

# Judicial Commission of Inquiry into State Capture Report: Part 2

Vol. 2: Denel



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

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

Report of the Judicial Commission of Inquiry into State Capture: Part 2: Vol. 2



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Of  
Inquiry into allegations  
Of  
State Capture, Corruption and Fraud in the  
Public Sector Including Organs of State

Report: Part II

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# DENEL

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## **INTRODUCTION**

1. This section of the report relates to transactions within the state owned enterprise (SOE) called Denel SOC Limited (Denel) and certain of its subsidiaries and divisions as disclosed in the evidence presented to the Commission.
2. The structure of the section of the report will be: this introduction; then, consecutively, a reference to the Public Protector's report styled the State of Capture Report; the Terms of Reference of the Commission relevant to the topics in the memorandum; the content of the State of Capture Report relevant to this section; an identification of the scope of the evidence presented in relation to Denel; a discussion and evaluation of the evidence, and recommendations.

### **The Public Protector's Report**

3. The establishment of the Commission arises from a report by the Public Protector, no. 6 of 2016/2017 dated 14 October 2016 called the "State of Capture".
4. The State of Capture Report related to an investigation into complaints of alleged improper and unethical conduct by the then President of the Republic of South Africa, Mr Jacob Zuma, and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and directors of SOEs resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses.

### **Commission's Terms of Reference Relevant to this Report**

5. Under its terms of reference (ToR) promulgated as a schedule to Proclamation no. 3 of 2018, the Commission was directed to, amongst other things, inquire into, make findings, report on and make recommendations concerning the following, guided by the Public Protector's State of Capture Report, the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017 under case number 91139/2016. The following terms of reference appear to be relevant to the enquiry relating to Denel:
  - 5.1. (ToR 1.1) whether, and to what extent and by whom, attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors; and of the boards of SOE's;
  - 5.2. (ToR 1.4) whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any ... SOEs breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;
  - 5.3. (ToR 1.5) the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;

- 5.4. (ToR 1.6) whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in The New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOEs;
- 5.5. (ToR 1.9) the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. Particularly, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest.

#### Content of State of Capture Report relevant to this section

6. The investigation by the Public Protector which culminated in the State of Capture Report emanated from complaints lodged against President Jacob Zuma on 16 March 2016 and 22 April 2016. The investigation included an examination of the business dealings of the Gupta family with SOEs and government departments and included whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to Gupta linked companies or persons. One of the SOEs implicated in media reports considered by the Public Protector was Denel.
7. A section in the State of Capture Report identified certain allegations raised in relation to Denel. These were:

“4.20 With regards to allegations raised against Denel, I noted an article in the Mail and Guardian styled “Guptas conquer state arms firm Denel” dated 5 February 2016. The article raised the following allegations against Denel:

- (a) The Guptas have done it again this time by teaming up with state owned arms manufacturer Denel to profit from the sale of its products in the East;
- (b) Denel announced the formation of joint venture company Denel Asia last week but did not identify the controversial family as shareholders by name;

...

- (g) There are similar claims, though, of unfair play paving the way to the Denel deal in this instance over the bodies of officials who might have opposed it;
- (h) The joint venture was concluded in the absence of Denel's permanent chief executive, chief financial officer and company secretary, all three of whom are on suspension
- (i) Several sources sympathetic to the three have indicated that there is a strong suspicion they were removed to clear the way for the deal. Denel says they were suspended for their roles in an unrelated matter. Announcing the joint venture, Denel said in a press release last week Thursday that Denel Asia, headquartered in Hong Kong, would help Denel “find new markets for our world class products, especially in the fields of artillery, armoured vehicles, missiles and unmanned aerial vehicles”;
- (j) Denel Asia would “focus its marketing attention on countries such as India, Singapore, Cambodia, Indonesia, Pakistan, Vietnam and the Philippines who have all announced their intentions to embark on major new defence acquisitions”;
- (k) Denel's joint venture partner in the company was identified as “VR Laser, a company with 20 years' extensive experience [in] defence and technology in South Africa”. Denel also said that VR Laser had “a good understanding” of the target markets and opportunities”;

...

- (m) VR Laser Asia was registered in Hong Kong after the Gupta family and associates acquired VR Laser Services, a Boksburg engineering firm, two years ago another deal that attracted controversy (see “VR Laser and the Guptas” below);

...



(p) Momentum for the joint venture appears to have built after Public Enterprises Minister Lynne Brown appointed a new Denel board in late July. She retained only one member of the outgoing board, Johannes Sparks Motseki, for purposes of continuity;

(q) Motseki, a former treasurer of the Umkhonto we Sizwe Military Veterans Association, is a Gupta business partner. A company of which he is the sole director was allocated 1.3% in a Gupta led consortium that bought a uranium mining company now named Shiva Uranium in 2010;

...

(t) Among the new board's first acts, in September, was to suspend Denel chief executive Riaz Saloojee, chief financial officer Fikile Mhlontlo and company secretary Elizabeth Afrika. No formal reasons were given at the time;

(u) Denel this week said Saloojee and Mhlontlo were "suspended in respect [of] their roles in the acquisition of LSSA [Land Systems South Africa] by Denel, where Denel paid R855 million, of which Denel business was negatively affected. The disciplinary process is underway;

(v) Denel bought LSSA, an armoured vehicle manufacturer, from arms multinational BAE Systems before the new board's appointment;

(w) There are questions, however, about the strength of the charges against the officials. One legal and one other source acquainted with the matter this week said disciplinary hearings have not commenced but that an informal mediation process was about to start;

...

(cc) At the time, a key part of the story was that the Guptas' interest in VR Laser was not initially disclosed. Westdawn Investments, a Gupta contract mining company, better known as JIC Mining Services, took a 25% stake in VR Laser Services, and Salim Essa, another Gupta business associate, took 75%. Duduzane Zuma, the president's son, also acquired a stake through Westdawn. Sharma's stake was by ownership of VR Laser's premises;

(dd) Since then, the Gupta family's control of VR Laser has become clearer. Corporate records show that VR Laser is registered to the same Grayson, Sandton, office park where other Gupta businesses are based. VR Laser's only three directors are Essa, Pushpaveni Govender, who is also a director of other Gupta companies, and Kamal Singhala, a 25-year-old nephew of the Guptas who gives his address as the family's Saxonwold compound;

- (ee) Denel launched its Gupta joint venture, Denel Asia, without approval from the finance and public enterprises ministers as required;
- (ff) Public Enterprises Minister Lynne Brown's spokesperson, Colin Cruywagen, said on Thursday: "Minister Brown gave pre approval with strict conditions that included a viability study and a due diligence on the transaction. There are still other conditions to be met before final approval can be granted";
- (gg) Pressed whether the minister, who represents the government as Denel's only shareholder, was concerned about the launch of the deal, Cruywagen would only say: "Interactions between the minister and the board are confidential. For questions about operational matters of Denel, I refer you to Denel and the board"; and
- (hh) The treasury's spokesperson, Phumza Macanda, said Denel's application seeking Finance Minister Pravin Gordhan's approval had been received but the treasury is still processing it. She said Denel required both ministers' approval under the Public Finance Management Act as it is a significant transaction for Denel and in line with government guarantee conditions. Denel did not respond to urgent questions on Thursday whether it and its board exceeded their authority".
- (ii) I have decided to investigate contracts concluded between Denel and VR Laser Services as referenced in the above media article. The investigation into Denel will however form part of the next phase of the investigation."

## **THE SCOPE OF THE EVIDENCE**

8. The evidence focussed on the following topics:

- 8.1. The formation and corporate structure of Denel after the democratic elections and the coming into force of the Constitution in the 1990s up until the appointment of the board of directors of Denel which took office in 2015;
- 8.2. The purchase by the Gupta family, acting largely through their associate, Mr Salim Essa, in two transactions, of the shares in VR Laser Services (Pty) Ltd (VR Laser), a South African company which specialised in cutting and bending armour plate;
- 8.3. The approaches of members of the Gupta family and associates from 2012 onwards to the then Group Executive Officer of Denel, Mr Riaz Saloojee, and their interactions with that officer, directed at influencing Denel, through Mr Saloojee, to channel Denel business to VR Laser;
- 8.4. The internal processes within Denel by which business was channelled to VR Laser, contracts were concluded between Denel and VR Laser which had the effect of establishing VR Laser in a supremely dominant position as a supplier of Denel's requirements of "complex engineering systems" at stated tariffs for a period of ten years and had VR Laser as Denel's joint venture partner in marketing a venture called "Denel Asia", intended to target the arms market in India and Asia;
- 8.5. The conclusion of three large contracts between Denel and VR Laser:
  - 8.5.1. a contract concluded on 28 November 2014 between the division of Denel called Denel Land Services (DLS) and VR Laser (the hulls contract);

- 8.5.2. a contract concluded on 19 May 2015 between DLS and VR Laser appointing VR Laser as single source supplier to Denel of complex engineering systems at agreed tariffs for a period of ten years (the DLS single source contract);
- 8.5.3. a contract concluded on 14 December 2015 between Denel Vehicle Systems (Pty) Ltd and VR Laser, appointing VR Laser as single source supplier to DVS for, inter alia, complex armour steel fabrications for vehicles and related steel products for a period of ten years (the DVS single source contract).
- 8.6. The replacement in mid-2015 of all but one of the members of the Denel board appointed in or around 2011 (the 2011 board) and the constitution of the new board (the 2015 board);
- 8.7. The summary suspension in September 2015 of Mr Saloojee and his fellow executives, Mr Fikile Mhlontlo, the Group Chief Financial Officer (Group CFO) and Ms E Afrika, the Group Company Secretary, ostensibly pending disciplinary enquiries; how those enquiries never took place and how the three group executives were ultimately pushed out of Denel with substantial payouts.
- 8.8. The decline of Denel following the appointment of the 2015 board members, the removal of the three executives.

## FORMATION AND STRUCTURE OF DENEL

9. This section of the report of the Commission deals with transactions within Denel in the second decade of this century. Denel, or to give it its full name, Denel SOC Limited, was incorporated in terms of the company legislation of South Africa under registration number 1992/001337/30. Denel was established pursuant to a division agreement concluded in 1992 between the Minister of Public Enterprises, the Minister of Defence and Communication, the Armaments Corporation of South Africa (Armcor) and Denel (Pty) Ltd.
10. The effect of the division agreement relevant for present purposes was to split Armcor into two separate state owned companies, Armcor and Denel. Armcor proceeded to function as an acquisition agent for the Department of Defence and Denel as a manufacturer of military equipment.
11. At the time the evidence regarding Denel was presented to the Commission, Denel had five divisions, three subsidiaries and four international associated companies. It employed over 3 000 employees, of whom some 60% were artisans, technicians, engineers and scientists.
12. One of Denel's divisions is relevant to the matters which served before the Commission: Denel Landward Systems (DLS). Two of Denel's subsidiaries are similarly relevant: Denel Vehicle Systems (Pty) Ltd (DVS) with registration number 1999/001/275/07 and Land Mobility Technologies (Pty) Ltd (LMT).

### **Armcor Awards Denel the Hoefyster Contract**

13. In 2007 Armcor awarded DLS a contract to manufacture 217 new generation infantry combat vehicle products systems to replace the Ratel infantry combat vehicle. In all, seven variants of the combat vehicle were to be manufactured. This contract became known as the Hoefyster program and the vehicle became known as the Hoefyster infantry combat vehicle or the Badger. The Hoefyster design is based on a platform hull design from Patria Land Services Oy of Finland. In layman's terms a "platform hull" is the body of the vehicle onto or into which all the features of the vehicle are attached.
14. Because DLS was not a complete armoured vehicle manufacturer but specialised in the assembly of the vehicles, the greater part of the manufacturing of the different parts of the vehicle had to be outsourced.
15. Hoefyster was to be completed in two phases: development and fabrication or production. The development phase was to have been completed by 2012 but even in 2021 the development phase is still incomplete. The reasons for the delay in the completion of the development phase are said to include Denel's lack of funds, the engineering complexities which became apparent during the process, loss of critical skills, slow progress and protracted decision making processes. The COVID-19 pandemic made things worse. The initial cost estimates have been overtaken and far exceed the original budgeted figures.

### **Problems with Hoefyster leading to Denel's financial decline**

16. The severe problems with Hoefyster are a matter of public record. At a presentation to the Portfolio Committee on Public Enterprises on Denel's funding and governance

challenges in October 2020, the Chairperson of Denel, Ms Monhla Wilma Hlahla<sup>1</sup>, who testified before the Commission<sup>2</sup>, is reported to have said:

“Hoefyster remains the biggest threat to Denel. If the parties do not find a way to resolve the technical issues around the programme, Hoefyster remains the single biggest programme on Denel's balance sheet or income statement.”

17. The Minister of Defence and Military Veterans is reported by the same source to have told Parliament in September 2020:

“Project Hoefyster suffered significant delays and Denel is currently reneging on contractual deliveries for this project. In 2018 Denel formally indicated to Armscor it cannot complete the project within timescales, specifications or budget and requested a reset of the contract.”

18. Indeed, in a press report published on 16 February 2021, the Treasury is reported to have concluded that Denel would run out of cash at the end of March 2021 and needed additional funding of around R500 million and was battling to pay salaries, creditors and statutory payments for medical aid and UIF. This is despite Government having already provided Denel with guarantee facilities amounting to R5,93 billion and Treasury having provided Denel in 2019/2020 with R1,8 billion as recapitalisation for its turnaround plan and having allocated Denel R576 million for 2020/2021. According to the Treasury, Denel is battling to meet its sales targets and there are obstacles to Denel implementing its turnaround plan, particularly in relation to the sale of non-core assets and finding strategic partners. According to the same press report, Denel recorded a loss of R1,2 billion as at the end of December 2020 and had forecasted a nett loss of R1,6 billion by the end of March 2021.

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<sup>1</sup> Exhibit W9.

<sup>2</sup> Transcript 26 October 2020, p 82 *et seq.*

19. Denel had suffered from the contraction of military business arising from the contraction of the military campaigns of the United States in the Middle East and the contraction of the world economy following the sub-prime financial crisis of 2007-8. However, in the earlier years of the second decade of this century, Denel's position appeared to be much more positive. Denel appeared to be turning the corner.

