 From records that later emerged, it appears that in the face of these issues that we had raised, the Minister of Energy went on to conclude the agreement with Russia, which still provided for a “...*special favourable regime in determining tax and non-tax payments, fees and compensations, which will be applied to the projects implemented in the Republic of South Africa...*” In addition, cooperation agreements were concluded with several other countries between October and December 2015. However, the content of these agreements was very different to that concluded with Russia, specifically they did not suggest a commitment to procure a nuclear programme and did not provide for tax incentives.
- 55 In the letter I had sent to Ms Magubane, I had proposed that a joint task team be established. Ms Magubane quickly agreed to the establishment of the task team. Unfortunately, this was followed by a period of turbulence at the Department of Energy. In March 2014 Ms Magubane stepped down as the DG, ostensibly for health reasons. Mr Tseliso Maqubela acted as the DG for a short period before being replaced by Dr Wolsey Barnard, who acted until a new DG, Mr Thabane Zulu, was appointed in October 2015. At each point, I proposed to the successive DGs that we establish a joint task team between our two Departments to deal

with this matter, but the rapid changes meant that the task team did not get off the ground until July 2015.

### **The meeting with the President and the advisor**

- 56 One Friday during the second half of 2013 I received a call from Mr Dondo Mogajane who was Mr Gordhan's Chief of Staff at the time enquiring about my plans for that afternoon. After I told him that I would be in Pretoria and that I was not planning to go out of town he asked me to be on standby because the President would like to see Mr Gordhan and I on his return from a trip abroad.
- 57 He said the meeting would be held at Mahlamba Ndlopfu residence. No time was set, and we were not told what the meeting was about.
- 58 Around 15h00 or slightly later I received a call from Mr Gordhan or Mr Mogajane to go to the President's residence. I proceeded as asked.
- 59 Mr Gordhan and I arrived at about the same time at the main gate of the Government Estate and the Minister got into my vehicle and we drove on to the residence together. On our way I asked the Minister what he thought was the reason for our being there. He did not know but speculated that it might be about nuclear procurement because he had spotted someone, he knew to be a nuclear physicist at the gate where we met. The person was Mr Senti Thobejane who later introduced himself as advisor to the Minister of Energy and the President on energy matters.

- 60 The Minister also speculated that the President might be wanting to talk about funding for the training of intelligence personnel because he (the President) had raised the same with him at one point.
- 61 We arrived at the residence, left our phones in the lockers as is the practice and waited in one of the rooms. Mr Thobejane arrived at more or less the same time.
- 62 Mr Gordhan started to ask Mr Thobejane whether he knew why we were all there. The latter explained that he thought it was about nuclear procurement. That led to a 50-70 minute conversation on the subject.
- 63 The essence of that discussion was about:
- 63.1 The fact that SA had technical capacity to operate nuclear reactors as reflected in the good record of Koeberg.
  - 63.2 The appropriateness of nuclear as a technology for SA in light of our country's rich endowment with uranium.
  - 63.3 The new generation nuclear reactors, and which country is the world leader in that kind of technology.
  - 63.4 Mr Thobejane also explained the approach to procurement that was being contemplated by the Department of Energy which would entail a two-stage process: (i) stage one would be about deciding which countries would compete to supply reactors and that South Africa would sign bilateral agreements with those countries, and (ii) stage



two would entail the evaluation of competing bids from the countries selected in the first stage.

- 64 Mr Gordhan and I had some reservations about the procurement approach that was contemplated and we signalled these concerns and the need to be meticulous in designing the process for procuring something as big as nuclear reactors.
- 65 While the initial exposition by Mr Thobejane appeared neutral towards the end, I got the impression that he liked the Russian technology. He talked about it last and took much longer to explain a number of its advantages, including how the cooling system of their reactors worked and that Russia was the only country that seems prepared to train South Africans in their technology such that parts of the equipment would be manufactured in SA. In other words, there would be some transfer of intellectual property to SA and/or an industrial participation of sorts.
- 66 Around that point the President arrived. After exchanging pleasantries Mr Gordhan advised the President that we had been there for some time and we had used the time quite fruitfully to discuss aspects of nuclear: different technologies, which country offered these and ideas on procurement.
- 67 The President retorted that that was good. He had wanted just that because the process had to move forward with urgency.
- 68 Mr Gordhan then went on to make the following points that I considered very important:

- 68.1 That IF SA were to proceed with nuclear it would have to follow every rule in the book: Section 217 of the Constitution and all relevant laws and regulations governing procurement. He went on to caution that failure to follow due process would "... turn the arms deal problems into a Sunday school picnic".
- 68.2 That Mr Thobejane and I should exchange numbers so that we - and other relevant officials from Treasury and the Department of Energy, could meet soon to go through the nuclear procurement process in details.
- 69 Mr Thobejane and I did exchange SMS messages, but no meeting took place between the two of us. Later we encountered one another in meetings of the technical team that did work on nuclear procurement. This affidavit covers what happened at those meetings.

**The technical task team on nuclear procurement and the meeting of 8 December 2015**

- 70 A National Nuclear Energy Executive Coordinating Committee (NNEECC) was established in November 2011.
- 71 The NNEECC was initially chaired by Deputy President Motlanthe. Later the Committee was converted into a sub-committee of Cabinet and President Zuma took over the chairing of the reconstituted Committee.
- 72 The NNEECC was supported by the Nuclear Energy Technical Committee (NETC). The technical committee had sub-committees whose composition depended on the work they were assigned and the relevance of this work to

each department. Naturally, National Treasury chaired a committee that dealt with finance and procurement matters, which had the Department of Public Enterprises as the Deputy Chair. The Constitution and the PFMA together with its regulations prescribe a central role for National Treasury in these areas.

- 73 In December 2013, the Department of Energy submitted a draft feasibility for the nuclear programme to the National Treasury for review. This essentially comprised all the documents that had been concluded as at that date by the various sub-committees of the NETC. Following a review by the responsible National Treasury officials, they informed me that this did not constitute a proper, fully-fledged feasibility study, which still needed to be undertaken, and that amongst other aspects, the procurement strategy still needed to be clarified.
- 74 In June 2015, the Department of Energy presented Cabinet with a proposal to procure 9.6GW of nuclear. Given Eskom's inability to fund the programme, it was proposed that the South African Nuclear Energy Corporation (NECSA) replace Eskom as the implementing agent and the Department of Energy take responsibility for the procurement. It is important to note that NECSA is largely a research institution which receives a significant proportion of its funding from the government. At that point, NECSA itself was not in a sound financial position and in any event did not have the balance sheet strength to undertake, construct and operate a massive nuclear programme. Nevertheless, Cabinet approved that NECSA become the implementing agent.

- 75 Although the National Treasury was aware that nuclear procurement was being contemplated by government, we had not had prior sight of the memorandum on nuclear procurement. So, there had been no detailed work done by the Treasury to estimate the affordability of the project and how it would be funded. This is in spite of the stipulated requirement that all Cabinet memoranda must have a section titled "Financial Implications". Under this heading Cabinet memoranda ought to state the cost of implementing what they are proposing and how the cost would be financed.
- 76 Consequently, Cabinet required that the Department of Energy and Treasury should undertake detailed work to estimate the cost of 9.6GW nuclear build, assess whether South Africa could afford it and how it could be funded.
- 77 Around mid-July 2015, Minister Nene returned from Ufa, Russia and gave me a report of what had transpired there between him, his colleague Ministers and President Zuma. It became clear that we needed to detail our concerns regarding the financial and fiscal feasibility of the nuclear programme more clearly.
- 78 Accordingly, I asked Mr Dondo Mogajane (who headed the Public Finance Division which deals with the allocation of funding among national departments) to be the lead person for the discussions and Mr Michael Sachs (who headed the Budget Office which is responsible for settling the overall fiscal framework) to support him.
- 79 The two gentlemen were a level more senior than the previous representatives, which I expected to assist in the negotiations, and it did.

80 Following a lot of rigorous modelling various scenarios, in September 2015 the technical team prepared a power point presentation to put before the two Ministers and to take to the sub-committee and ultimately Cabinet. This presentation is attached as “**LF3**”. The key aspects of the report were the following:

80.1 Given the very high upfront cost of nuclear (estimated to be between R576 billion to R1 trillion), the weak fiscal position of government, and that for any entity (existing or new) to procure nuclear reactors it would need support from the sovereign in the form of guarantees or a cash injection, it was abundantly clear that SA could not afford 9.6 GW worth of nuclear reactors at one go. We were very clear on this conclusion which was a direct response to the question asked of us by Cabinet on affordability or otherwise of the nuclear Programme.

80.2 If we were going to go ahead with nuclear, we should instead recommend a phased approach to procurement whereby only 2.4GW would be procured in the first phase and that no public commitment should be made to procure 9.6GW because such a public pronouncement could be misconstrued to suggest that the country was about to buy something it could not afford. So, rather than present the Committee and Cabinet with a response that nuclear was simply unaffordable, we looked at what could be feasible. We understood this to be our job: offering sound technical advice. Admittedly, there were arguments about the economies of scale, that is, that the unit cost would be lower if SA bought all 9.6GW reactors

at once. We were not convinced that these considerations outweighed the importance of preserving the country's sound public finances.

80.3 That construction should only begin once the fiscal position of the sovereign showed improvement, through the stabilization of the national debt – i.e. at a point where national debt was no longer increasing year after year as a share of GDP. We estimated that such a position could be reached after 2017, if the necessary fiscal actions were taken first, and a faster momentum of economic growth achieved.

80.4 That Cabinet needed to decide which entity would be the procurer and operator of the nuclear reactors and that if this necessitated a new law or an amendment to existing laws this should be done.

80.5 That a detailed procurement process/approach that was consistent with the Constitution and all relevant laws and regulations should be agreed upfront and all relevant documentation developed.

80.6 The team also identified a number of risks that could hamper nuclear procurement such as:

80.6.1 Construction risks leading to delays and cost overruns;

80.6.2 Litigation from competitors and environmental lobbies;

80.6.3 Impact that the required tariff increases, and balance of payment effects of the nuclear programme would have on the economy;

80.6.4 Slowdown in economic growth relative to the projections, negatively impacting the fiscal sustainability of the commitments;

80.6.5 Developments in the energy landscape, leading to the emergence of more cost-effective technologies;

80.6.6 Changes in energy demand patterns, resulting in lower than anticipated revenues;

80.6.7 Increase in interest rates of an exchange rate depreciation in the face of large upfront cost with about 60 per cent import content of the programme.

80.6.8 Increase in interest rates and exchange rate depreciation, when combined with the large upfront cost with about 60 per cent import content of the programme, would increase the cost of the programme.

80.6.9 Announcement risks: negative perceptions associated with the programme.

80.6.10 Specific risks associated with nuclear technology, for example, nuclear catastrophe, etc.

81 All of the above are contained in the presentation that is attached to this statement. While the Department of Energy colleagues had started the

negotiations firmly believing that SA should make an upfront commitment to procure 9.6GW, in the end, we believed that they had come to accept the logic of Treasury's recommendation.

- 82 This is a summary of a very detailed exposition on the modelling of nuclear cost, proposals on financing and procurement thereof as well as some risks that would need to be borne in mind throughout the process. We believed that even the detailed report at best constituted a preliminary analysis, which for such a massive programme should be expanded into a full, detailed feasibility assessment. In or around the first week of September 2015, we were told that we should be on standby for a possible meeting of the energy security sub-committee and Cabinet that would discuss nuclear procurement. This was before the Ministers of Finance and Energy could meet to consider the recommendations of the task team. The meeting was later cancelled. From that point onwards, things went quiet on nuclear for about two and half months until December 2015.
- 83 On Monday 7 December 2015 Mr Nene, Mr Mogajane, Mr Sachs and myself went to brief President Zuma on national departmental allocations for the 2016 MTEF. The meeting went very well: we were all participating in the discussion and agreeing that the 2016 Budget was going to be a difficult balancing act.
- 84 The economy was slowing, students were demanding free higher education and the country's rating had been under pressure for some time. So, the budget needed to strike the delicate balance between demonstrating fiscal



rectitude while balancing the need to spend more on education with some support for growth.

- 85 The budget did not make any provision for nuclear build except for an allocation of R200 million to fund the technical work that was necessary to prepare for nuclear procurement.
- 86 A meeting of the Energy Security Cabinet Sub-committee that was chaired by President Zuma was scheduled to take place in the afternoon of 8 December 2015 at the President's official residence in Pretoria.
- 87 Less than an hour before the scheduled time, while we were already on our way to the meeting, we were told that the meeting had been rescheduled to start an hour later. We (Mr Mogajane, Mr Sachs and I) decided to proceed to the meeting venue regardless.
- 88 Upon arrival at the venue we noticed that there were many cars in the parking lot, but this did not bother us until we realised that all or most of the other persons (Ministers and officials) who were to attend the same meeting as us had been there presumably for a preparatory meeting whose purpose was to become apparent later.
- 89 Just before the meeting of the sub-committee began Mr Nene arrived. He and the others (ministers and officials) were ushered into a room where the meeting was to take place. Officials from Treasury were left out for a while and then we were called in. We learnt later that we were called because Mr Nene had asked that we be called in.