#### **Reconstitution of Denel Board: the 2011 Board**

20. Between 1992 and 2000, the equipping of the SANDF was restructured. Seventy percent of SANDF acquisitions were imported. Denel inherited certain cumbersome and unprofitable obligations which affected it negatively. Research and development spend was drastically reduced. Several attempts to access commercial markets with non-military products failed to produce results.
21. Although, between 2001 and 2004 Denel adopted a strategy to centralise core activities, Denel lost critical markets and sustained increased financial losses. Thus began a long period of financial problems.
22. Between 2005 and 2009 a new turn-around strategy was adopted. This included right sizing by reorganising the business, workforce and management and managed decentralisation of governance and authority to improve performance and accountability. Equity partnerships were concluded to access funding, best practice business processes, new technology and new markets. Several non-core businesses were disposed of.
23. Denel's board was re-constituted in 2011 under its chair, Mr Zoli Kunene. Its executive was, from January 2012, headed by the Group CEO, Mr Riaz Saloojee ("Mr Saloojee")<sup>3</sup>,

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<sup>3</sup> Exhibit W4.0, W4.1 and W4.2.



a veteran of Umkhonto we Sizwe (MK) and the South African National Defence Force, into which MK and the old SA Defence Force had been folded. Mr Kunene left the Denel Board some time in 2014 where after Ms Martie Janse van Rensburg<sup>4</sup> (“Ms Janse van Rensburg”) was appointed interim Chair of the Board.

24. Ms Janse van Rensburg testified before the Commission.<sup>5</sup> She was a good witness. Her evidence was both detailed and reliable. She is a Chartered Accountant with over 40 years’ experience in accounting and finance and more than 20 years’ experience as an executive and non-executive director of various SOEs. She joined the Denel board in 2010 and was appointed its interim chair in 2014 after the departure of Mr Kunene.
25. Ms Janse van Rensburg testified that the business of Denel grew significantly during the period 2011 to 2015, reversing a history of losses in preceding years. In this regard she was corroborated by the evidence of Mr Kgathatso Tlhakudi<sup>6</sup>, then Deputy Director-General of the Department of Public Enterprises with responsibility for, and, insight into, SOEs.
26. Between 2010 and 2012 a new strategy was undertaken to improve revenue, optimise efficiency and costs as well as leadership and transformation. In 2011, a new board (the 2011 board) was appointed which included Ms Janse van Rensburg and four other members of the previous board. Shortly after its appointment, the 2011 board appointed Mr Saloojee as CEO in the place of the former incumbent, who did not wish to renew his contract. His appointment was with effect from 16 January 2012.
27. The 2011 board achieved significant successes. When the 2011 board was almost entirely replaced, it left an order book of R35 billion, the highest in the history of Denel,

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<sup>4</sup> Exhibit W2.

<sup>5</sup> Transcript 19 March 2019, p 3 – 90.

<sup>6</sup> Exhibit W1.

in Denel's traditional products such as missiles, artillery and military vehicles. Tangible opportunities worth some R40 billion were being actively pursued. Denel's strategic markets had expanded to the Middle East, Africa, South America and the Far East. Its revenue increased from R3,252 billion in 2011 to R6 billion in 2015. From a loss making situation from 2005 to 2010, Denel showed a profit from 2011 to 2015.

28. In 2015 the Denel group's financial position was that the group was both solvent and liquid, its total equity was R1,9 billion and its total assets were valued at R9,7 billion. This included cash of R1,9 billion. In 2015 the group had sufficient funds, including borrowing facilities, to meet the group's requirements for the next twelve months.

#### Denel Manages Challenges Under 2011 Board

29. In the financial year ending 28 February 2015, Denel made a profit of a few million rands and its order book showed substantial growth, reflecting work on hand of some R6 billion. Denel was praised in Parliament and in the media. In a board effectiveness valuation conducted by Deloitte, Denel was found to be highly effective both in providing oversight and in direction. Denel secured clean and unqualified audits from the Auditor General.
30. Denel appeared to be managing the challenges of the industry in which it traded. However, Hoefyster must have been a concern which grew as time went by and the target date of 2012 passed without any indication of when the development phase of the project would be completed.

### VR Laser: its Shareholders and its Relationship with Denel

31. There was a limited number of suppliers to whom Denel could turn for the manufacture of the components which went into the complex machine that was Hoefyster. One of the largest, most important and reliable suppliers was VR Laser Services (Pty) Ltd.
32. By 2007 VR Laser was an established company which specialised in the cutting and bending of armour plate and steel. Its shareholders were Mr John van Reenen and Mr Gary Bloxham. In 2007 Mr MJ Jiyane and his wife acquired an interest in VR Laser for some R270 million. R61 million of the purchase price was financed by a bank and the balance of about R200 million remained a debt owed by the company created as a vehicle for the new shareholders to the sellers, Messrs van Reenen and Bloxham. VR Laser was valued for the purpose of the transaction by the bank which financed it. A significant component of the value of the shares was found by the bank to lie in the contracts which VR Laser had executed for the defence industry, many of which were with the military of the United States for the supply of armoured hulls for the vehicles it used in the Gulf War.
33. Both Mr and Mrs Jiyane worked for VR Laser. In 2011 VR Laser moved to new premises, measuring 36 000 square metres, in Boksburg. Messrs van Reenen and Bloxham bought the premises on which VR Laser was trading.

### Guptas begin efforts to capture Denel through VR Laser

34. As already indicated, Mr Saloojee was appointed Group Chief Executive Officer of Denel with effect from January 2012. In the first quarter of 2012, Mr Essa contacted Mr Saloojee and told him that he would like Mr Saloojee to meet certain individuals who were in a position to assist Denel with future business. At first Mr Saloojee did not respond to Mr Essa's invitations but Mr Essa persisted. He told Mr Saloojee that his

request for a meeting came from the “very top” and that it would be in Mr Saloojee's interest to attend such a meeting.

35. Eventually, Mr Saloojee acceded to Mr Essa's request. Mr Essa personally picked Mr Saloojee up at a coffee shop and drove him to an address in Saxonwold, Johannesburg which Mr Saloojee later learned was the Gupta compound. At the Gupta compound Mr Saloojee was introduced first to Mr Tony Gupta. Then, Mr Tony Gupta took Mr Saloojee to another room where he was introduced to Mr Malusi Gigaba, the then Minister of Public Enterprises, as the new Denel CEO, and another man, who Mr Saloojee later identified as Mr Atul Gupta. According to Mr Saloojee, Minister Gigaba said to him that “these people” were his friends<sup>7</sup> and that he hoped that they and Mr Saloojee could work together.
36. This evidence therefore shows that the then Minister of Public Enterprises, Mr Gigaba, was introduced to the CEO of one of the SOEs under the control of the then Minister, by the Guptas and at their home and place of business.
37. Mr Saloojee was immediately conscious of the fact that he had been brought to the Saxonwold compound to show him the reach of the Guptas' influence. This fact informed his further dealings with the Guptas.
38. A few weeks later Mr Essa summoned Mr Saloojee to a further meeting at the Saxonwold compound. Both Mr Tony Gupta and Mr Essa were present at the meeting. Mr Saloojee was introduced to Mr Duduzane Zuma, the son of the then president of the Republic, and a man who was introduced to him as Mr Ace Magashule's son. At the meeting Mr Essa told Mr Saloojee that the Guptas had supported his appointment to his position as Denel CEO and that they had the full support of “number one”. They also

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<sup>7</sup> Exhibit W4, p 11-12.

referred to them having the full support of “the old man”. Mr Saloojee took these to be references to President Zuma.

39. Mr Essa told Mr Saloojee at the meeting that the Guptas wanted to do business with Denel and assist Denel in getting business in other markets, particularly in the Middle East and Asia. Mr Saloojee told them at this meeting and thereafter that, if they wanted to do business with Denel, they had to go through the proper channels.
40. For the next few months Mr Saloojee evaded Mr Essa's requests to meet but eventually went to a meeting at the Saxonwold compound in the latter part of 2012. In that meeting Mr Tony Gupta put pressure on Mr Saloojee to cooperate more closely with the Guptas. He told Mr Saloojee that he was “not cooperating” and that he did not want to “elevate it further”. Mr Saloojee testified that Mr Tony Gupta said that the Guptas were working hard to get the Denel blacklisting in India lifted.
41. The blacklisting arose from a criminal investigation into conduct in India attributed to Denel. The blacklisting lasted from 2004 until 2014. Even when the blacklisting was lifted, Denel was unable to penetrate the Indian market.
42. Mr Tony Gupta also complained at the meeting that Denel was one of the few SOEs which was not supporting The New Age Newspaper, a Gupta-owned publication, with subscriptions or advertising.
43. Mr Saloojee persisted in his stance that, if the Guptas wanted to do business with Denel, they had to follow the proper processes. When the meeting ended, Mr Tony Gupta walked out with Mr Saloojee and asked him why he, Mr Saloojee, did not take money. Mr Saloojee said that Mr Tony Gupta said that he should take money, because “everyone does”. Mr Saloojee replied that he did not. If the Guptas wanted to do

business with Denel, Mr Saloojee said, they should contact Denel's Business Executive: Marketing Development at the time, Mr Zwelakhe Ntshepe.

44. In an effort to shake the Guptas off him personally, Mr Saloojee later introduced Mr Essa to Mr Ntshepe. Prior to the meeting, Mr Saloojee cautioned Mr Ntshepe to follow due process in regard to the Guptas. Mr Essa and Mr Ntshepe developed their own relationship. From time to time Mr Ntshepe asked Mr Saloojee to meet Mr Essa so that Mr Ntshepe could provide feedback on their discussions.
45. At one of these meetings, Mr Essa discussed buying companies that would allow the Guptas entry into the defence environment. Mr Essa asked Mr Saloojee about the viability of VR Laser. Mr Saloojee knew that VR Laser had a relationship of some years standing with Denel and responded positively.
46. In May 2014 Minister Gigaba was replaced by Ms Lynette Brown as Minister of Public Enterprises. Shortly after Ms Brown's appointment, Mr Saloojee was told, at a meeting between Mr Essa, Mr Ntshepe and Mr Saloojee, that the Guptas had the support of the new Minister. Mr Saloojee's evidence in this regard is consistent with that of Mr Jonas who said that the Gupta "brother" with whom he had a meeting on 23 October 2015 mentioned Ms Lynne Brown as one of the people who were working with the Guptas.

#### Jiyane, Essa, and the Guptas: The Sale of VR Laser Shares

47. By about the middle of 2012 Mr and Mrs Jiyane had realised that the business of VR Laser was not producing the results for which they had hoped. Although the bank finance was repaid, much of the company revenue went towards servicing the vendor loan and the interest accruing on it. Sales were also either declining or failing to grow as anticipated because the important customer, the US government, was not placing the business which they had anticipated would ultimately benefit VR Laser.

48. Mr Jiyane sought to negotiate a reduction of the vendor loan with Messrs van Reenen and Bloxham, who offered to sell their shares and loan accounts (including the vendor loan) for R120 million. Mr and Mrs Jiyane thought this was fair. They tried to interest the banks and the IDC in the transaction. None of them was interested. Unfavourable economic conditions may have played a role. Messrs van Reenen and Bloxham told Mr Jiyane that, if he did not soon close the deal with them, they would sell to some foreign investors who were interested in buying VR Laser. If that happened, the Jiyanes would be obliged to sell to the foreign investors under a “come along” provision in the shareholders' agreement.
49. Among the persons with whom Mr Jiyane had separate discussions towards the end of 2012 in an effort to find a new partner in VR Laser, were Mr Saloojee, the Denel Group CEO, Mr Z Ntshepe, the Denel business development and marketing executive, and Mr S Burger, the CEO of DLS.
50. In February 2013 Mr Jiyane attended a defence exhibition in Abu Dhabi in the UAE. Denel was exhibiting there. Mr Ntshepe was representing Denel at the show. Mr Ntshepe reminded Mr Jiyane of their prior discussions about Mr Jiyane looking for a new partner in VR Laser. Mr Ntshepe introduced Mr Jiyane to Mr Salim Essa of Essar Capital, with offices in Melrose Arch, Johannesburg. Mr Jiyane and Mr Essa had brief discussions and agreed to take the matter further when they were both back in South Africa.
51. It is at this stage that the Guptas entered the picture in regard to VR Laser. All the evidence shows that Mr Essa was an associate of the Gupta family. There is nothing in this module of the evidence which identifies and pins down the precise nature of the relationship between the Guptas and Mr Essa but the evidence shows that for purposes

of what follows, there was complete identity between the interests of the Gupta family and the interests of Mr Essa.

52. Mr Essa and Mr Iqbal Sharma who, Mr Essa said, worked with Mr Essa, negotiated with Mr Jiyane about buying out Messrs van Reenen and Bloxham. The Jiyanes would remain as shareholders and even possibly increase their shareholding. Mr Jiyane would become the CEO of VR Laser after the takeover. They even got Mr Jiyane to meet with employees of Ernst and Young in June 2013, for the purpose of valuing VR Laser.
53. In September 2013 Mr Essa called Mr Jiyane to a meeting. Mr Essa's new financial advisors, Mr N Wyma and Mr J Loeb of Regiments Capital, were at the meeting. They gave Mr Jiyane some offer documents which they asked Mr Jiyane to pass on to Messrs van Reenen and Bloxham.
54. One of the documents was an offer by Elgasolve (Pty) Ltd to buy the property on which VR Laser traded for R50 million from "Propco", whose identity was not defined. The offer to purchase the property was signed by Mr Sharma on behalf of Elgasolve. Another document was a sale of shares agreement by which Elgasolve bought the shares of Messrs van Reenen and Bloxham in VR Laser (74,9% of VR Laser's issued shares) for R72 million, to be paid on or before 10 December 2013.
55. Elgasolve paid Messrs van Reenen and Bloxham the agreed amounts and the property on which VR Laser traded was transferred out of the control of Messrs van Reenen and Bloxham. Mr Jiyane was told that Mr Iqbal Sharma had through Essar Capital (Pty) Ltd obtained control of VRLS Properties (Pty) Ltd, the company which had owned the property. How Messrs van Reenen and Bloxham, on the one hand, and the Guptas, on the other, finally structured the property transaction is not clear from the evidence before the Commission.



56. Mr Essa did not keep his promises to Mr Jiyane. On 6 January 2014 the Guptas' new management team arrived at the premises of VR Laser. One of them was introduced to Mr Jiyane as Tony. Mr Jiyane later learnt that he was Mr Tony Gupta. Mr Sharma in effect transferred all executive control from Mr Jiyane to two representatives of the Guptas. This arrangement was extremely unsatisfactory to Mr Jiyane and by agreement dated 20 February 2014, Mr and Mrs Jiyane sold their 25,1% shareholding in VR Laser to Craysure Investments (Pty) Ltd for some R16,5 million. Mr Jiyane was obliged to work, and did work, for a further twelve months for VR Laser at a monthly cost to company package of R148 761, 43. During the second half of 2014, Mr Jiyane was introduced to the Guptas' attorney, Mr Pieter van der Merwe. Mr van der Merwe started working at VR Laser in the second half of 2014 and took over from Mr Jiyane as CEO of VR Laser.
57. This evidence shows that the Guptas bought control of a significant supplier of armoured steel to Denel. Mr Jiyane's evidence was that the Gupta connection with the transaction was never explicitly disclosed to Messrs van Reenen, Bloxham and Mr Jiyane. However, he said that the Guptas were involved in the acquisition from at least the date on which the Gupta management team arrived at VR Laser in early January 2014. While Mr Essa and Mr Sharma did not keep their promises to Mr Jiyane and manoeuvred him into a position in which they could acquire the Jiyanes' shares at a discount, the Guptas invested substantial sums in acquiring control of VR Laser and then caused it to operate, at one level, legitimately in the market in which it had always operated.