- 90 Coincidentally, everyone at the meeting sat on one side and we (Minister Nene, officials from Treasury) and President Zuma sat on the other side.
- 91 The Department of Energy led with a presentation of what they claimed to be our (Energy and Treasury) joint recommendation to the meeting. This was not true as I will explain shortly.
- 92 After the Department of Energy had finished the presentation, the President turned to Mr Nene who was seated on his immediate left and asked him if he had anything to say.
- 93 Mr Nene pointed out that the assumptions in relation to the exchange rate were very optimistic. It was presented as R10,00 to the dollar when in fact the exchange rate at the time was R14.57 to the dollar. He also pointed out that the concerns expressed by Treasury had not been included in the presentation. He then looked to me to provide further input.
- 94 I prefaced what I was going to say by pointing out that Cabinet had asked for:
- 94.1 An estimated cost of 9.6GW of nuclear reactors, and
- 94.2 Options for financing the cost of nuclear build and risk mitigation strategies.
- 95 I indicated that our job was to advise, and members of the executive have the authority to decide. They can take our advice, modify it or ignore it. We had been asked a specific question and we were ready to answer it.

- 96 Before I could say anything further the Ministers across the table lamented that I was wasting the time of the meeting and that a decision had already been made.
- 97 President Zuma directed that I should be allowed to respond to the questions Cabinet had previously asked.
- 98 I will summarise the comments I made as follows:
- 98.1 I pointed out that we were disappointed that what was presented by the Department of Energy was not exactly what we had discussed and agreed.
- 98.2 In particular, I highlighted the following discrepancies:
- 98.2.1 First, the modelling we had done led us to the firm conclusion that SA could not afford 9.6GW;
- 98.2.2 Second, while the cost could not be known with absolute certainty before financial close (that is, before a contract had been signed with a supplier), I pointed out that the presentation had grossly understated the cost of nuclear by about 40 per cent. We felt that this was very significant. The presentation by the Department of Energy had assumed that the weakest the rand could be to the US dollar was R10.00. On that specific day the rand was trading around R14.57 to the dollar;

98.2.3 Third, informed by the above considerations, we had proposed that nuclear procurement should be undertaken in a phased manner, only committing to 2.4GW at a time; and

98.2.4 Fourth, we had recommendations about how procurement would best be run to mitigate the risk of litigation.

99 I acknowledged that while the Department of Energy colleagues had not enthusiastically accepted the above line of thinking and recommendations, we had persuaded each other on the merits thereof.

100 Yet their exposition at the meeting created the wrong impression that we had agreed to their original proposal, which was not the case.

101 At that point the President turned towards me and commented that “you and your former Minister had stopped the Engen-PetroSA project”. He also said something to the effect that “in other countries of the world Finance Ministers don’t tell the President that there is no money. Their job is to find the money, so that what has been decided can be implemented, but alas this was not the approach of Finance Ministers in South Africa”.

102 The President’s comment left me shocked. The meeting resolved to take the recommendation of the 9.6GW as presented by the Department of Energy to Cabinet the following day.

### **After the removal of Minister Nene**

103 During the course of 2015 a number of engagements took place with the Department of Energy (DOE) regarding the process for procuring the nuclear

programme, which culminated in the Chief Procurement Officer (CPO) writing to the DOE setting out National Treasury's view on proposed approach.

- 104 The DoE intended to undertake a government-to-government procurement. They intended to follow a two-stage approach: prequalification of bidders followed by a competitive closed bidding process. This implies that competition would be among the pre-selected bidders. According to the DOE, the prequalification was being done through vender parade workshops and the signing of intergovernmental agreements.
- 105 However, this approach was not in line with the principles of Section 217 of the Constitution which requires a state institution to procure goods or services using a system that is fair, equitable, transparent, competitive, and cost-effective.
- 106 During 2016, a number of engagements took place between the Department of Energy, the National Treasury and the CPO's office, which were led by Mr Mogajane. In addition, two legal opinions were obtained. After initial resistance from the DoE, the Department shifted its approach towards an open competitive bidding process. Nevertheless, there were still concerns raised, which had not been addressed. These were:
- 106.1 The legal competency and basis for the DOE to carry out the procurement on behalf of other state-owned entities that were to be the implementing agents was not properly established.
- 106.2 The DOE's procurement strategy lacked specificity around the requirement of localisation. While the document explained the need for localisation in order to build the South African nuclear industry, it stopped

short of setting out the procurement processes which would give effect to this requirement. In addition, it was not clear whether it was intended that the successful bidder would ultimately be required to enter into contract/s with a local consortium and, if so, what selection processes or procurement processes would be employed to select the members of the consortium.

107 Using the funding that had been allocated in the 2015 MTBPS, the DOE had appointed advisors to assist them in developing a Request for Proposals (RFP). Although the advisors as well as National Treasury highlighted numerous gaps and weaknesses in the RFP documentation that the DOE had developed, the DOE appeared determined to proceed regardless.

108 The engagements with the DOE came to end, when in November 2016, Cabinet approved that Eskom be the owner, operator and procurer of nuclear. Shortly afterwards, the DOE gazetted a Section 34(1) determination providing for the procurement of 9.6GW of nuclear power by Eskom. Eskom indicated that they intended to issue the RFP. This was stymied by the legal challenge launched by Earthlife Africa, on which the courts eventually ruled in their favour, setting aside the determinations and inter-governmental agreements which had been entered into, as they were found to be unlawful and unconstitutional.

## **Conclusion**

109 My conclusions with regard to the nuclear procurement process are as follows:

109.1 It was the biggest ever financial commitment that the SA government was about to make, with an estimated cost of around R1 trillion. Yet there was a rush to sign the contract with the potential supplier even before SA had determined how to pay for it. Had it proceeded, nuclear would have led to excessive increases in electricity prices for all users and would have further elevated the cost structure of the SA economy and eroded the competitiveness of SA firms.

109.2 The process had serious flaws which risked causing several government institutions and persons working for it (Ministers and DGs) to make an irrational and illegal decision with very serious consequences for their reputations.

109.2.1 Although nuclear had been part of the IRP 2010, in the face of a changed energy generation technology landscape (e.g. improved reliability and lower cost of renewables and discovery of new gas reserves in Mozambique) it was no longer clear that procuring nuclear at the scale proposed was the best solution to the energy challenge the country faced,

109.2.2 the two-stage procurement process as proposed was not aligned to the SA Constitution and procurement laws and regulations,

109.2.3 technical processes were deliberately undermined, and their outcomes were suppressed so that the decisions that were made were predominantly “political”. While political office bearers have the final say on policy, due technical processes

have a lot of value to add to and an important role and place in a properly run government. A blending of political considerations with sound technical analysis and advice is what makes for a good government and governance.

109.3 Even when there was a genuine effort to follow proper and due process, deliberate derailment and manipulation of the process was brought to bear. The manipulation of the outcome of the work of the technical task team up to the last day (the 8 December) is a good example of this.

109.4 Our efforts were in vain and the nuclear programme was adopted the next day at the last Cabinet meeting of the year. Coincidentally it was also the day that Mr Nene was fired.

### **The Engen-PetroSA deal**

110 From about 2012, the Department of Energy had been exploring the possibility of having PetroSA acquire a substantial share or 100 per cent of Engen. As the documents relating to the matter show, the rationale was that this would be in the strategic interests of SA. Engen was owned by a Malaysian company called Petronas. These documents are annexed to Mr Gordhan's statement as Annexure 11.

111 As some of the correspondence between the Ministers of Finance and Energy shows, this potential transaction had been a subject of discussion during a visit by former President Zuma to Malaysia during 2013.



- 112 From the information we had at our disposal, the processes pertaining to the transaction appear to have gathered some momentum following that visit as evidenced by the letter from Minister Martins to Minister Gordhan. This letter is attached as annexure “**LF4**”.
- 113 During the first quarter of 2014, the National Treasury received an application for a guarantee amounting to R13.4 billion from the Department of Energy. The guarantee was meant to enable PetroSA to raise money to pay for an acquisition of 100 percent of the shares in Engen.
- 114 The structure of the transactions was as follows:
- 114.1 PetroSA was to acquire 100 per cent of the Engen shares for a total enterprise value of R18.67 billion (i.e. this included the Pembani shareholding);
  - 114.2 Petronas had accepted PetroSA’s offer subject to a letter of guarantee being provided for 100 per cent of the offer price and a fully committed funding plan being in place prior to executive definitive transaction agreements by 31 March 2014. This date was later extended to 18 April 2014;
  - 114.3 Initially, PetroSA planned to fund the transaction through contributing R5.6 billion of their own funding, raising debt of R5.28 billion, comprising acquisition funding supported by Engen’s cash flows and have Development Finance Institutions (DFIs) warehouse an amount of R3.93 billion. The shortfall of R4.21 billion was to be contributed by

government or raised using a special purpose vehicle with funding to be serviced and repaid by government.

114.4 A government guarantee of R13.42 billion was requested to cover the full purchase consideration, less PetroSA's equity contribution. It was envisaged that this guarantee would step down as the funding was secured. Should the envisaged funding not be secured, Government would remain liable for the shortfall. This would allow PetroSA to fulfill the condition set by Petronas.

114.5 PetroSA had identified SONANGOL as a potential equity partner which would acquire a 49 per cent shareholding in a joint venture company that would hold 100 per cent of the shares in Engen. The amount that SONANGOL were to contribute was to be determined after a due diligence had been completed.

114.6 At that time PetroSA had not yet secured any of the funding.

115 Some of the concerning matters about the proposed acquisition were that:

115.1 PetroSA's balance sheet (the size of the business) was relatively small with revenue streams neither buoyant nor large enough to enable it to pay for Engen.

115.2 From the correspondence received there was no evidence that a due diligence exercise had been done to allow PetroSA to ascertain the status of the business they were about to acquire. Such due diligence would typically assess the quality of the assets held by Engen, it's

liabilities, revenue streams, any binding contracts that could give rise to tax, legal and/or financial commitments in the future, including the state of its assets - are they new, would they require replacement or repair, at what cost, etc. The purpose of the due diligence is to determine the worth of the asset or business one is investing in. It could also include checking whether there were other buyers who had been interested in the asset who have since pulled out and the reasons why that happened. Buying a large business without a due diligence is like taking a big leap of faith.

115.3 There had been a significant increase in the offers made by PetroSA to acquire the business. The Boards of both the Central Energy Fund (CEF) and PetroSA acknowledged that the most recent increase at that time of R1.29 billion from R17.38 billion to R18.67 billion was not economically justifiable. None of these offers was underpinned by a robust valuation based on a due diligence.

115.4 There was no support for PetroSA's ambitions to become a National Oil Company in the National Development Plan or the Industrial Policy Action Plan.

115.5 PetroSA asserted that there was a risk that the independent oil companies would divest from the market thereby creating a need for government to invest in order to ensure security of supply. However, the retail market was well serviced by existing, privately owned petroleum companies and there was little indication that they intended to divest. (Indeed 5 years later, this is still not the case).

- 115.6 A number of other assertions justifying the transaction were made by PetroSA which the National Treasury considered flawed.
- 116 On the 31 March 2014 several officials of the National Treasury and Minister Gordhan joined colleagues from SARS to prepare for the press conference on the revenue collected for the financial year ending that day.
- 117 Minister Gordhan called me aside and advised me that he had had a telephone conversation with former President Zuma about the Engen-PetroSA transaction. Mr Zuma was enquiring about the progress with the guarantee application lodged by Minister Martins.
- 118 We recapped our views about the transaction: that it would not be judicious to proceed with it in the face of the risks we had identified.
- 119 The following day Minister Gordhan and Minister Martins met at SARS to discuss the transaction early on 1 April, before the scheduled press conference. The outcome of the meeting was captured in the letter Minister Gordhan sent to Minister Martins on the same day. **LF5**".
- 120 A delegation comprising of representatives from the CEF and PetroSA including Mr Senti Thobejane, advisor to Minister Martins, Mr Tseliso Maqubela the responsible DDG at the Department of Energy, Mr Sizwe Mncwango, the Chief Executive Officer (CEO) of CEF and the Ms Nosizwe Nokwe-Macamo the CEO of PetroSA came to meet us at the Treasury to explain the rationale for the deal and how it would be funded.
- 121 The Treasury was represented at the meeting by Mr Thuto Shomang who was the DDG responsible for Assets and Liability Management, Ms Avril

Halstead who was responsible for overseeing the SOEs among others, and myself.

122 The meeting took place on 7 April 2014 at the National Treasury office on 40 Church Square.

123 Some of the documentation that the delegation led by the Department of Energy brought included:

123.1 Several letters mainly from international banks that were signalling willingness to fund the transaction subject to certain conditions. Contrary to the delegation's assertions, these did not constitute an irrevocable commitment to fund the transaction.

123.2 There was also a letter from SONANGOL of Angola confirming that it would buy the 49 per cent share as described above, subject to a due diligence being done.

124 With all of the above, we were not convinced that the deal was workable. It appeared extremely risky and we communicated the same to Minister Gordhan.

125 Subsequent to that, several meetings and discussions took place between officials of Treasury and those of the Department of Energy to further examine the contemplated transaction in greater detail.

126 Following these meetings, Minister Gordhan wrote to Minister Martins approving the guarantee to the total amount of R9.5 billion with several conditions intended to safeguard the national revenue fund and the interests

of SA. These are clearly set out in the letter of 25 April 2015. This letter is attached as annexure “**LF6**”.

127 I raise the matter of this transaction because, to me, just like the nuclear deal, it reflects:

127.1 The lack of due care evinced when dealing with matters involving substantial sums of state funds and exposing the state to potentially huge fiscal risks.

127.2 A cavalier attitude to due process. Why was a transaction that ought to begin with a thorough and proper due diligence taken to the point of near financial close without a due diligence being undertaken? Moreover, this reached a point where those who were asking for what was standard in the normal course of doing business were themselves made to look and feel awkward.