## THE HULLS CONTRACT

### Background to Memorandum of Agreement (MOA) between Denel and VR Laser to Produce Hulls for Hoefyster

58. During 2014 Denel was required to deliver a quantity of platform hulls onto which the Badger infantry combat vehicle would be built under Hoefyster. The two main structural components of the vehicle were the hull and the turret. Some of the vehicles were to be equipped with a specified 30mm gun. In such vehicles, the gun would be mounted in the turret. An intense debate within Denel arose around the question of to whom the work of constructing the hulls would be outsourced.
59. This debate focussed on disagreements of long standing amongst the Denel executives and management. There were those who believed that Hoefyster, phase 1 of which had already passed its projected completion date of 2012, was being fatally obstructed by the time-consuming processes which were required before orders such as the hulls and turret contracts could be awarded. Then there was the question of who should do the work.
60. On 29 April 2010, DLS and LMT had concluded a contract under which LMT was to supply turrets (or trunnion machining) for Hoefyster. LMT was under severe financial constraints at the time. Denel agreed to make advance payments to LMT totalling R1,7 million. Contemporaneously, Denel acquired an option to purchase 70% of the shareholding in LMT. This was seen as operating as a sort of security for Denel for its investment in LMT.
61. A presentation to a sub-committee of the Denel board dated 18 August 2011 identified LMT as a strategic supplier to DLS and critical to Hoefyster. The position was put forward that by acquiring control of LMT, Denel would not only secure a strategic

supplier and deny it to Denel's competitors, but also establish a vehicle integration capacity within Denel. In short, Denel would acquire a subsidiary or a division capable of constructing hulls, generate additional business and save costs.

62. One witness who stands above the others in regard to this aspect is Mr Johannes Mattheus Wessels<sup>8</sup>. Mr Wessels had an honours degree in electronic engineering and was employed at a stage as Group Chief Operating Officer (COO) of Denel from April 2013 to 13 March 2016. He resigned from Denel and now works as Executive Vice-President: Defence Electronics for Saudi Arabian Military Industries (SAMI) in Saudi Arabia. Mr Wessels made a statement which he signed on 5 October 2020. He was interviewed by the evidence leader and those who were assisting him and his evidence was recorded. He subsequently deposed to an affidavit confirming that the evidence in the transcript of that interview was true and correct. He did not give his testimony in open session because of misunderstandings about how much time he had available in South Africa before he was obliged to return to Saudi Arabia.
63. The position of COO was created in early 2013 because the board saw the need for more technical and industrial expertise in the Denel corporate office team. Mr Wessels was the first such incumbent. His role evolved to one in which he sought to resolve conflicts at a high level of professional opinion between the heads of the several Denel divisions. As Mr Wessels put it, he was the "technical industrial trouble-shooter". This position enabled Mr Wessels to form an overview in regard to the acquisition by Denel of LMT.
64. On 8 May 2012 after the requisite permissions had been obtained, Denel exercised an option to purchase a 51% of the shares in LMT from its erstwhile private sector shareholders, with Pamodzi Investment Holdings (Pty) Ltd taking 29% as Denel's

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<sup>8</sup> Exhibit W 6.

empowerment partner. Pamodzi put up a total of R30 million towards recapitalising LMT: R10 million in cash and R20 million by way of preference shares.

65. The remaining 20% of the shareholding was retained by the erstwhile private sector shareholders in LMT: Dr Stefan Nel (8%) and Mr Andrew Hodgson and Mr Chris Gilliomee (6% each). Dr Nel had been the CEO of LMT at the time of its takeover by Denel. Dr Nel was kept on as CEO of LMT until he was replaced in March 2016 by Mr JM Wessels. Dr Nel then became COO of LMT and resigned from Denel on 19 September 2016.
66. During the period 2014 to 2015, negotiation and conclusion of contracts with suppliers was decentralised. That means that they were done by each Denel division according to approved thresholds set at Denel Group level.
67. Mr Wessels described how tension arose between Mr Burger and Dr Nell, the CEOs of DLS and LMT, respectively, on a variety of projects and technical issues. Mr Wessels ascribed this tension to professional differences of opinion. He was at pains to point out that this was not a case where the one was correct and the other wrong; he said that both Dr Nel and Mr Burger were “world class” players with different views on the best way to success. This tension manifested itself in the debate within Denel around whether Denel should acquire a majority stake in LMT. One of the primary arguments in favour of the acquisition was that it would enable Denel to obtain an in-house military vehicle hull and structures design and fabrication capability. Resolving this tension became one of Mr Wessels' key tasks, allocated to him by Mr Saloojee.
68. There were cogent arguments both for and against decentralising. On the one hand, decentralising spread the risk and enabled Denel to go into the market to select suppliers both for quality of work and of price. On the other hand, there were strategic reasons why it was desirable for Denel to maintain a capability in house.

69. Mr Wessels came to know VR Laser in 2014 as an armoured steel component supplier with a generally good reputation. In 2014 Mr Burger of DLS persistently argued to the Denel senior management that LMT could not be relied upon in this regard but that VR Laser was well equipped to meet Denel's expectations regarding hull manufacture for the Hoefyster program. This view, it seemed, was also held by Patria, the Finnish design company responsible for the Hoefyster vehicle.
70. At that stage, VR Laser was a highly regarded but also very narrowly specialised company: VR Laser used very powerful lasers to cut pieces of armoured steel precisely. Those cut pieces would then be returned to LMT (where LMT was the customer which had placed the order). LMT would weld them into the whole structure. However, after VR Laser had been sold to its new owners, its ambition was to obtain business in the field of welded parts, i.e. assembling the finished product from various parts, thus becoming a competitor with its old customers, including LMT.
71. It seems that LMT was acquired primarily to manufacture welded steel hulls, notably for the Hoefyster vehicle. However, around 2014 Mr Saloojee asked Mr Wessels and Mr Mhlontlo to advise him on the argument made by DLS that the hull manufacture no longer be directly awarded to LMT but that the contract be put out to a procurement process.
72. In an email dated 29 July 2014 Mr Wessels proposed a compromise: that the hull components be supplied by VR Laser and the doors and internal components be supplied by LMT. This position was supported by Mr Burger and Mr Mhlontlo.
73. In the opinion of Mr Wessels, this debate dragged on somewhat because Mr Saloojee at first did not make a decision but at the end of October 2014, Mr Saloojee called a meeting in his office. At that stage the impasse, which had endured since July 2014 was potentially compromising the Hoefyster delivery schedule.

74. The meeting was attended by Mr Saloojee, Mr Burger, Mr Ntshepe, Mr Mhlontlo, and Mr Wessels. The recollection of Mr Wessels was that Mr Mlambo was not present. An intense debate ensued. During the debate, reference was made to Mr Mlambo's email dated 9 September 2014 in which Mr Mlambo had rejected the proposition that the contract be awarded to VR Laser because procurement procedures had not been followed. However, a counter-argument was advanced either by Mr Ntshepe or Mr Burger that Mr Mlambo's concerns had been adequately addressed. Mr Wessels was not able to comment on whether proper procurement processes had been followed or not.
75. Mr Burger argued at the meeting that he could not rely on LMT to ensure the safety of the crew within the vehicle and said that, if Mr Saloojee instructed DLS to contract with LMT for the hull manufacture, Mr Saloojee should relieve DLS of responsibility for crew safety and bear the burden himself.
76. The outcome of the meeting in Mr Saloojee's office at the end of October 2014 was that the compromise was accepted. VR Laser would get the hulls contract and LMT would be contracted by DLS to manufacture the hull doors and internal components.
77. It is clear that there were those within Denel who regarded the work produced by LMT as substandard. A major criticism of LMT related to a consignment of Casspir hubs built by LMT for an order of such vehicles placed by the UN. The hulls of all those vehicles cracked and many in the professional engineering world in Denel blamed LMT's workmanship for the Casspir hull failures. Other criticisms of LMT, as detailed in the position paper of 18 August 2011, included poor planning, late delivery and uncompetitive pricing.
78. The upshot was that the hulls contract was put out to a closed tender. Requests for offers (RFOs) were sent out to three suppliers: LMT, DCD - Dorbyl (Pty) Ltd and VR

Laser. All three submitted bids. Of these LMT's price was the lowest, followed by VR Laser which was some R97 million higher. DCD-Dorbyl's price was the highest.

79. Denel established a committee to evaluate the bids in accordance with a formula which awarded 25% of the points for price, 45% for functionality and 30% for BBBEE qualifications.
80. LMT scored far lower than VR Laser for functionality and far higher on price. However, when BBBEE was evaluated, LMT's BBBEE certificate was found to have expired, as was that of DCD-Dorbyl. LMT and DVD-Dorbyl were not given an opportunity to provide updated certificates. The evaluation committee proceeded to score them nil for BBBEE. This extraordinary result was achieved in conflict with what must have been well known within Denel: that Pamodzi was in fact Denel's empowerment partner in LMT and had contributed R30 million towards getting LMT back on its feet.
81. In the result, the evaluation committee declared VR Laser the winner on scoring by a margin of 0,76%. This gave rise to protracted boardroom battles. Prominent in the struggle to have the tender awarded to VR Laser was Mr Burger, the CEO of DLS. On the other side were Ms Malahlela, Denel's Executive Manager: Supply Chain, and Mr D Mlambo, the Denel Group Executive: Supply Chain.
82. A factor which appeared to weigh with those who supported VR Laser and took an adverse view of LMT's capacity to deliver was a visit paid to each of the three tendering suppliers by a representative of Patria, the Finnish company which had supplied much of the IT for Hoefyster.
83. The representative of Patria compiled a memorandum dated 3 March 2014 after the Patria site visit to the three bidders. This memorandum recorded that VR Laser was capable of manufacturing the whole hull from parts to delivery, that Patria was

concerned about information leakage at DCD-Dorbyl and that Patria considered that LMT had a poor level of welding quality and needed to improve in order to be able to manufacture the hulls.

84. Another factor of concern to the engineers within Denel was that LMT failed the land mine protection tests conducted by the CSIR. In fact, the test showed that the vehicle as developed by LMT up to that stage failed at the most dangerous place from the perspective of crew safety.
85. In the result, Denel decided to award the hulls contract to VR Laser. An agreement to this effect was signed on 28 November 2014 between DLS and VR Laser.
86. Section 217(1) and (2) of the Constitution provides as follows:
- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
- (a) categories of preference in the allocation of contracts; and
  - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.”

87. The award of the Hulls contract was irregular. The process by which the Hulls contract was awarded was flawed in the following respects: it was improper to approach VR Laser to reduce its tendered price without giving the other two tenderers a chance to revise their tenders it was improper to sideline and then override Mr Mlambo who was against the award to VR Laser precisely because of flaws in the process; it was improper to accept the criticisms of LMT's capacity to perform without giving LMT an opportunity to deal with those criticisms; it was improper not to start the tender process



afresh once the flaws in the process were pointed out; the process was concluded in an overly hasty manner.

88. The decision to put the Hulls contract out to closed rather than open tender was defended by several of the Denel executives. Mr Saloojee, for example, justified the departure from the norm of open public tender on the grounds of audit and risk assessments; supply chain management protocols and procedures; analysis of market and new opportunities; advantages and disadvantages of the deviation; and comparative analysis in favour of the deviation.
89. VR Laser was at the time before it was taken over by the Guptas the leading supplier of armoured steel plate in South Africa. It had good BBBEE credentials: some 30% of its shareholding was black owned. There was in fact near unanimity among the Denel decision makers that VR Laser was not only the best supplier for the job but that it was the only supplier in a very small field that could be entrusted with the work. The objections to the appointment of VR Laser were at the level of process.
90. However, the requirements of s 217 of the Constitution are not something that Denel could choose or not choose to follow. The provisions of s 217 are binding on all organs of state, such as Denel, and all decision makers within Denel were obliged to implement its terms, both in letter and in spirit.
91. Regrettably, that was not how the Denel executives, with the exception of Ms Malahlela and Mr Mlambo, saw it. They were preoccupied with getting the job done and felt frustrated by what they saw as an unnecessarily lengthy and cumbersome decision making process which got in the way of getting the job done. So, they cut procedural corners and overrode or ignored the wholly correct objections to the process raised by Ms Malahlela and Mr Mlambo. With the exception of the executives mandated to preserve the procedural integrity of Denel's supply chains, most, if not all, the other

executives regarded supply chain process as an obstacle to Denel's capacity to get the Hoefyster job done, which had to be surmounted in order to get the work done properly and expeditiously.

92. All the executives concerned who participated in the corner cutting procedural exercise which led to the award of the hulls contract to VR Laser either knew broadly that they were acting in violation of their obligation to promote a procurement process consistent with s 217 of the Constitution or ignored the readily available material which would have put them on the right path. For these executives, the means justified the end. However, that is not the law.

## HOW THE GUPTAS USED VR LASER TO CAPTURE DENEL

93. Next to consider are the circumstances in which the Guptas and Mr Essa took control of VR Laser and engineered for themselves a position as Denel's most privileged supplier of "complex engineering systems". This included steel armour plate and as Denel's single and exclusive partner in Denel's effort to establish itself in India and Asia. As will be shown, the retention of only one of the members of the Denel board appointed in 2011, the appointment in mid-2015 of a new board, the suspension of Mr Saloojee, Mr Mhlontlo and Ms Afrika in September 2015 all formed part of the Guptas' strategy to capture Denel. The one Board member who remained was Mr Motseki. Based on his own evidence in the form of an affidavit, he had an existing relationship with the Guptas. There is no suggestion that his retention was in anyway based on his excellent performance as a member of the Board.
94. Mr Saloojee was appointed the GCEO of Denel with effect from 16 January 2012 for a fixed term ending on 31 January 2015 but renewable thereafter by agreement. When the Guptas, through Mr Essa, called Mr Saloojee to his first meeting with them at their Saxonwold compound shortly after his appointment as group CEO, their penetration into South African public and commercial life was relatively well known. Their influence at that date is shown by the following facts which emerged from the evidence. Firstly, that they persuaded the then Minister of Public Enterprises, Mr Malusi Gigaba, and Mr Saloojee, the newly appointed CEO of Denel, to go to the Gupta compound on the same day. Secondly, that Mr Tony Gupta there introduced Minister Gigaba to the CEO of one of the SOEs for the administration of which Mr Gigaba, as the representative of Denel's shareholder, the South African government, was responsible. Thirdly, that at the

conclusion of this very brief meeting, Minister Gigaba made suggested that Mr Saloojee should work together with the Guptas or should co-operate with them.