127.3 The pressure brought to bear on Minister Gordhan (and possibly Minister Martins) to provide the guarantee was inappropriate, especially at a time when there was going to be a new Cabinet constituted after the elections which were due to take place on 7 May 2014, less than a fortnight after the guarantee was issued. In these circumstances one would not be blamed for inferring that the timing of the deal was calculated to “extract” the required responses and action from potentially vulnerable Ministers facing the risk of not being reappointed or being shuffled out of their portfolios.

### **Matters relating to South African Airways (SAA)**

- 128 During my tenure as DG of Treasury one of the matters I helped successive Ministers deal with was SAA.
- 129 This included providing technical support to the Ministers with regard to the approval of guarantees that were required to ensure that the airline remained a going concern. By the time I left government in May 2017, the cumulative guarantees totalled R17.9 billion which was a substantial contingent liability for the sovereign.
- 130 I also assisted the Ministers in evaluating the various applications from SAA in terms of section 54 (2) of the PFMA. These include applications for acquiring or leasing aircrafts. In this regard, we would undertake, the analysis required to assess, among other things, the ability of SAA to honour its obligations as they pertain to those transactions. This became increasingly important as the guarantee exposure to SAA was rising and any failure by the airline to meet its own obligations would have cross triggered a cross- default on the airline's other obligations and a call on the government guarantees. It would also have had wider implications for the entire government, by triggering some kind of "contagion" for other SOCs and government itself, including pushing up borrowing costs, making it more difficult to secure funding, etc.
- 131 National Treasury's monitoring of SAA intensified further after the executive authority (shareholder) responsibility was transferred from the Minister of Public Enterprises to the Minister of Finance through a Presidential minute of gazette on 19 December 2014 ostensibly because the business was

experiencing financial challenges and needed to be under a department that better understood finance. My own view is that the following were the real reasons and implications of the move:

131.1 It was intended to put Treasury under pressure to find the money to give to SAA because the belief was that once the airline was under Treasury it would cease to ask tough questions. As events proved, this was not the case.

131.2 One of the effects of the transfer was that the credibility of the National Treasury was undermined. Although the term of the board was supposed to have ended in March 2015, it took a further 18 months for a board to be appointed. Given that the failings of the existing board were patently obvious, I had the impression that investors began to question whether National Treasury recognised the problem or at least whether we had the ability to appoint a capable board. This would risk undermining the strong reputation that National Treasury had slowly built up over the years for being reliable and capable of delivering on its promises and would have negatively impacted on even the sovereign's ability to raise funding cost-effectively.

132 Needless to say, we continued to ask the same questions as we were asking when the airline was under the DPE.

133 The assignment of SAA to the Minister of Finance meant that the Treasury was responsible for approving everything for which the airline needed shareholder approval. For purposes of assisting the Commission, two



matters warrant special mention. These are (a) the application for the leasing of Airbus aircrafts and (b) the appointment of the board of SAA.

### **The application for the leasing of Airbus aircrafts**

134 In July 2015 SAA applied to the Minister of Finance (Mr Nene) for approval to enter into operating leases on five A330 aircraft instead of purchasing ten A320 aircraft. The aircraft purchase related to a contract concluded in 2002 and which, in the intervening period, had resulted in the purchase price becoming extremely onerous: having acquired the aircraft, SAA would have immediately had to write off an amount in the order of R1 billion because the purchase price far exceeded the market value of the aircraft. Treasury evaluated the deal and found it to be beneficial to the airline. The Minister duly approved the transaction as per the letter of 30 July 2015, subject to the airline providing additional information. The letter is attached as annexure “LF7”. This information was provided in September 2015 and the Minister confirmed his approval of the transaction.

135 Later in the month, on 29 September 2014, the Minister received a letter from the chairperson of SAA, Ms Dudu Myeni (“Ms Myeni”) seeking approval to pull out of the original deal and to enter into a new deal.

136 To put the new deal in proper perspective it is important to begin by summarising how SAA had ended up with Airbus as a supplier in the first place:

136.1 Around 2002 SAA contemplated renewing its fleet. It went on a procurement process which culminated in Airbus being the preferred

supplier of 15 A320-200 aircrafts (A320s). I understand that the number of aircrafts was later increased to 20.

136.2 As per the agreed structure of the transaction, SAA was required to make a pre-delivery payment (PDP) of about R1.3 billion. A portion of these PDPs were paid, although I cannot recall how much and by when. The remaining amount was still payable at some later date, with one of the payments falling due in November 2015.

136.3 SAA had already taken delivery of 10 A320s.

137 Before the transaction had run its full course, two main factors changed materially, thus rendering the original (A320s) purchase transaction undesirable:

137.1 Escalations in the purchase contract had resulted in the contractual purchase price increasing more quickly than the market price. This was exacerbated by the introduction of new model of the A320 aircraft (the A320 Neo) into the market, further depressing the market prices of the older model that SAA had contracted to purchase.

137.2 The difference between the purchase price and the market price meant that SAA would have had to impair part of the value of the aircraft on the date of receiving them. This would have hurt their already weak balance sheet.

138 In addition, the financial position of the airline had deteriorated and had become quite perilous

- 139 Airbus was prepared to enter into a new deal that would see SAA leasing more modern and fuel-efficient aircrafts in exchange for cancelling the original purchase transaction (of A320s).
- 140 In the new lease deal, SAA was going to lease five long haul A330-300 aircrafts from Airbus, the purchase of the remaining 10 A320s that had yet to be delivered was to be cancelled and SAA was going to get back the amount already paid in pre-delivery payments on the 10 A320s and SAA would no longer be required to make the remaining payments. For an airline that was experiencing liquidity challenges the deal looked good.
- 141 It was in this context that having done our technical analysis of the application from SAA, we recommended to Minister Nene and he approved the transaction and communicated the same in his letters of 30 July and September 2015.
- 142 In an about turn, SAA, through its chairperson Ms Myeni wrote back to the Minister proposing to enter into a sale and lease back of the aircraft through a local supplier. Limited details were provided. This letter is attached as annexure “**LF8**”.
- 143 Treasury tried to understand why such an approach would be superior and in the best interest of SAA than the direct lease from Airbus. We made SAA aware of the risk that Airbus could simply revert to the original A320 structure. The only explanation I remember was that the new approach would prevent foreign exchange from flowing out of SA, which did not make sense at all: the local lessor would still have needed to purchase or lease the aircraft that

were being supplied to SAA, which would have resulted in a foreign currency outflow from the country.

- 144 Having repeatedly requested SAA to provide additional information explaining why they believed it was in the best interests of the airline, with little having been forthcoming, the Minister decided not to approve the proposed amendment. Throughout this period, we had been extremely cognisant of the risks to which SAA was exposing itself and indeed the fiscus. If Airbus walked away from the swap transaction, then SAA would have been forced to pay the outstanding pre-delivery payments – something they were not in a position to do. This would have triggered a default by the airline on its government guaranteed obligations, requiring that government repay immediately repay the debt on SAA's behalf. Almost immediately after the Minister declined the amendment, he was unexpectedly removed on 9 December 2015.
- 145 For a very short time Mr van Rooyen was the Minister of Finance, but he too was removed and replaced by Minister Gordhan on 13 December 2015. On his reappointment Mr Gordhan had to take over from where Mr Nene had left. He decided to allow SAA one more opportunity to demonstrate the benefits of the alternative deal they had been proposing. Airbus had reluctantly agreed to allow additional time for consideration of the deal, but a decision had to be made by 21 December 2015.
- 146 My original plan was to go on my annual leave on 11 December 2015, but I had to delay this by a day or so following the sudden change of Ministers.

Minister Gordhan, the Governor of the Central Bank, Mr Lesetja Kganyago and I had a press conference on Monday, 14 December 2015, at the GCIS.

147 On Wednesday 16 December, which as the Commission knows is a public holiday in SA, a group of us (including Mr Ismail Momoniat, who was going to act in my place while I was on leave, Ms Avril Halstead and I) met a team from SAA including the then acting CEO Mr Musa Zwane and the acting CFO Ms Phumeza Nhantsi to discuss the Airbus matter.

148 After a detailed comparison of the two options that SAA had and taking due regard of the possibility that Airbus could have reverted to the original transaction to the disadvantage of SAA and SA, we agreed that the new deal (purchase, sale and lease back) had too many unknowns and was thus inappropriate.

149 I recall the SAA team asking us if we could assist them to explain the matter to the chairperson. They were visibly concerned that they were going to have to face up to her and explain that they could not convince us about the merits of what they were proposing.

150 I went on leave from 17 December 2015. I am advised that Ms Avril Halstead and Mr Momoniat (who was acting DG in that period) dealt with this matter on 21 Dec 2015. Around this time I received a call from Minister Gordhan asking me to give him a run-down of the SAA matter, which I did. He told me that he had received a call from Mr Zuma earlier asking him about the Airbus deal. I recall Mr Gordhan and I reflecting that people were trying everything to push through something that did not make financial/business sense. Part of the proposal was to have a South Africa Company coming between SAA

and Airbus under the guise that such an arrangement would “protect SAA from foreign currency risk.

- 151 Around the same time there had been a threat that one member of the board (Ms Yakhe Khwinana) had resigned because Treasury was not agreeing to the deal. The Minister had asked to be furnished with her letter of resignation. I attach this letter of resignation as annexure “LF9”.

## **Conclusion**

### **The appointment of the board of SAA**

- 152 In October 2014, the Minister of Public Enterprises, who was still the Executive Authority (shareholder) at the time appointed what was intended to be an interim SAA board comprising of 4 non-executives.
- 153 The non-executive board members were: Ms Dudu Myeni, the chairperson, Ms Yakhe Khwinana who was chairing the Audit Committee, Dr Tambi (an international aviation expert) and Mr Anthony Dixon. Mr Dixon resigned in November 2015.
- 154 Treasury was concerned about the board being fully capacitated to execute its fiduciary duties.
- 155 When SAA was transferred to Treasury the board’s term was due to expire in March 2015. One of the immediate tasks we set out to do was to assist Minister Nene to appoint a full and competent board.
- 156 This task proved very hard to execute. Our initial view was that SAA needed a totally new board. We were agreeing with the Minister that unless the new

board members were respected; with impeccable credentials it was going to be very hard to raise funding for SAA even with government guarantees.

157 We also emphasised that it did not matter what people in government thought of the remaining four and later three non-executive members of the board, the lenders had lost all confidence in them. Personally, I had discerned this from discussions with senior executives of the banks when trying to convince them to lend SAA money that it desperately needed.

158 Most credit facilities of SAA were granted in anticipation and almost on condition that a new board would be appointed.

159 However, my understanding from Minister Nene was that the President was determined that Ms Myeni should continue to serve on the board. Initially, we thought it would be possible to persuade the President that Ms Myeni did not have the requisite credentials, so the board's term was extended for a period which was intended to be 6 months, but which later became an indefinite period.

160 In December 2015 a Cabinet Memorandum had been prepared, which was intended to be tabled by the Minister in Cabinet on 9 December 2015. In the Cabinet Memorandum, a new board for SAA was proposed, which did not include Ms Myeni or any of the existing board members. Immediately after the Cabinet meeting where this proposal was to have been discussed Mr Nene was removed.

161 Minister Gordhan had to pick up from where Minister Nene had left the process. he had one or more discussions with the President on the matter

of the SAA board. On one of those occasions he returned with what was a very firm indication that President Zuma was not going to agree to remove Ms Myeni from the board of SAA. The Minister then instructed me to liaise with Ms Lakhela Kaunda to compile a list of names from which a board could be constituted.

162 A series of meetings took place involving Mr Mogajane, Ms Kaunda and I where various proposals of names for the SAA Board were made by both National Treasury and the Presidency, which were then to be discussed with our respective principals. Ultimately, a "compromise board" was agreed and a Cabinet Memorandum prepared. In the Cabinet Memorandum we recommended that the new board members be appointed for a 3 year period, subject to annual review. However, in Ms Myeni's case, she had already served on the SAA Board for 7 years at that point, so serving for a further 3 years would have resulted in her exceeding the 9 year threshold stipulated in the King Code of Corporate Governance, where regular assessments are required to establish a Board member's independence. On this basis, we motivated that her appointment be limited to only 2 years as a way of balancing the President's desire to have her continue serving on the board, while minimising the period for which this would continue. The Board was appointed on 2 September 2016, with a clear decision from Cabinet that Ms Myeni would only serve one year on the board.

163 I recall that one or two CEOs of banks expressed their disappointment at the fact that government had failed to appoint a wholly new board and signalled that they might find it hard to continue to do business with SAA under such circumstances. This has come to pass.



## **The Social Security Grant Contract**

- 164 The social security grant payment contract has been a subject of litigation over many years, which culminated in a number of court judgments, including one by the Constitutional Court in 2014, which declared the contract invalid, but simultaneously suspended the invalidity until 31 March 2017.
- 165 At about the end of November beginning December 2016, the then Deputy Minister of Finance Mr Jonas and later the Minister of Finance Mr Gordhan alerted me to what he understood to be a looming crisis; namely, that there was no firm arrangement made to take over the payment of social security grant when the invalidity of the contract resumed on 1 April 2017.
- 166 I understand that this might have been brought to their attention by Mr Zane Dangor who was either DG of the Department of Social Development or Advisor to the Minister and Minister Bathabile Dlamini herself.
- 167 They asked me to take the matter up with Mr Dangor to explore workable alternatives. I set out to do just that by setting up a meeting with Mr Dangor and the Deputy Governor of the Central Bank Mr Francois Groepe. From the Treasury's side I included Mr Dondo Mogajane (DOG: Public Finance) and Mr Momoniat (DDG: Tax and Financial Sector Policy) in the meeting.
- 168 The presence of the SARB at the meeting was to ensure that they were ready to open the National Payment System to the solution proposed.