95. Mr Gigaba denied Mr Saloojee's evidence that they met at the Gupta residence and that Mr Gigaba suggested to him that he should work together with the Guptas or cooperate with them. However, Mr Gigaba did not advance any reason or explanation as to why Mr Saloojee would have said he met him at the Gupta residence and they were introduced to each other if in fact that is not what happened. In other words, Mr Gigaba did not advance any reason why Mr Saloojee would have falsely implicated him in this way. Mr Saloojee had no reason to lie about this. On the other hand, Mr Gigaba may have denied Mr Saloojee's evidence because he did not want to be seen to have urged Mr Saloojee to cooperate with the Guptas. On the probabilities Mr Saloojee's version is true.
96. The Commission agrees with the impression gained by Mr Saloojee from this meeting: that the Guptas were demonstrating their reach and influence, at a high political level. Mr Saloojee's response to this overture was appropriate: in effect, "If you want to do business with Denel, go through the proper channels." This was a refrain that Mr Saloojee was to repeat throughout his interactions with the Guptas and Mr Essa and was to culminate in Mr Tony Gupta's question to Mr Saloojee, in effect: why did Mr Saloojee not take money for doing the Gupta's bidding, as everybody else did?
97. Mr Saloojee testified that Minister Gigaba used the position of authority conferred upon him by his office and his status as Mr Saloojee's ultimate superior to solicit SOEs for business for his "friends". Minister Gigaba's conduct in doing so will call for strong censure. Such conduct violates the Constitution, which requires public powers to be exercised bona fide and for a proper purpose. However, it seems that, as the law stands at present, such conduct, by itself, attracts no criminal sanction. This lacuna in our law

will be addressed below and forms the subject of one of the Commission's recommendations. There is no doubt that the Guptas brought Minister Gigaba to the meeting with Mr Saloojee to show Mr Saloojee that Minister Gigaba was a mere tool in their hands, a dupe who would do their bidding and from whom Mr Saloojee could expect no protection. A politician who did not recognise this to be so would be naive indeed. It is the same as what, on the evidence heard by the Commission, Mr Tony Gupta used to do with Mr Duduzane Zuma. He would bring him along to meetings that he had with government officials attached to state owned entities and he would do all the talking and Mr Duduzane Zuma would simply be there but not really take part in the discussion. Mr Tony Gupta's idea was that the government officials and SOE officials would have realized that through Mr Duduzane Zuma he had easy access to Mr Duduzane Zuma's father, President Zuma. In other words, they better co-operate because otherwise, if they did not co-operate, their non-cooperation could be reported to President Zuma.

98. The Guptas continued to apply pressure on Mr Saloojee through Mr Essa to meet with them. Mr Saloojee continued to fob them off by restating his position that, if they wanted to do business with Denel, they should use its channels created for that purpose. Mr Saloojee's evidence was that he did not report or share with others the pressure the Guptas were applying to him because he did not know whom to trust. This rings true. The Guptas began their relationship with Mr Saloojee by demonstrating to him that they had access to Minister Gigaba, Mr Saloojee's ultimate political superior. He was told more than once by Mr Essa that approval of the approach to him (i.e. Mr Saloojee) by the Guptas had been sanctioned at the very top. Mr Essa also introduced Mr Saloojee to the 2015 board chair, Mr Mantsha, before Mr Mantsha's appointment had even been publicly announced. This introduction was manifestly designed to show Mr Saloojee that Mr Mantsha was the Guptas' man, one of their dupes as they had showed Minister Gigaba to be.

99. Mr Saloojee's evidence that he introduced Mr Essa to Mr Ntshepe as a way of creating distance between the Guptas and himself is similarly credible. Mr Saloojee was invited to attend the well-publicised Gupta wedding at Sun City in 2013 but chose not to attend.
100. In May 2014 Minister Gigaba was replaced by Minister Lynne Brown. For a year or so, the relationship between Mr Saloojee and Minister Brown was good. This is not surprising: under Mr Saloojee's stewardship, Denel had been turned from a loss making entity into one which made a profit, with an order book in 2015 worth some R35 billion and accolades from major financial institutions, the Departments of Defence and Public Enterprises and the Treasury. During Mr Saloojee's time as group CEO, Denel achieved a clean audit from the Auditor General.
101. In her budget speech to Parliament on 15 May 2015 Minister Brown praised Denel's performance and the preliminary figures which showed a net profit of R200 million after tax. Minister Brown then said:
- “Thank you Denel. That is music to my ears. Maybe we should second your CEO to Eskom as well.”
102. In mid-2015 the terms of office of all but one of the members of the 2011 board expired and were not extended. The Board member whose term was extended was Mr Motseki who appears to have had certain links with the Guptas. In her address to Denel's 2015 AGM on 23 July 2015 Minister Brown noted “another successful financial year”. Ms Lynne Brown said that the professionalism and spirit with which the 2011 board had served Denel “not only ensured a smooth transition, but more especially set [Denel] on a long term path of sustainable performance”. Minister Brown noted that the order cover was in excess of R35 billion; improvement in revenue from R4,6 to R5,8 billion; that for the fifth year in a row, Denel was posting a profit. There were, however, areas of concern: commercial paper redemption was due in the financial year 2015/2016, current

liabilities were at their highest in the last ten years and prepayments and their utilisation needed close attention. However, all in all, the Minister's address was in glowing terms.

103. In her address to the new Board at the AGM of Denel on 24 July 2015 Minister Brown said that the new members of the Board had been chosen to serve as Directors of Denel “after a rigorous selection process which involved wider consultation including Cabinet.” It is difficult to understand what rigorous process Minister Brown was talking about because, firstly Mr Tlhakudi, the DDG in the Department of Public Enterprises who was in charge of SOEs, testified that the Minister did not subject the new members of the Denel Board to the normal process that candidates for Board membership would normally be subjected to. We also know that, when she appointed the leader of the Board, namely Mr Mantsha, she did not know that he had previously been struck off the roll of attorneys which is something that would have been very easy to find if she wanted find out.

104. In that same address Minister Brown also said:

“I have felt it necessary to repeat the statement I made to the outgoing Board at the AGM yesterday on the performance of Denel in the last financial year.

1. The SOC achieved 88% of the Shareholder's Compact targets in the last financial year. I am happy with the performance, as it is amongst the best in the SOCs in our portfolio. I however wish to challenge the Board and management to achieve 100% of set targets. Excellence must not be compromised

...

4. Excellent execution of strategic acquisition projects. This has been done on the back of Denel's ability to attract and retain some of the best executive talent in this country. Please ensure that it is retained.”

105. Minister Brown concluded her address by thanking the outgoing 2011 board for a job well done.
106. The reference to Eskom must be understood within the context that Eskom was going through challenges, certain executives had been removed and Mr Brian Molefe had just

been seconded to Eskom. It is ironic that the Denel CEO, namely, Mr Saloojee, who Minister Brown suggested jokingly should be seconded to Eskom, obviously in order to fix Eskom, was, about two months after the Minister's address, suspended by the new Board under very strange circumstances and was ultimately pushed out of Denel.

#### Minister Brown Replaces All but One of the Non-Executive Members of the 2011 Board

107. The evidence of Mr Kgathatso Tlhakudi, who held the position of Deputy Director - General at the DPE during this period (as he continued to do when he gave evidence), described how potential members of a board of an SOE such as Denel were identified, vetted and submitted to the Minister for her consideration by senior officials within the DPE. However, the evidence of this official demonstrated, in the case of the 2015 board, that the selection process was taken out of the hands of the officials. He said that Minister Brown excluded him and other officials from playing the non-executive role that they always played whenever there were vacancies in a Board that needed to be filled. Minister Brown admitted not having involved Mr Tlhakudi and other senior officials. She gave a ridiculous excuse. She said that they were too close. While the members of the 2011 board had distinguished themselves, the same could not be said of the members of the 2015 board, who appeared to be collectively lacking the experience and skills required.

108. Ms Martie Janse van Rensburg emphasised the sterling qualities of several of the board members and the important parts they were playing in the then current projects. She said she could not speculate on Minister Brown's reasons for making the board changes which she did but concluded that the Minister's decision had not been reasonable: continuity was sacrificed; the former board had been highly effective and was in the midst of a successful turnaround strategy and the new board lacked essential skills; e.g. there was no chartered accountant on the board.



109. The decision to replace virtually the entire board could not have been made on the ground of poor performance by the board members who were replaced in 2015. In her 2015 budget speech Minister Brown said:

“Denel continues to show pleasing improvement in financial performance. Over 50 percent of revenues were derived from its international business. The order book stands at over 33 billion. The revenue is expected to exceed 5.5 billion. Preliminary numbers suggest more than 200 million in net profit after tax. Denel Aerostructures is on a course to achieve break even in the next financial year. Denel cash facilities improved on a scale which allows the company to mitigate against any liquidity risk. In addition, banks have also granted Denel 10 billion in facilities on the strength of the company's balance sheet. Thank you Denel. That is music to my ears. Maybe we should second your CEO to Eskom as well.”

110. Ms Martie Janse van Rensburg was informed by Minister Brown of her intention to replace the board members in a letter dated 25 May 2015. She sought on several occasions to meet Minister Brown to discuss the proposed replacements but was unsuccessful in having such a meeting. The terms of office of all the 2011 board members, except Mr Motseki came to an end on 23 July 2015. Mr Motseki's term was extended.
111. The 2011 board had a wide range of skills at its disposal. These included a member with skills in accounting, a member with political and anti-corruption expertise, academics in the fields of economic and management sciences and technology, senior executives in private enterprise and lawyers, one with many years engineering experience.
112. Ms Janse van Rensburg identified several areas into which the 2011 board anticipated Denel would grow in the short term. Two of these will be mentioned.
113. On 24 July 2015 Minister Brown held a meeting with the incoming 2015 board. At the same meeting, she announced the names of all new members of the Audit and Risk

Committee (ARC). This was a departure from usual practice: an ARC is a committee of the board and should have been appointed by the board. However, a possible reason why the ARC members' names were announced before the 2015 board had even met for the first time will emerge from what follows later below.

114. Minister Brown, however, maintains that her actions in retiring the 2011 board members and appointing new board members was entirely regular. She testified that she excluded the Deputy Directors-General such as Mr Tlhakudi from the process as a deliberate act of policy because the Deputy Director Generals were too close to the decision makers within the SOEs and their involvement might lead to corruption and Deputy Director - Generals using the connection to obtain more highly remunerated positions within the SOEs themselves. This excuse given by Ms Brown for excluding senior officials from doing the normal job they always did whenever there were vacancies to be filled in relevant Boards is ludicrous. She excluded them because they could raise questions about the candidates that the Guptas wanted to be appointed and in that way put her in a position where she would have had to go back to the Guptas and tell them that she could not appoint certain candidates and she did not want to do that. That is how keen she was to please the Guptas. In this regard it can also be pointed out that in relation to Eskom Mr Zola Tsotsi gave evidence of how on one occasion Minister Brown called him, in his capacity as Chairperson of the Eskom Board of Directors, to her residence where he found her in the presence of Mr Tony Gupta and Mr Salim Essa and she instructed him in their presence to implement a particular composition of Committees of the Eskom Board that she had previously emailed to him which Mr Tsotsi said was the same as one he had received from Mr Salim Essa earlier. Minister Brown was helping the Guptas and President Zuma in their agenda of capturing the state. She cannot explain how she chose Mr Mantsha to be the Chairperson of the Denel Board. It transpired that Ms Brown did not know that Mr Mantsha had been struck off the roll of attorneys until after she had appointed him as the Chairperson of the Denel

Board. Mr Mantsha had been suspended as an attorney early in the year 2000 or 2001 until 2007 when the High Court, Pretoria struck him off the roll of attorneys.

115. The appointment of Mr Daniel Lungisani Mantsha as Chairperson of the Denel Board demonstrates how Minister Lynn Brown failed to do the most basic background check before appointing the Chairperson of the Denel Board. Mr Mantsha was admitted as an attorney in the mid-late 1990s. However, in 2001 he was suspended from practice as an attorney as a result of various allegations or findings of unprofessional conduct. In 2007 and while he was still suspended from practice, the High Court struck his name off the roll of attorneys. It would appear that his name was reinstated on the roll of attorneys a few years later but it is not clear when that was.
116. The judgment of the High Court in terms of which Mr Mantsha was struck off the roll is a public document and Minister Brown and her staff would easily have found it if they had done a basic background check on Mr Mantsha. The judgment is that of the Gauteng Division of the High Court, Pretoria, in the matter of *Law Society of Northern Provinces v Mantsha* case no. 21706/2003 which was handed down by Judge Southwood on 25 July 2007. That judgment reflects some of the conduct which led to Mr Mantsha being struck off the roll.
117. Paragraph 32 of the judgment reads as follows, with Mr Mantsha being the respondent in that matter:

“[32] The applicant has established the following misconduct by the respondent –

(1) The respondent failed to keep proper accounting records relating to money received and held by him in trust. This is a contravention of section 78(4) of the Act, unprofessional conduct and renders the respondent liable in terms of section 83(13) of the Act to be struck off the roll or suspended from practice. See *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394B-E;

(2) The respondent failed to keep proper books of account generally as required by Rule 68.1.1. As pointed out in *Cirota and Another v Law Society, Transvaal* 1979

(1) SA 172 (A) at 193F-G and Law Society, Transvaal v Matthews supra at 395D-E the failure to keep proper books of account is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or suspended;

(3) The respondent failed to produce his accounting records for inspection by Mr Faris, the applicant's auditor. This was a contravention of section 70(1) of the Act and constitutes unprofessional conduct in terms of section 70(2) of the Act;

(4) The respondent failed to comply with Rule 76.3 when he ceased to practise as Mantsha Attorneys on 31 May 2001. This is a contravention of Rule 89 read with Rule 89.11 and constitutes unprofessional conduct;

The respondent first wrongly denied that he had defaulted and then admitted that he had;

(5) The respondent failed to comply with Rule 70 when he commenced practising as Mantsha Nuntsweni Inc. This is a contravention of Rule 89 read with Rule 89.11 and constitutes unprofessional conduct.

The respondent first wrongly denied that he had defaulted and then admitted that he had;

(6) The respondent practised for two years without being in possession of a fidelity fund certificate as required by section 41(1) of the Act. This is a contravention of Rule 89 read with Rule 89.11 and constitutes unprofessional conduct. The respondent's attack on the applicant's bona fides was unjustified and unfounded;

(7) Apart from not keeping proper books of account the respondent allowed his trust banking account to go into debit. This is a contravention of section 78(1) of the Act and Rule 69.3;

(8) Shirt Bar.

The respondent attempted to pay his indebtedness to the Shirt Bar by means of cheques drawn on his trust account, five of which were dishonoured. By handing the creditors these cheques the respondent represented to the creditors that they were trust cheques which, according to the respondent they were not. He also represented to the creditor that he would be paid. There is no proper explanation for the fact that the cheques were dishonoured and in view of the respondent's financial position the inference is justified that he drew the cheques knowing that there were insufficient funds to meet the cheques;

(9) Hoffmann J.

(a) The respondent applied for judgment by default for his client Silva against SARS for payment of R1.5 million when he knew that SARS had already delivered a notice of intention of defend and a notice of exception.

(b) The respondent repeatedly failed to reply to letters addressed to him by the applicant in connection with the complaint.

(c) The respondent tendered an explanation to the applicant and this court that his client had applied for the judgment by default. That explanation has been found to be so inherently improbable that it cannot be believed and it has been rejected.

(10) Summersgill.

(a) When replying to the applicant's inquiries on behalf of Summersgill the respondent indicated that Summersgill's action was not defended but that he was in the process of applying for judgment by default. He provided the applicant with a notice of bar and the application for judgment by default. He did this well-knowing that the defendant had filed a special plea and a plea. The respondent was clearly attempting to mislead the applicant in connection with the progress of the matter.

(b) The respondent issued a summons after being told by the medical expert that Summersgill's condition was not caused by her work situation. To his knowledge therefore there was no cause of action. Despite this the respondent charged his client for services rendered.

(c) The respondent issued the summons when the claim had prescribed. The respondent admits this and admits that he erred in issuing the summons.

(11) Sibiya.

(a) The respondent informed the applicant that the Legal Aid Board refused to support the litigation when that was not so.

(b) The respondent informed the applicant that he had not been able to proceed with the case because Sibiya had not been able to obtain proof of his arrest. This was not the truth. Sibiya obtained copies of the relevant police record and handed them to the applicant. The true explanation must be that the respondent did not request the information from Sibiya or go to the police station to inspect the records.

(c) The respondent allowed Sibiya's claim to prescribe and withheld the fact that the action was opposed and that a plea of prescription raised which he has been advised would be successful.

(d) The respondent acted unprofessionally in not attending to Sibiya's case with the required skill, care and attention.

(12) Ankuda

(a) The respondent's statement to the applicant that there was no contingency fee arrangement entered into between him and Ankuda was a deliberate untruth. The respondent contradicted this statement in his answering affidavit without any attempt to explain the contradiction.

(b) The respondent's statements in his answering affidavit that the contingency fee arrangement related only to the CCMA matter were deliberately untruthful. The document itself clearly distinguishes between the claim for commission for which the respondent would receive the greater of 10 % of any amount recovered or R300 per hour and the maximum fee of R3 500 for the CCMA matter. In addition the finding above based on the respondent's failure to answer and deny Ankuda's statement in his fax that the arrangement governs both matters, puts the matter beyond doubt.

(c) The respondent failed to attend properly to the affairs of Ankuda in regard to the claim against Holcom;

(d) The respondent was untruthful when he advised Ankuda that an offer had been received from Holcom, through its attorneys Deneys Reitz, in the sum of R800 000, when no such offer had in fact been received;

(e) The respondent was untruthful in advising Ankuda that Holcom had through its attorneys, Deneys Reitz, made an offer of settlement of R410 000, when no such offer had been made;

(f) The respondent was untruthful in advising Ankuda, in about March 1999, that judgment had been obtained against Holcom for R800 000, interest and costs, when in fact no such judgment had been obtained;

(g) The respondent was untruthful in representing to Ankuda, on or about 28 April 1999, that a warrant of execution had been prepared pursuant to the judgment allegedly obtained and that it was to be processed the following day;

(h) The respondent acted unprofessionally borrowing money from his client and repaying that money by way of cheque drawn on his firm's business account which was dishonoured on presentation;

(i) The respondent was untruthful in informing the investigation committee that a plea had been filed in the Holcom matter.

### (13) Wreckers

In respect of the first complaint the respondent acted un-professionally:

(a) in failing to hand over the file to Brian Kahn;

(b) in failing to act in the best interests of his client;

(c) in failing to reply to correspondence and in failing to act with the care, skill and attention expected of an attorney;

In respect of the second complaint the respondent:

(d) misrepresented to Wreckers that their case had been settled and the cheque for R6 000 deposited and paid when this was not so;

(e) deposited the cheque into his account, obtained payment and retained the amount paid for more than two years;

(f) failed to carry out his client's instructions to deliver the cheque to Deneys Reitz and retain the funds himself;

(g) did not act in the interests of his client and did not act with the skill, care and attention expected of an attorney.

(14) Sinyatsi.

The respondent recovered R4 200 for his client and failed within a reasonable time to account to her and pay over the money.

(15) McIntyre & Van der Post

(a) The respondent failed to pay his correspondent as required by the rules. The respondent failed to pay despite repeated undertakings to do so.

(b) The respondent misrepresented the nature and extent of the work done by McIntyre & Van der Post to the applicant.

(16) Advocate Van Sittert.

The respondent failed to pay advocate Van Sittert's fees totalling R28 283,20 despite an agreement that the respondent would be personally liable for these fees and settle the advocate's accounts within 97 days. Advocate van Sittert has not been able to recover this amount from the respondent. This constitutes a contravention of Rule 68.9 and unprofessional conduct in terms of Rules 89 read with 89.11.

(17) The respondent's persistent failure to reply promptly to letters from his clients and from the applicant and sometimes his failure to reply at all."

118. In paragraph 35 of the judgment the High Court said about Mr Mantsha (respondent):

"[35] While it is true that no loss by the Fidelity Fund has been established it is clear that a misappropriation of funds occurred in the case of Wreckers (R6 000). It has also been established that the respondent is untruthful when dealing with his clients, the applicant and the court. His professional conduct and his conduct in this case also demonstrate a lack of insight into the attorneys' profession and the role which the applicant plays in supervising attorneys' conduct. The factors mentioned above do not show that the respondent has insight into his character defects and that he has rehabilitated himself. Taken cumulatively the respondent's conduct referred to in this judgment demonstrates not only that he is not a fit and proper person to continue to practise as an attorney but that the only proper sanction is that of striking from the roll. While I have sympathy with the difficulties which the respondent experienced in qualifying as an attorney his conduct indicates that the public must be protected from him."

119. It is said that by 2015 he had been re-admitted as an attorney and could practise as an attorney. Mr Mantsha must have been chosen by the Guptas. Ms Brown could not explain how it came about that the only member of the 2011 Board of Denel who was allowed to continue as a Board member beyond July 2015 was Mr Motseki who had an existing relationship with the Guptas. Minister Brown acknowledged the failure to appoint a chartered accountant to the 2015 board. She accepted that because Ms Janse van Rensburg, the chair of the 2011 board, was a chartered accountant, Ms Janse van Rensburg would have been an appropriate person to retain on the 2015 board. She described how the positions on the board were advertised and a list submitted to her by an outside organisation called Nexus, she thought, which evaluated the candidates for board positions. In the place of the Deputy Director-Generals, then Minister Brown used her legal unit to examine the list. The list was then evaluated first by the Deployment Committee of the ANC and then by the Cabinet. This was Ms Brown's evidence. Therefore, the Deployment Committee of the ANC approved a Board which consisted of a majority of members who were connected with the Guptas.
120. Minister Brown appeared to do little more, on her version, than transmit the list of candidates drawn up by the outside organisation to her party and then to the Cabinet before she rubber stamped the nominees for appointment. She made no attempt to explain why the only non-executive member of the 2011 board to be retained, Mr Motseki, was selected for this purpose. Nor did she explain why the board chair, Mr Mantsha, who had been struck off the roll of attorneys and then reinstated in 2011, was selected as chair.
121. Minister Brown explained that she did not become involved in the disciplinary process regarding the three suspended Denel executives on advice of her officials that this was a matter appropriately left to play out between Denel and the executives themselves. However, she accepted that the Department of Public Enterprises should conduct its



own process to evaluate the probity of the process. However, despite being asked specifically to do so by Mr Saloojee through his attorney, Minister Brown persisted in her supine attitude. Yet, when she attended a meeting of the Board of Directors of Eskom on the day she effectively urged the Board to suspend certain executives there she did not adopt the same attitude when the Deputy Director-General who accompanied her to that meeting advised her that they should not be taking part in the discussion about operational matters and the suspensions of executives, she resisted leaving the meeting. When, after some time, she agreed to leave the meeting, she told the Board that she would be on standby within the premises if they needed her. The question is why she was happy to urge or advise the Board of Eskom to suspend the Executives but she was not prepared, when approached by Mr Saloojee, to intervene in Denel. Although she may seem to have acted inconsistently, in each case she acted consistently with the wishes of the Guptas. In Eskom the Guptas wanted to have the executives suspended and she went along. In Denel the Guptas were behind the suspension of the executives and she went along.

122. In her address to the new Board of Directors of Denel on 24 July 2014 Ms Lynne Brown said that those new directors – including Mr Mantsha – had been selected after a rigorous process which included consultation with the Cabinet. Either in that address or oral evidence before the Commission Ms Brown also said that she had taken the names of the people she intended to appoint to the Denel Board to the ANC Deployment Committee. She said that she was allowed to go ahead and appoint them. If her evidence in this regard is true and there is no reason to think it is not because we all know that the ANC's position is that it has an interest in the people appointed as members of Boards of SOEs and they have a say, in such matters, the question arises: how could a situation be allowed where a person such as is described in the Mantsha judgment referred to above is appointed to a Board of an SOE, not to talk about such a person being appointed as the Chairperson of such a Board? That this was allowed to

happen is simply indefensible. When you have an interest that an SOE is led by good people – people of integrity and people with the necessary knowledge and expertise, it would be expected that at least you would ensure that basic background checks would be done. That somebody with this background could be appointed to be the Chairperson of the Board of an SOE as important as Denel makes you wonder how many other people have been appointed and continue to be appointed to important positions without proper background checks and who should not have been appointed. Maybe a lot of such people have been appointed to SOEs and that is why what is happening to the country's SOEs is happening.

123. The Commission tried unsuccessfully to obtain the judgment which allowed Mr Mantsha to be re-admitted as an attorney to see how it justified re-admitting somebody who had been struck off the roll on the basis of what is set out in the judgment referred to above but the Commission did not succeed in getting it. It is recommended that the Legal Practice Council should try and investigate how Mr Mantsha got re-admitted if he did get re-admitted as an attorney. If he did get re-admitted, he should have been expected to have taken the Court into his confidence and explained a number of things that the judgment referred to above says he did not explain to the Court when he was struck off the roll.

#### **Land Systems South Africa (Pty) Ltd (LSSA), Renamed DVS**

124. LSSA is important in the wider context because the 2015 board and Mr Mantsha in particular claimed that misconduct by Mr Saloojee and the Group Chief Financial Officer, Mr Fikile Mhlontlo, justified their suspensions.
125. The 2011 board concluded a transaction for the acquisition of LSSA in 2014. They regarded LSSA as an ideal fit for Denel to enhance its landward equipment capabilities, building on its experience and expertise regarding vehicle programs such as the G5,

G6, Rooikat and Casspir. LSSA had always been responsible for the production of these vehicles while Denel was responsible for the overall concept design, firepower and integration. The 2011 board considered that the acquisition would better position Denel for future vehicle acquisition programs by the SANDF and mitigate production risk on some of the bigger programs.

126. The acquisition of LSSA was supported by the Department of Defence and SANDF and the then Minister. Approvals were secured from the Competition Board and the Reserve Bank.
127. The success of the acquisition transaction was dependent on the inclusion of a strategic equity partner who would bring at least R450 million as investment equity and provide significant access to markets and orders. At the time of its departure, the 2011 board had identified a few potentials such partners with the right qualities and had commenced a closed bid process in that regard. This process was at an advanced stage when the 2015 board took over.
128. However, the 2015 board discontinued the process for the participation of the strategic equity partner in LSSA. In the opinion of Ms Janse van Rensburg, there was no sound business reason for the discontinuation of the process. The inclusion of a strategic equity partner was critical to the success of the LSSA transaction and the financial viability of Denel. Ms Janse van Rensburg links the decline of Denel to the decision to terminate the search for a strategic equity partner in LSSA, exacerbated by failures of governance and what she called other negative publicity.
129. Ms Janse van Rensburg's evidence on the potential value of the LSSA acquisition was contradicted by that of Mr AS Burger, whose view is that LSSA was worth no more than R300 million, at most, while Denel bought the interest in LSSA for R855 million. This acquisition, according to Mr Burger was what led to Denel's decline.

130. Mr Burger did not attempt to justify this firm assertion but said that an “objective assessment of all available evidence will undoubtedly reveal” that he is correct.
131. The evidence of Ms Janse van Rensburg is preferred. Mr Burger's opinion is based on speculation, reached without an examination of the facts and is part of the bluster that he employed in an effort to deflect attention from his own conduct. On the other hand, Ms Janse van Rensburg's conclusion is reasoned and supported by the facts. It is indisputable that the transaction went through many levels of scrutiny, including by Denel itself, the Competition Commission, the Department of Public Enterprises and the Minister.
132. Ms Janse van Rensburg denied that the 2011 board had made a decision to establish the Denel Asia Venture. She pointed out that in August 2014, Denel had finally resolved the criminal investigation into Denel which had been going on for ten years. This had opened the way for Denel to seek to do business with the government of India.
133. Ms Janse van Rensburg pointed to a joint venture which Denel had concluded with Tawazun Dynamics after the UAE had concluded a significant missile contract with Denel, as part of the offset provisions of that contract. This showed that Denel was open to such ventures under the 2011 board.
134. Ms Janse van Rensburg referred to the venture with Tawazun Dynamics to contrast the position of that firm with that of VR Laser. In her view, VR Laser had no manufacturing capabilities or any demonstrable access to markets; there were no offset imperatives that necessitated the creation of VR Laser; under the joint venture with VR Laser, Denel would have an effective 25% ownership of the venture vehicle; and VR Laser had no demonstrable experience or access to the relevant Indian market.