- 169 In exploring the various options, we were focusing on a solution that could be activated by the 1<sup>st</sup> of April 2017 and lawful. At the same time, we sought to find an option that would be cost - effective. We were also mindful that the existing contract that was due to expire at the end of March had been found to be illegal by the Constitutional Court. So, the option of simply extending it was not plausible.
- 170 One of the options that had appeal was the option of getting most beneficiaries paid directly through banks rather than via an agent or a service provider. This option had appeal for several reasons:
- 170.1 About 60 per cent or so of the recipients of grants had accounts with one of the banks. It is fair to assume that the choice would have been informed by considerations of convenience, among other things.
- 170.2 It also seemed highly feasible to negotiate a reasonable ("cheap") uniform fee or a special dispensation for SASSA card holders with the banks to enable the payment of grants through the national payment system (and the SARB was open to requests aimed at enabling this).
- 171 There was always the very difficult part which related to the cash payments to people who do not have any account with any bank.
- 172 We were clear that the final decision rested with relevant persons at SASSA, but we indicated willingness to make any legally compliant solution work in the interest of the grant beneficiaries.
- 173 Not very long after our very cordial and fruitful meeting in which we had made tremendous progress towards averting what was a looming crisis, Treasury

(the Minister) received a letter from Minister Dlamini which was suggesting interference by Treasury in what was the business of her portfolio. This letter is attached as annexure “**LF10**”.

174 The letter and subsequent correspondence appeared to be calculated to frame a narrative that we (NT and MoF) were interfering in what was a Social Development and SASSA process.

175 Some of the correspondence was very demeaning.

176 The key areas of disagreement between National Treasury and Social Development related to the following:

176.1 The appointment of a “committee of experts”, separate from SASSA administration in a way that was subsequently found to be irregular.

176.2 The recommendations arising from this Committee were very expensive and problematic, seemed to involve SASSA taking on the functions of banks, and did not seem feasible to implement by the time the CPS contract ended as legally required.

176.3 The reluctance to accept a significant role for the banking industry in the payment model despite the central role of the National Payment system in making payments.

176.4 The reluctance to seriously consider 5-6 alternate practical payment options to take over from CPS which had been developed jointly with Treasury. Delays in this added to the need for the Constitutional Court to intervene.

- 176.5 Criticism that the OCPO was finding SASSA procurement processes irregular.
- 176.6 Failure by SASSA to take sufficient practical steps to put a new payment system in place by default led to the existing service provider having to be extended.
- 176.7 The absence of a Board for SASSA and weaknesses in the SASSA Act which made it substantially dependent on the Minister for governance was a key underlying governance problem.
- 177 At the beginning of 2017, three months before the expiry of the CPS contract's validity, there was no alternative in place to take over payment of social security grants. A real crisis was looming.
- 178 SASSA wrote to Treasury requesting approval to deviate from procurement processes and to extend the "soon to be invalid" contract with CPS. This letter excluding annexures is attached as annexure "LF11".
- 179 We explained that we did not have the power/authority to override a Constitutional Court decision that rendered the contract invalid and had suspended its invalidity until March 2017. We advised them to approach the Court and make a plea to extend the contract. They were simply not keen to do so.
- 180 As the 31 March drew closer there was panic in government. I recall that the South African Social Security Agency (SASSA) contract matter was an item

of discussion at a Cabinet meeting just a few weeks before the contract was due to expire.

181 Minister Gordhan and I were under immense pressure to grant the exemption to SASSA to extend the contract with CPS for a further year.

182 We made it clear that we would not act illegally and outside the powers and the authority of our positions. On 28 February 2017 SASSA instituted an urgent application with the Constitutional Court for an extension of time. However, SASSA sought to withdraw the application the very next day. The matter went ahead despite this, as a civil society organisation Black Sash had also instituted an urgent application with the Court.

183 When asked by a journalist what would happen if grants were not paid after the 31 March 2017, then President Zuma said the journalist should watch what would happen to the persons who were supposed to ensure that grants were paid.

184 Needless to say, the Constitutional Court reluctantly extended the contract on the same terms as the old one and grants were paid. It was around the same time that Mr Gordhan and Mr Jonas were removed from their positions.

### **The closure of the Gupta bank accounts**

185 In or about April 2016, Oakbay Investments (Pty) Ltd, controlled at that time by the Gupta family, announced that its bank accounts had been closed. In a letter dated 8 April 2016, the CEO of Oakbay Investments, Mr Nazeem Howa, wrote to the Minister Gordhan stating that they would “soon be incurring significant job

losses” as a result of “...*the unexplained decision of a number of banks, and of our auditors, to cease working with us, and of the continued press coverage of unsubstantiated and false allegations against the Gupta family...*”. He went on to say that “*We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts. KPMG themselves said that there was no audit reason to end their work with us*”. Following another letter dated 17 April 2016 he apologised and indicated that his only intention was “to hearing from you about any possible assistance you are able to offer”. I attach letters of 8 and 17 April 2016 as annexures “**LF12**” and “**LF13**” respectively.

186 The Minister and I met with Mr Howa and Ms Ronica Ragavan (who he introduced as the CFO) on 24 May 2016 at National Treasury, supported by Mr Momoniat, Mr Roy Havemann and Ms Rebecca Tee. After hearing his account, where he indicated that the banks had not provided him with any reasons, I pointed out to him that banks operate in a highly-regulated environment, and a range of factors (including money laundering) could give rise to a bank’s decision to close an account. We provided him with detailed information on the regulatory framework, linked to documents that we had provided to the public as Parliament was at that point considering two key bills: The Financial Intelligence Amendment Bill and the Financial Sector Regulation Bill.

187 We pointed out that there are legal impediments to any registered bank discussing client-related matters with the Minister of Finance or any third-party, and that the Minister of Finance “cannot act in any way that undermines the regulatory authorities”. It was also clear that they had not as yet exhausted all

their legal remedies, including approaching the court for appropriate relief, which I pointed out, if they had not done anything wrong, would “also be in the public interest and help to strengthen the current regulatory regime in order to serve customers better”.

188 Towards the end of the meeting, I also pointed out “that the recent attacks on the integrity of the National Treasury are not helpful or in the national interest and should be avoided”. This point was reiterated in a follow-up letter. This is because we were aware of the attack, they had launched in a meeting with the ANC leadership and as reported in an online article dated 6 May 2018 by Carol Paton. This related to an anonymous document entitled “Operation Spider Web” which was covered in detail in the statement by Minister Nene to the Commission. This article is attached as annexure “**LF14**”.

189 We also became aware of other facts that demonstrated that Mr Howa was very economical with the truth. For example, he appeared on Carte Blanche (an investigative television production) screened by M-Net on 19 June 2016, where he divulged that Standard Bank had provided him with the reasons for them closing his account. In paragraph 23 in the affidavit of Mr Gordhan in a case he initiated (Case no 80978/16) in the Gauteng Division of the High Court, the bank stated the reason as being related to their concern that “...*a reasonably diligent (and vigilant) person would suspect that such dealings could directly or indirectly make us a party to or accessory to contraventions of that law*”, in reference to both domestic, UK and USA anti-corruption laws. This affidavit excluding annexures is attached as annexure “**LF15**”.

- 190 It became clear to me that Oakbay (and the Gupta family) were afraid to go to court as they did not want to be cross-examined on their suspicious transactions, and instead preferred to lobby the ruling party and the Presidency to force banks to open their accounts. The subsequent exposure of Bell Pottinger and the use of concepts like “White Monopoly Capital” was intended to hide their nefarious activities.
- 191 The fact of the matter is that banks are compelled to implement the laws of the country like the FIC Act. Failing to do so will not only strengthen criminal syndicates and money laundering, but to risking or increasing the costs of their correspondent banking relationships with foreign banks (hence impacting negatively on trade), and worse, exposing our banks to massive fines from overseas regulators, as has been the case with BNP Paribas (fined \$8.9 billion by USA authorities). This would bring great financial stability risk to the SA banking system and to our economy.
- 192 It was clear to me after the President set up the Inter-ministerial committee, that the process was calculated to produce one outcome: the reinstatement of banking relationships by SA for the Gupta family and their businesses. This disregarded the fact that the banks were enforcing the law.
- 193 As we pointed out to Mr Howa, the right place to ventilate his concerns were the courts of law. Indeed, the matter ended up there and as the saying goes, the rest is history.



## THE DENEL-VR LASER DEAL

- 194 Another good example which demonstrates the flouting of rules and manipulation of process was in the well-publicised case where Denel (the 100 per cent state owned arms manufacturer) entered into an arrangement with VR Laser Asia to form Denel Asia.
- 195 While I raise this matter in this statement, I am aware that some of my former colleagues have agreed to assist the Commission with all relevant details on this issue. A lot of what I have to say on the Denel matter is also covered extensively in the affidavit I deposed to in May 2017.
- 196 With this background in mind, I provide a brief summary of the Denel matter in this statement.
- 197 In October 2015 the National Treasury (through the Minister of Finance) received correspondence from the Denel Board chairman, Mr Mantsha which was couched as a pre-notification of the intention of forming a partnership between Denel and VR Laser Asia to form Denel Asia.
- 198 The relevant provisions of the law applicable to the process that Denel had to follow are section 51(1)(g) and 54 (2) (a)(b) and (e). Section 54(3) deals with instances where there is an undue delay in response from approving authorities.
- 199 In the case of Denel, a further requirement existed as a result of the entity having been granted a sovereign guarantee in 2012 in which further conditions were imposed on the entity had been imposed. In this regard, one of the conditions was that Denel would have to obtain approval of the Minister of Finance whenever it was to enter in a transaction in terms of section 54.

- 200 In December 2015, around the time of Minister Nene's dismissal and his replacement with Mr van Rooyen the Chairman of Denel submitted a formal application for the approval of the Denel Asia deal. By some coincidence his letter was dated 10 December 2015, which was the first day of Mr van Rooyen's brief term as the Minister of Finance. The formal application followed on from a pre-notification that had been sent to the Minister of Finance from the Denel Board chairman, Mr Mantsha, where Denel's intention of forming a partnership between Denel and VR Laser Asia to establish Denel Asia had been mooted.
- 201 As it would be appreciated, during December many of the personnel in the Treasury (and in most departments and businesses) take a December break. Quick turnaround times are hard if not impossible at that time. In the case of that particular year in which the Treasury had three Ministers in one month it was particularly hard to keep track of things. Adding to the difficulties was the fact that it is during January and February that the Budget is finalised.
- 202 Toward the end of January, we were surprised to learn via the media that Denel had already gone ahead and formed Denel Asia without obtaining the requisite approvals as indicated in sections 51 and 54 and the conditions of the guarantee and also without even reaching out to communicate with the Treasury.
- 203 Subsequently:
- 203.1 A series of meeting were held between Denel officials and officials of the National Treasury. I held one myself with the then acting CEO Mr Zwelakhe Ntsepe and the acting CFO Mr Odwa Mhlwana. The meeting did not yield any positive outcome as they appeared determined to prove

that they had complied with the legal requirements and that we were wrong.

203.2 Letters were also exchanged where National Treasury set out in detail the legal advice that it had received by way of explaining its position. This correspondence is attached as annexure **“LF16”**.

203.3 There were also some public spats which were also reiterated in some of the correspondence, and which included an unprecedented attack by the Chairperson of Denel on the Minister of Finance, demanding that he retract statements that he had made. There was also an instance where the Board issued a blistering statement purportedly responding to media allegations that a letter had been sent to them by the National Treasury demanding that Denel dissolve its partnership with VR Laser Asia or face legal action. The letter never existed. Moreover, if anyone should have been in possession of this letter, it was Denel. Given that they later confirmed that they did not have any such letter, this approach is extraordinary.

204 Ultimately, I filed an affidavit on the matter in May 2017 just a few days before I left government. The affidavit excluding annexures is attached as annexure **“LF17”**.

## MY RESIGNATION AS DG

205 Minister Gordhan has testified before the Commission about his removal from office in March 2017. I shall not repeat everything he said in this regard suffice to make the following points:

205.1 I had been part of planning the roadshow which was like any other roadshow we had undertaken previously. We had followed all due processes to obtain approval for the trip. My travel had been approved by Minister Gordhan as per the applicable rules of the civil service.

205.2 The trip was intended exclusively for legitimate business, namely, to share with investors and rating agencies the Budget that had been tabled and to seek their support for financing of the deficit. There were no secret and unlawful meetings scheduled with anyone.

205.3 We received a message from the DG in the Presidency to return back upon arrival and we took the next flight back in evening of the day we had arrived.

205.4 After getting to know everything that Minister Gordhan has referred to in his statement about his imminent sacking, I decided to resign. I tendered my resignation on 29 March 2017 with a notice period running through to May 2017.

206 I served notice period under Mr Malusi Gigaba through 15 May 2017.

**CONCLUSION**

207 In this affidavit, I have dealt only with some of the most significant matters with which I was confronted during my term as Director General and which, in my assessment, best illustrate the attempts that were made to pressure the Ministers of Finance and National Treasury to give the requisite approvals that would have supported the state capture project, even where this was in conflict with the law, sound fiscal management and the interests of South Africans.

DATED AND SIGNED AT PRETORIA ON THIS 15<sup>th</sup> DAY OF FEBRUARY 2019.



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**LUNGISA FUZILE**