135. Ms Janse van Rensburg accordingly testified that the establishment of Denel Asia made no economic sense for Denel because it would have entailed Denel giving VR Laser a share in the venture without receiving any significant benefit in return. The venture also appeared to go counter to the established principles by which Denel had historically concluded successful partnerships.
136. Ms Janse van Rensburg described how in a process completed on 28 April 2015 Denel acquired Land Systems South Africa (Pty) Ltd (LSSA), which changed its name to Denel Vehicle Systems (DVS). This acquisition enhanced Denel's capability in the production of landward equipment such as mobile artillery systems and infantry carriers. She testified that this transaction required that Denel obtain a strategic equity partner, who would bring to the proposed venture at least R450 million and significant access to markets and orders. This process was commenced through a closed bidding process. Ms Janse van Rensburg communicated to Minister Brown the then current position in regard to DVS in a letter dated 3 July 2015. However, the new board simply cancelled or discontinued this strategic equity partnership. This put considerable financial strain on Denel because its balance sheet was not strong enough to repay the loans which Denel had taken out to pay for the acquisition.

**DENEL BOARD CHAIR TOUTS GUPTAS TO DENEL CEO AT SAXONWOLD COMPOUND**

137. In early September 2015 the new chair of the 2015 board, Mr D Mantsha, called Mr Saloojee to what Mr Mantsha described as a briefing meeting, to be held probably at his office. While Mr Saloojee was en route, Mr Mantsha called him again and said the meeting would be at the Saxonwold compound. Present at this meeting were Mr Mantsha, Mr Tony Gupta, Mr Essa and Mr Saloojee. Mr Tony Gupta said that the Guptas were interested in acquiring LMT. Mr Saloojee indicated that this would take time and would require several processes. Mr Saloojee testified that he got the impression that Mr Tony Gupta was frustrated by the way Mr Saloojee appeared to be putting obstacles in the path which the Guptas wished to follow in relation to Denel.
138. Mr Mantsha dealt with this meeting in his affidavit signed on 28 August 2020. In the affidavit Mr Mantsha said that he did not request to meet Mr Saloojee and did not direct him that the meeting would take place at the Guptas. His recollection was that Mr Essa convened the meeting as a follow up to meetings he had previously had with Mr Saloojee. Mr Mantsha agreed with Mr Saloojee that present at the meeting were the two of them and Tony Gupta and Mr Essa. He said that Mr Essa asked Mr Saloojee for feedback on the progress of the discussion that Mr Saloojee had apparently had with the two private shareholders of LMT in which Denel was majority shareholder.
139. Mr Mantsha said that it appeared that there was an agreement between Mr Essa and Mr Saloojee that Mr Saloojee would ask the two private shareholders in LMT to sell their shares to VR Laser, then controlled by Mr Essa. Mr Mantsha said that Mr Saloojee reported that he was still talking to the shareholders and that at the end of the discussion he was asked if he had any comment. He testified that he replied that he did not have any comment since at that stage he did not even know what LMT stood for and what it did and that he further had no background in the matter.

140. Mr Mantsha said that on the way out Mr Saloojee had said to him “Chair, I need your support” and that he had told Mr Saloojee he would look into the matter. He denied that he had asked Mr Saloojee to look into the matter and give feedback. His impression based on the nature of the discussion was that Mr Saloojee and Mr Essa had a long close working relationship with each other.
141. In oral evidence Mr Mantsha departed from his affidavit. He said that it was possible that he might have been the one who asked Mr Saloojee to meet him or that Mr Essa might have asked Mr Saloojee to attend the meeting. This, according to Mr Mantsha, was the only meeting at Saxonwold where Denel matters were discussed.
142. Apart from the deviation from his affidavit, it is strange that Mr Mantsha would have attended a meeting at which, on his version, he did not know what was to be discussed. It will be recalled he claimed he did not know anything about LMT, not even what that acronym stood for.
143. Mr Saloojee's evidence that Mr Mantsha called him to the meeting is, on the probabilities, true. That Mr Mantsha was prepared to attend a meeting about Denel with the Guptas about which he did not even know what was to be discussed, shows that at that early stage he was prepared to do the Guptas' bidding without question and that he was quite prepared to call the Denel CEO to a meeting about which he knew nothing and attend such a meeting himself. That would be if his version that he did not call Mr Saloojee to that meeting and that he did not know what that meeting was about were true which cannot be.

## **THE SUSPENSION OF DENEL EXECUTIVES**

144. On 9 September 2015 a special ARC meeting with its newly appointed members was convened to consider the acquisition of LSSA, renamed DVS by Denel. They received

a full briefing from Mr Saloojee, who formed the impression that the members of ARC had neither the experience or the qualifications to evaluate this transaction. It must be emphasised, however, that this transaction had gone through the full rigour of the processes established to evaluate such an acquisition and culminated with approvals from, amongst others, the 2011 board, the Department of Public Enterprises, the Competition Board and the Treasury. The purchase price which Denel paid for DVS, some R855 million, was determined as an appropriate price by experts retained for the purpose, not by Mr Saloojee and other officers at Denel.

145. On 10 September 2015 the 2015 board held its first meeting. The members of the Denel executive were required to leave their cellphones outside the meeting. This had not been happened before.
146. Mr Saloojee and Mr Mhlontlo presented a written report at the board meeting. The report covered a wide range of topics, setting out Denel's position in the local defence industry and describing its products. The report specifically addressed Denel's strategy for focussed business development in key markets such as Brazil, the UAE, Africa and Malaysia.
147. However, the 2015 board showed little interest in the presentation by the executive. Without any prior notification, the board members proceeded to discuss establishing a formal presence in Asia, particularly India, to explore business opportunities. Mr Saloojee's evidence was that he expressed the view that such action was premature because, in the light of the lifting of the blacklisting of Denel in India, Denel needed first to undertake an analysis of the market and new opportunities, to develop a credible strategy and to explore potential strategic partnerships with established entities. This process, it was noted, would take some time, after which the executive would present their findings to the 2015 board.



148. Mr Saloojee's impression was that his response did not please the members of the 2015 board but no further discussion on the question took place. However, in the report to Parliament submitted after 29 January 2016, (the date on which the report records Denel Africa as having been incorporated), it is stated that Mr Saloojee made a presentation to the board on 10 September 2015 in which he requested the 2015 board to authorise him to pursue the Denel Africa venture and to find a strategic partner for Denel in this venture.
149. It would appear that this passage in the report to Parliament was either wholly inaccurate or did not capture the essence of Mr Saloojee's response when the prospect of the venture was raised. When the report was presented to Parliament, Mr Saloojee was under suspension and, therefore, did not take part in its preparation and was not responsible for its contents.
150. From 14 to 19 September 2015 Mr Saloojee and the Denel team attended the Defence Security Exhibition in the United Kingdom. Minister Brown and Mr Mantsha were members of the Denel delegation. Mr Saloojee arranged a briefing session with Minister Brown and Mr Mantsha to familiarise them with the objectives of the exhibition and key stakeholders and customers with whom they would be meeting.
151. Before the briefing session, Minister Brown and Mr Saloojee had coffee together. There, Minister Brown told Mr Saloojee that she had instructed her officials to extend Mr Saloojee's term as group CEO, as recommended by the 2011 board. Minister Brown told Mr Saloojee how happy she was with his performance.
152. During the time they were in the United Kingdom, Mr Mantsha told Mr Saloojee that ARC was unhappy with Denel's acquisition of DVS. On the day Mr Saloojee returned to his office after the trip to the United Kingdom, he was summoned to a meeting of ARC. At the ARC meeting, without any prior warning, Mr Saloojee was called upon by

the Chair of the ARC to provide reasons why he should not be suspended because of his participation in the DVS transaction. No specifics were given to him and the ARC members did not tell him what he was alleged to have done wrong or which aspect of the DVS transaction Mr Saloojee was required to address if he wanted to avoid suspension. They did not tell him despite the fact that Mr Saloojee asked them for the information. Mr Saloojee told ARC that there was nothing about the transaction that required an explanation from him.

153. Similar meetings were held by ARC with Mr Mhlontlo, the Group CFO, and Ms Afrika, the Group Company Secretary. Mr Mhlontlo responded in a manner similar to that of Mr Saloojee.
154. The following day, 22 September 2015, Mr Saloojee was handed a letter of the same date. The letter dealt in depth with the DVS transaction. Its thrust was that Mr Saloojee had defrauded the South African government through its relevant organs by giving fraudulent reasons to justify the transaction and that Mr Saloojee had breached the terms on which permission to conclude the transaction had been given. The letter gave Mr Saloojee about one day to advance reasons why he should not be suspended for a period of three months.
155. Mr Mhlontlo received a similar letter. It seems that Ms Afrika did as well, although the text of the letter to Ms Afrika was not placed before the Commission. Mr Saloojee, Mr Mhlontlo and Ms Afrika responded to the allegations by the ARC in a joint letter dated 23 September 2015 addressed to the Denel board. They protested their innocence on the allegations made against them, protested that the time allowed them to respond was grossly inadequate and that the process was thus unfair, asked for a short extension of time in which to present their case, pointed to their lengthy periods of good service to Denel, contended that the reputational damage to Denel and the executives

would far outweigh any benefit of a suspension to Denel and offered to engage in constructive discussions with the members of the board in an effort to resolve the concerns raised against them.

156. Neither the board nor the ARC answered the letter of 22 September 2015. Instead, the three executives were summoned to a meeting of the ARC that same day, i.e. 23 September 2015. Each of them met separately with the ARC. After these separate meetings between the ARC and the three executives, the ARC members were joined by Mr Mantsha and other members of the 2015 board.
157. Then the three executives were separately called back to the ARC meeting. The ARC offered each of the three executives, separately, a three-month package if they would resign. Each of the three executives refused the offer and declined to resign.
158. In a letter dated 25 September 2015 the three executives jointly proposed a final and binding arbitration under s 188A of the Labour Relations Act, 1995.
159. On the same day Mr Mantsha wrote to Mr Saloojee. His letter asserted that Mr Saloojee had failed to provide reasons why he should not be suspended and that the board had resolved on 23 September 2015 to suspend him for three months or such further period as the board might determine, on full pay. Mr Mhlontlo and Ms Afrika received equivalent letters.
160. The three executives addressed a letter to the Denel Board dated 23 September 2015 with regard to their proposed suspension. Some of the points they made in their letter were the following:

- 160.1. they wished to resolve the matter constructively and agree on a process that did not involve a damaging suspension; they said that the process could be expedited and they suggested that the timeframes be agreed.
- 160.2. it was clear from the haste with which the A&R Committee was drawing conclusions that the “entire event” (i.e. suspension and allegations of gross misconduct) had been premeditated for some time, at least since 10 September 2015.
- 160.3. they requested a week in order to compile a comprehensive presentation in response to the document prepared, well in advance of the meeting at which they had been “confronted on the 22nd September 2015.”
- 160.4. they said it was clear and would become more abundantly clear in any transparent and objective process even a final and binding arbitration in terms of section 188A of the Labour Relations Act, 1995 or similar process that the complaints had no merit whatsoever and that all the necessary statutory and corporate governance approvals had long since been met.
- 160.5. they reiterated that the Minister and the Board had already approved the transaction of which the Board was complaining and that furthermore “Denel SOC is a beacon of hope in respect of financial performance and governance and has not been tarnished in this manner.”
- 160.6. they said that they were requesting an opportunity to comprehensively address the allegations in the suspension letter and thereby obviate the need for any further investigation or disciplinary process.

161. On the 25th September 2015 the three executives addressed a letter to the Chairperson of the Board, Mr Mantsha on their suspension. In that letter they pointed out that the A&R Committee accused them of being disrespectful to it because they had sent their earlier letter to the Board rather than to the Committee and the Committee said to them that they were guilty of dishonesty and had had enough time to respond to the allegations. They once again said that, if given enough time, they would be able to answer the allegations against them comprehensively. They also placed on record that they were offered an immediate resignation and one months' notice pay or an 'alternative offer of three months' pays.

162. In that letter the three executives also said the following, among others:

"In our letter dated 23 September 2015 we have already proposed a final and binding arbitration in terms of Section 188A of the LRA since we are confident that there is no substantive merit to the allegations. Such a process will also test the bona fides of the A&R Committee's willingness to expedite the matter. It is not appropriate to take a further 90 days to investigate since the Committee has already been solely focused on this investigation since their appointment and seemingly long before we were confronted with the allegations. We therefore request that you consent to the following:

11.1 That we receive a final charge sheet by no later than Friday 2 October 2015.

11.2 That we be granted legal representation at the internal hearing.

11.3 That we be afforded 14 days preparation time and that the enquiry commence on Monday the 19th October 2015.

11.4 That a senior Counsel of the Sandton Bar who is an expert in employment law matters be appointed to chair and that the selection be transparent and untainted.

11.5 That the disciplinary enquiry take the form a final and binding arbitration in terms of section 188A."

163. The correspondence referred to above that the three executives sent to the Board or the A&R Committee proposed an expedited process to decide whether they were guilty of the allegations or not. They proposed a process under section 188A of the Labour

Relations Act that would have been binding on all parties. The Board did not agree to that. They had also asked to be given time to comprehensively respond to the allegations and the Board did not accept that. Instead, the Board or the A&R Committee offered them three months' pay in return for their departure from Denel. Why? Why did they offer this to employees that they said were guilty of dishonesty? Why did the Board not agree to an expedited process in which their allegations would be tested? Was the Board scared that their allegations would not stand and then the three executives would have to return to work? It has to be so. Otherwise, the Board's refusal to go along with that proposal makes no sense. That must mean that it was crucial to the Board that these three executives be not allowed back at work under any circumstances any time in the future. That should not be the attitude of an employer before an employee is found guilty in a proper disciplinary process.

164. Minister Ntshavheni submitted an affidavit to the Commission at the request of the Commission to explain how the Board and the Audit and Risk Committee of which she was part defends or explains its conduct in regard to the three executives. She said she agrees with Mr Mantsha's position and has sought to defend the Board's decision on the same basis as Mr Mantsha did. Her and Mr Mantsha's explanation make absolutely no sense. Minister Ntshavheni, like Mr Mantsha, says that there was strong evidence that the three executives were guilty of serious acts of misconduct and this evidence was already there when the executives were suspended. If that was so, the question is: why was that evidence not placed before the three executives in a disciplinary inquiry within a month after they were suspended? If, for some reason, the Board could not do that within a month, why could it not do that within the first three months of the suspension of the executives? Why did it not do that within six months?
165. Why did the Board not accept the three executives' proposal that they made on 23 or 25 September 2015 that an expedited process be agreed upon and timeframes be

agreed upon to have these allegations tested so that the matter could be finalised without delay? The Board of which Mr Mantsha and Minister Ntshavheni were part did not agree to this proposal and no sound explanation has been given why the Board did not accept it, particularly because, on Mr Mantsha's evidence and Minister Ntshavheni's evidence on affidavit, there was enough evidence before the Board already when the executives were suspended which showed that they were guilty. The Board's decisions in regard to this matter make no sense unless one accepts that the suspensions and the way that the Audit and Risk Committee and the Board dealt with the matter of these executives reveals that there was an agenda to push these executives out of Denel at all costs. If the expedited process that the executives proposed was accepted, there was a serious risk that they would be found innocent and would have to be allowed back at work and the Guptas' agenda would be thwarted. It would have been expected that anyone who may not have realised this when it happened would have realised it by now but even in 2021 – when so much evidence has been put in the public domain – Minister Ntshavheni still thinks that there was nothing wrong that the Board did.

166. Both Mr Mantsha and Minister Ntshavheni sought to explain the delay in the finalisation of the suspensions or in convening a disciplinary inquiry – which was never convened -on the basis that the Board had asked the Head of the Legal Department at Denel to handle the matter and he delayed and they as the Board were complaining about this. This explanation is rejected. In other words, both Mr Mantsha and Ms Ntshavheni say that the Board was keen to have the disciplinary inquiry convened as soon as possible and it was only the Head of the Legal Department who delayed this. There is no way that a Board which had all the evidence it needed against the three executives already on 22 September 2015 could have allowed the Head of the Legal Department or anybody to delay the convening of the disciplinary hearing for over six months. The explanation simply makes no sense.

167. In a letter dated 18 February the attorney representing the suspended executives inter alia said to Denel's attorneys that her clients, namely the executives were insisting that a disciplinary hearing be convened so that the matter could be finalised. It is quite clear from the letters that the three executives said to the Denel Board that they were keen to have the Board's allegations against them tested but that the Board always found excuses over the suspension period to avoid a forum where the allegations were going to be tested. That is because they knew that the allegations had no merit. If they truly believed that the allegations had merit, they would have agreed to the executives' proposal for an expedited process to test the allegations and would have convened a disciplinary inquiry and allowed the process to take its course. The allegations were made for an ulterior purpose. Accordingly, the suspension of the executives was resorted to in order to facilitate the capture of Denel.
168. The 2015 board then instructed Dentons Attorneys to conduct an investigation, with the assistance of Grant Thornton. Each of the three executives was separately interviewed by Dentons. Mr Saloojee himself was interviewed on 14 November 2015. On 14 December 2015, Mr Saloojee was served with a charge sheet detailing his alleged acts of fraud, breach of his obligations and other alleged malfeasances.
169. Perhaps by accident (one does not know) the Acting Group Company Secretary sent to Mr Saloojee a copy of a letter dated 17 December 2015 written and signed by Mr Mantsha to the Acting Group Company Secretary. The contents of this letter are astonishing and it warrants quoting in full.
170. Mr Mantsha's letter to the Acting Group Company Secretary reads as follows:

"1. I request you to furnish us with the charge sheet so that we can settle as we need to have the charges served upon the suspended employees before close of business tomorrow the 18 of December 2015.



2. And further request you to draft a settlement proposal of three months payments in full and final to the three suspended employees.
3. The offer of settlement must be delivered tomorrow together with the charge sheet and further with a letter informing them that their suspension is extended until the finalisation of the hearing.
4. You are further requested to inform Dentons that their report is not accepted and request them to provide us with a report within thirty (30) days and kindly direct them to provide information to support the charges."
5. And lastly may you recall the circulated Denton's report and make sure it is not circulated." [own emphasis]

171. By itself, this letter demonstrates that the suspensions were not effected in good faith and for the purpose of advancing the true interests of Denel. The suspensions were, on the evidence of this letter, a hatchet job. The suspensions were, literally, weaponised, to serve a corrupt purpose. What was that purpose? I shall make that clear shortly.
172. Mr Mantsha gave evidence initially over two days. He was an unimpressive witness. He was consistently vague, taking refuge in lack of memory, and complained consistently of being victimised. He would have been aware of critical issues on which the Commission wanted to hear him. He replied on paper frequently without any attempt to present facts to back up his bland assertions of innocence. He sought to present his relationship with Mr Saloojee as one which began with an admiration for the good work Mr Saloojee had done in Denel. At the first board meeting of the 2015 board on 10 September 2015 Mr Mantsha actually congratulated Mr Saloojee on turning Denel around. Mr Mantsha claimed that soon thereafter he had learned that Mr Saloojee had deceived the board when he concluded a bridging finance arrangement with ABSA.
173. Perhaps the low point of Mr Mantsha's evidence was his efforts to explain why Gupta money had been used to fund his travel and accommodation in Dubai and India in early October 2015. His explanation was that he had a private verbal arrangement with Mr Chawla, the then CEO of Sahara Computers, a Gupta company. According to Mr

Mantsha, Mr Chawla would organise and pay for Mr Mantsha's travel through invoices raised on Sahara. Mr Chawla would then tell Mr Mantsha what he owed Mr Chawla and Mr Mantsha would then reimburse Mr Chawla the travel costs plus a fee for Mr Chawla. This was said to be a private business of Mr Chawla. There was not a shred of paper to back up Mr Mantsha's version. Nor was it explained why Mr Mantsha happened to have enough cash lying around and available for the travel costs and Mr Chawla's fees when needed.

174. The conclusion is irresistible: the overseas travel was a quid pro quo for Mr Mantsha's services in effecting the capture of Denel. The letter quoted above shows that Mr Mantsha tried to get Dentons to manufacture evidence to support Mr Mantsha's campaign to oust the executives. His denial in this regard is rejected. Mr Mantsha was a deliberately untruthful witness. The Commission accepts Mr Saloojee's evidence on all points where he is contradicted by Mr Mantsha.
175. This is perhaps an appropriate place firstly to answer the question posed above: why was the new ARC constituted even before the first 2015 board meeting? The answer is that Mr Mantsha needed the new ARC to deal with and neutralise the executives. Secondly, it is appropriate here to mention that the 2015 board appointed Mr Ntshepe, the relatively junior executive who had formed the link between Mr Saloojee and Mr Essa (and thus the Guptas) as Acting Group CEO in Mr Saloojee's place. They did so probably because Mr Mantsha knew that Mr Ntshepe would do as he was told and not raise the kind of troublesome objections that Mr Saloojee had.
176. All the directors who supported Mr Mantsha in his corrupt endeavour to get the three executives out of the way are similarly probably culpable. The evidence before the Commission does not enable one to name names in this regard but it does show that at least one of the new appointees to the 2015 board did not go along with this scheme.

177. Ms Nonyameko Mandindi was appointed to the 2015 board. She had reservations about the suspension process because the 2015 board had been in office for too short a time adequately and fairly to assess the allegations. She was also confused because, according to the agenda, the board was supposed to discuss the LSSA transaction. Despite her misgivings, she left at about 21h00 before the conclusion of the board meeting. She learned the next day that the board had resolved to suspend the three executives and approve certain acting appointments.
178. Ms Mandindi wrote a letter dated 25 September 2015 to Mr Mantsha to express her concerns about the procedure followed at the board meeting and to the lack of wisdom shown by the board in proceeding as it did. Mr Mantsha did not reply to her letter.
179. On 7 October 2015 Ms Mandindi signed a round robin resolution of the board in which she disagreed with the decision to appoint Dentons to investigate the LSSA transaction. She followed up her letter with an email dated 13 October 2015 to her fellow board members in which she urged the board to investigate and debate the LSSA transaction in a proper manner. She resigned as a board member pursuant to a letter to Minister Brown dated 30 July 2016.
180. There was a series of communications between the attorneys for the executives and those of Denel. The disciplinary hearing was initially scheduled for 25 January 2016. The executives' attorney called, entirely predictably, for production of a list of documents. None was forthcoming. Instead Denel offered mediation. Mediation went ahead on 8 February 2016. It was unsuccessful.
181. In a letter dated 17 March 2016 to Mr Saloojee, Mr Mantsha offered to pay Mr Saloojee out for the balance of his contract, which was due to terminate by effluxion of time on 17 January 2017. Mr Saloojee in response rejected the offer and pressed for a disciplinary enquiry to be held.

182. By letter dated 1 October 2015, the three suspended executives, through their attorney, wrote to Mr Mantsha as chair of the Denel board, complaining of the process which had been followed in their suspension. They copied this letter to the Minister and asked her to intervene. The Acting Director-General of the Department of Public Enterprises responded in a letter dated 26 October 2015, declining to intervene on the basis that this was a board, and not a shareholder, issue. Nevertheless, the Department of Public Enterprises committed itself in the letter to:
183. “undertake a process of its own to ensure that the actions taken by the Board in respect of the necessary governance processes have been followed in accordance with relevant regulatory principles.”
184. Minister Brown approved this stance.
185. By letter dated 25 April 2016, through his attorney, Mr Saloojee wrote to Minister Brown. Setting the facts out fully and providing relevant documents, Mr Saloojee asked Minister Brown to intervene in order to cause his immediate reinstatement as Group CEO. Minister Brown did not respond to this letter. Despite the case made by Mr Saloojee, no process was ever undertaken by the Department of Public Enterprises to examine the lack of probity with which the disciplinary processes of the 2015 board had been undertaken.
186. It is striking, and not to Minister Brown's credit, that, when Mr Saloojee complained to Minister Brown that he was being victimised to the prejudice of Denel, Minister Brown did nothing to investigate independently the circumstances complained of. It will be recalled that in September 2015 Minister Brown had been so impressed with Mr Saloojee's performance as Group CEO of Denel that, over coffee in London, she had offered him an extension of his contract.

187. Ms Brown's refusal to intervene in this matter relating to the Board of Denel and Denel's executives in regard to the suspension of the executives stands in stark contrast to her willingness to influence the Eskom Board on 11 March 2015 to suspend the executives. The question that arises is: why was she prepared to intervene in the one but not in the other? Could it be that in the Eskom one her intervention may have been to assist the Guptas in their agenda but in Denel they would not have wanted her to intervene? I think that is the reason for her inconsistency.

### **Denel Pays Very Large Cash Settlements to Suspended Executives**

188. Finally, Mr Saloojee accepted the inevitable. Denel had, despite his best efforts, run down the clock and had denied him a fair hearing on the very serious allegations it had made against him to justify his suspension. Mr Saloojee signed a settlement agreement with Denel dated 8 November 2016. Denel paid Mr Saloojee out a total of R2 661 383 made up of accrued leave pay of R298 891 plus an "ex gratia amount" of R2 362 492.
189. Mr Mhlontlo's employment clock was similarly run down. He received a settlement of his full salary while he was under suspension until the termination date under his settlement agreement, as well as a 13th cheque amounting to R163 711,35 and an "ex gratia amount" of R6 625 644 and a short term incentive bonus of R1 656 411, all without prejudice to his rights under the rules of the Denel Retirement Fund and the medical aid fund. Mr Mhlontlo's settlement agreement with Denel was dated 25 July 2016. This means that Mr Mhlontlo was paid R 8 445 766,35 in addition for receiving his full salary for about nine months of suspension without working. Of the above amount just over R 6,6m was an "ex gratia payment". Denel was paying an employee that, according to Mr Mantsha was guilty of serious acts of dishonesty such a large amount. Why?

190. The Commission received the evidence of what transpired in regard to Ms Afrika through the affidavit of Mr Sadik. Through this affidavit, the Commission received the settlement agreement concluded between Denel and Ms Afrika. In settlement of her claims against Denel, Ms Afrika was paid an “ex gratia amount” of R1,642 million.
191. Mr Mantsha's version on the conduct or lack of conduct of the disciplinary proceedings was vague. He blamed the Denel management for not proceeding with the process as should have happened. Mr Mantsha justified the very large pay outs to the suspended executives on the ground that this protected Denel's reputation. I reject that explanation. The damage to Denel's reputation took place when the executives were suspended. Their successful prosecution on the serious charges levelled against them would have improved Denel's reputation.
192. Then Mr Mantsha sought to justify these payments of some R10 million, at a time when Denel was in a critical financial state on the basis that the disciplinary proceeds would have cost more. He did not suggest that he had the attendant financial and reputational risks and benefits analysed. Once again there is not a shred of paper to justify the assertion that he ever made a calculation in this regard. Once again, his evidence on this aspect falls to be rejected as deliberately false.

#### **Common features in the suspensions of Executives at Eskom and Denel**

193. There are features in the suspension and ultimate removal of executives at Denel and at Eskom that are common.
- 193.1. The suspensions of the three executives at Denel came a few months after the suspension of certain executives at Eskom. In Eskom the executives were suspended on 11 March 2015. At Denel it was on 23 September 2015.

- 193.2. The Denel Board suspended the Denel Executives very soon after it had been appointed; it was appointed in July 2015 and it suspended the executives about two or three months later. In fact, it suspended them in its second meeting as a Board. The Eskom Board also suspended the relevant executives within three or so months after its appointment.
- 193.3. In Denel there were a number of members of the Board who had connections with the Guptas; some of these were Mr Mantsha (the Chairperson), Mr Motseki who was the only member of the 2011 Board whose term was extended; Ms Refiloe Mokoena; in Eskom, too, there were a number of members of the Board who had connections with the Guptas or their associates. They included Dr Ben Ngubane, Mr Pamensky, Mr Romeo Khumalo and others.
- 193.4. At Denel the Chairperson of the Board, Mr Mantsha, was someone with a connection or relationship with the Guptas. At Eskom, Mr Tsotsi who had been chairperson of the earlier board and was one of only two members who were allowed to continue in the 2015 Board seems to have had a relationship with the Guptas or their associates but he may have had a fall out with them. After he had been removed from the Board, Dr Ben Ngubane was appointed Chairperson of the Board.
- 193.5. The suspension of the Executives both at Eskom and at Denel had been sudden and out of the blue and was effected very hastily.
- 193.6. Both at Denel and at Eskom the executives were granted a very limited time to make representations as to why they should not be suspended; it was clear in both cases that the respective Boards had made up their minds to suspend the executives before they could make their representations.

- 193.7. Both at Eskom and at Denel, the law firm that was appointed to conduct the respective investigations during the period of suspensions of the executives was Dentons.
- 193.8. Both at Eskom and at Denel no disciplinary inquiries were held although at Eskom the Board had said from the beginning that there would be no disciplinary inquiries.
- 193.9. Both at Denel and at Eskom the Executives were paid large amounts of money to get them to agree to leave the entity despite the fact that they had not been subjected to disciplinary hearings.
- 193.10. Both at Denel and at Eskom there is no doubt that Mr Salim Essa was involved behind the scenes in the suspension and ultimate removal of the executives.
- 193.11. Both at Eskom and at Denel the executives who were suspended included the Group CEO and the Financial Director or Chief Financial Officer.
- 193.12. Both at Eskom and at Denel those who replaced the suspended Group CEO and Financial Director or Group Chief Financial Officer were people who did not give the Guptas any resistance.
194. The utter cynicism of the suspensions was, as shown above, demonstrated by Mr Mantsha's letter to the Acting Company Secretary dated 17 December 2015. In the letter, Mr Mantsha, in so many words, castigated Dentons Attorneys for producing a report which did not justify the suspensions and called on them to fabricate a report which did. In the same letter, Mr Mantsha talked about settling with the three executives, two of whom he said had committed fraud and otherwise misconducted themselves egregiously.



195. The question why Mr Mantsha and, indeed, probably other members of the 2015 board so misconducted themselves can now be answered. The purpose of the suspension of Mr Saloojee, Mr Mhlontlo and Ms Afrika was to remove an obstruction from the path of the Guptas. The unscrupulous methods used by Mr Mantsha and his abettors to prevent the two executives and Ms Afrika from protecting Denel are quite palpable. The sweeping decapitation of the Denel executive committee also, usefully from the perspective of Mr Mantsha and others, served to warn the employees still at Denel that, if they stood in Mr Mantsha's way, they could expect the same treatment.
196. Viewed in context, the appointment of Mr Ntshepe as Acting Group CEO once Mr Saloojee had been removed is significant. Mr Ntshepe had worked with the Guptas. He must have shown himself to be a person on whom they could rely. Certainly, during Mr Ntshepe's term of office Mr Ntshepe did nothing to suggest that he would resist any of Mr Mantsha's moves. On the contrary, the evidence reveals that he did not assist Mr Mantsha and the Guptas in their agenda at Denel.
197. These conclusions are only reinforced by the manner in which Mr Mantsha evaded the disciplinary enquiry that was the ostensible, but not the true, reason for the suspensions. He knew the suspensions were unjustified and that the executives would be exonerated at an enquiry but he needed time for the Guptas to develop their capture strategy. That is why Mr Mantsha spent millions of rands on preserving the suspensions and evading the enquiry. Then when he had run down the clock, at a time when the executives were confronted with the difficulties of securing reinstatement, in Mr Saloojee's case purely because his contract was about to come to an end by effluxion of time, Mr Mantsha caused further millions of rands to be paid to the executives to ensure they went quietly. That, moreover, was at a time when Denel could not pay its own privileged supplier, VR Laser, to which Denel was so much in arrears (at one stage R15 million) that VR Laser had to refuse to take on new work for Denel.

198. By this time, Denel was in serious financial difficulties. This had been exacerbated by the need to pay back the large loans taken out to pay for the DVS acquisition. In this regard, as Mr Mantsha well knew, it was anticipated that funds to settle loans would be brought in by the anticipated equity partner with Denel in DVS. Yet Mr Mantsha was prepared to spend large amounts of money, which Denel did not have, to make what had now become Mr Mantsha's problem go away.
199. In November 2015 at an air show in Dubai Mr Mantsha terminated the negotiations with Denel's potential equity partner whose entry, it was hoped, would inject capital into the acquisition and thereby alleviate Denel's burden. There is no suggestion that Mr Mantsha ever again sought such an equity partner. So, in a significant sense, Mr Mantsha brought about the financial embarrassment of Denel. Mr Mantsha knew that Denel had this large commitment. This was one of the main bases of the charges he had brought against Mr Saloojee. Yet he closed the very avenue which could have led to safety on this score. It is a fair inference that Mr Mantsha acted as he did because he did not want an equity partner entering the Denel space in potential competition with the Guptas.
200. During Mr Mantsha's evidence, Mr Mantsha stated that, without having sight of the relevant minutes of board meetings, he was not fully able to explain the conduct of the 2015 Denel board as to why Mr Saloojee, Mr Mhlontlo and Ms Afrika were suspended, why Denel never held a disciplinary inquiry in regard to the conduct of these employees and why Denel paid them substantial amounts in settlement of the disputes between Denel and the employees.
201. By letter dated 24 June 2021, the Secretary of the Commission sent to Mr Mantsha's attorneys copies of the minutes of meetings of the board held between 8 September

2015 and 15 January 2017 and invited him to supplement his evidence in any way he deemed necessary now that he had been furnished with these minutes.

202. Mr Mantsha responded in a supplementary affidavit which he signed on 30 June 2021. In the supplementary affidavit, Mr Mantsha summarised the contents of the minute of the meeting of 28 April 2016 and otherwise merely quoted passages from the minutes in question, the text of which he attached to his supplementary affidavit and concluded with the assertion that the board had discharged its fiduciary duty diligently in matters relating to the suspension and termination of employment of the employees in question.
203. The minutes undoubtedly contain assertions regarding the misconduct of the employees in question. A comprehensive summary of the allegations put before the board will be made because the seriousness and wide extent of the allegations are relevant to a point to be made next: that the allegations never arose above the level of mere assertion; that Mr Mantsha has at no stage given any content to justify those serious allegations; and that the evidence which was produced demonstrates, on a balance of probabilities, that the allegations themselves were no more than bluster, designed to manipulate an under-qualified and inexperienced board into removing the employees concerned so that they could be replaced by officials considered to be more amenable to the planned capture of Denel by the Guptas and their proxies.
204. The case against the three employees was put to the board by Ms Kgomongoe, the newly appointed Chair of ARC. She levelled the following allegations against the three employees:
205. DVS shares had been pledged to Nedbank as security for a loan made by Nedbank to Denel. This was in breach of the PFMA. The offer to Nedbank of cross-guarantees of all Denel subsidiaries appeared to be a contravention of the PFMA.

206. The board was informed for the first time on about 10 September that Denel was obliged to pay Nedbank R450 million by 30 September 2015. This material fact had been hidden from the board by the executive directors. The financial report of the group financial director, Mr Mhlontlo had not included any information regarding the payment in his financial report.
207. The Nedbank loan had been signed by the executive directors without the required authority of the board and without the approval of the shareholder and the National Treasury.
208. The executive directors had failed to obtain a valuation in accordance with s 51 of the PFMA and had accordingly misled Nedbank as to the ability of Denel to repay the loan by 30 September 2015.
209. The executive directors had misled the Minister of Public Enterprises and the National Treasury by alleging that Denel was in a sound financial position and had an equity balance of R1,5 billion. This statement was not true because R1,2 billion was ring fenced for the Hoefyster project.
210. It was alleged that these acts of misconduct had caused an irretrievable breakdown of the relationship between the executive directors and the board.
211. The Company Secretary, Ms Afrika, was alleged to have misled the board by stating on 9 September 2015 that the shareholder and the Minister of Finance had approved the LSSA transaction on the basis that Denel would find a suitable equity partner, by blocking Board members from certain meetings and generally failing to communicate with members of the board.

212. Ms Kgomongoe advised the board that no good reason had been advanced by the employees in question for a postponement of the action to be proposed to enable the employees better to present their defences.
213. The board decided that the executive directors were to be offered the opportunity to resign with payment of one month's salary, failing which they and Ms Afrika were to be suspended with immediate effect. Further investigations of the LSSA transaction were to be carried out. Disciplinary proceedings were to be instituted within ninety days; that a law firm was to be appointed to investigate the LSSA acquisition.
214. The board further decided that Mr Ntshepe would be appointed as the Acting Group CEO, that Mr Odwa Mhlwana would be appointed as Acting GCFO and Mr Tau Mahumapelo would be appointed as Acting Company Secretary. Mr Tau Mahumapelo was a member of the Denel Board.
215. This precipitate and drastic action was put into effect and, as recounted, Dentons was appointed to investigate the LSSA transaction. Dentons reported and found no misconduct such as had been alleged.
216. The response of Mr Mantsha was not to reconsider the action he had effectively promoted but sought in the letter to the Acting Company Secretary which is quoted in the paragraph above to manipulate the authors of the report into producing a report more to Mr Mantsha's liking; in short to manufacture evidence for him.
217. A copy of the Dentons draft report dated 20 January 2016 (the Dentons draft report) was furnished to the Commission. It is not clear if Mr Mantsha was in possession of an earlier version of the Dentons draft report when he wrote his letter. The Dentons draft report runs to 157 pages, including annexures. Given that the Denton's draft report is

simply that, namely, a draft, the question that arises is: What is its status and can it be used for anything?

218. The very fact the Denton's draft report is a draft means that whatever is said in it cannot legitimately be used for anything. Only a final report could be used. Before the final report, the authors of the draft report could still change or qualify any purported findings or conclusions of their draft report and it is not knowing for certain whether the purported findings or conclusions of the draft report would have made it to the final report. For that reason, the Denton's draft report has no status which enables it to be used legitimately or lawfully. Accordingly, Mr Mantsha and his Board could not and cannot rely on that draft report to justify any decisions that they took in regard to Mr Saloojee, Mr Mhlontlo and Ms Afrika. However, on the assumption that the Denton draft report could be used, one can examine certain features of it.
219. The Denton draft report contains a section titled "CONCLUSIONS". The Dentons draft report concluded that the application submitted by Denel pursuant to the PFMA was procedurally not necessarily non-compliant, but could have been prepared with a higher degree of care. It also concluded that the Minister of Public Enterprises had approved the transaction conditionally, one of such conditions being that the terms and conditions of the final loan agreements to be concluded with Nedbank and ABSA should not be more onerous than those in the term sheets which the banks provided during the negotiations toward the conclusion of the acquisition transaction. The approval of the Minister of Finance was conditional on compliance by Denel with the conditions attached by the Minister of Public Enterprises.
220. However, the Nedbank loan was for a five-month period while the term sheet provided for a term of five years. Dentons regarded this as a material change, which did not conform to the board approval obtained for this aspect of the transaction on 11 February

2015. Dentons therefore concluded that both Mr Saloojee and Mr Mhlontlo were in breach of the board authorisation.

221. However, both the chair, Ms Janse van Rensburg, and Dr Cruywagen, a board member with considerable commercial experience, were aware of the change in the terms of the Nedbank loan at the latest by 22 April 2015 and the terms of the Nedbank loan were disclosed to the 2011 board on 26 June 2015. Dentons concluded that there

“... seems to have been inadequate disclosure and analysis of the financial implications of the shortened term of the loan. In particular, there is limited analysis concerning the financial demands that would be placed on Denel as at the end of September 2015 and the manner in which these financial demands would be met. The ARC reports and presentations indicate that more detailed information was provided to ARC, as opposed to the Board.”

222. It continued:

“There was a startling lack of realistic options as late as 25 August 2015 to address the cash requirement that would materialise at the end of September 2015, which lends itself to the conclusion that the matter was not being addressed with the requisite level of concern.”

223. The 2011 board, which possessed both skills and integrity, did not regard the change in the terms of the Nedbank loan as significant or warranting any further action. In particular, the 2011 board, after it became aware of the initial failure to obtain approval for the shorter time frame of the Nedbank loan, did not consider that any action against either Mr Saloojee or Mr Mhlontlo, let alone Ms Afrika, was warranted.

224. Nevertheless, Dentons concluded that there had been substantial compliance with the requirement of shareholder approval of the loans, all the essential elements of the funding component of the transaction having been disclosed during the PFMA approval process. However, Dentons regarded the language used in describing the bridging loans as misleading: the loans had not merely been actuated for five months pending

the restructuring of the funding arrangements. This, according to Dentons, was because there was no provision in the five-month agreement that entitled Denel to extend the loan for the full five years.

225. Dentons further concluded that they had found no evidence of fraud or corrupt conduct by Denel management or members of the 2011 board. Ultimately, in a section headed "RECOMMENDATIONS", Denel left the taking of disciplinary steps against Mr Saloojee and Mr Mhlontlo up to Denel. In a schedule 7 to the report which appears to be incomplete, Dentons commented "very briefly" on the conclusions of ARC contained in its report dated 23 September 2015. In short, Dentons rejected all the points made by ARC which Dentons considered for the purposes of the Schedule.
226. The conclusion is irresistible that, when Mr Mantsha read the Dentons draft report before he wrote his letter dated 17 December 2015, he realised that the case made by ARC against Mr Saloojee and Mr Mhlontlo, on the strength of which he had executed the suspensions, had no prospects of success if the Dentons draft report was substantially correct. That was why Mr Mantsha wanted Dentons to change their report.
227. There is no suggestion that Mr Mantsha or Denel ever obtained further evidence to bolster the allegations made against the three employees and laid before the board on 23 September 2015.
228. The allegations or arguments made in the board minutes as to why the disciplinary enquiry should not proceed and the three employees should be offered packages amount to the following:
  - 228.1. at its meeting on 26 February 2016, the board decided to pay out Mr Saloojee for the remaining ten months of his contract because the disciplinary process



could be protracted and costly but the disciplinary process regarding Mr Mhlontlo and Ms Afrika were to proceed immediately.

228.2. at the meeting of 28 April 2016 it was asserted that the Acting Company Secretary, Ms Fortune Legoabe, had leaked the Denton draft report to one or more of the suspended employees. This was said to have compromised the disciplinary process and to have led to the removal of the Acting Company Secretary.

228.3. at the meeting of 8 June 2016 the board discussed the concern that Denel had been captured by the Guptas but Mr Mantsha emphasised that Denel was doing very well. The board resolved that the disciplinary hearing should be concluded as soon as possible, preferably before the AGM. The Board said that the cases against the other employees should be settled in preference to going ahead with the disciplinary process to save costs. It said that this should be balanced with the public outcry to bring officials to account. The Board pointed out that management needed to focus on operations rather than the suspensions. It said that the Minister would like to focus on the positives of the business and see the process finalised urgently.

229. At the board meeting of 23 June 2016, it was resolved to pay Mr Saloojee “the remainder of the contract”. This contradicted the contention made at the previous board meeting on 8 June 2016 that Mr Saloojee was no longer an employee. Despite a discussion around legal technicalities such as whether Mr Saloojee was still an employee, the employment relationship being broken down and the risk that reinstatement might be ordered, the board was still firmly of the view that nothing had changed in terms of success and the merits of the case but the case could take long and cost Denel more money.

230. There is nothing to suggest that any analysis was undertaken of the length of time the disciplinary proceedings might take or the alleged saving of cost by paying the three employees out.
231. There was no evidence that the Dentons draft report was leaked to the suspended employees. What was leaked, or inadvertently disclosed, by the Acting Company Secretary was Mr Mantsha's letter to her in which Mr Mantsha directed her to instruct Dentons to manufacture evidence which would support Mr Mantsha's case against the three suspended employees. That report and the drafts that preceded a final report would in any event have been subject to discovery. It was not commissioned to provide Denel with legal advice in relation to contemplated legal proceedings but to determine whether there had been any justification for the suspensions and the disciplinary process in the first place. If the alleged leaking of the draft report compromised Denel's case, it could only have been so because the report concluded that the disciplinary case against the employees was not likely to end in a justification of the action that had been taken against the employees. If the employees were, as they themselves maintained, innocent of any wrongdoing, there could have been no legitimate objection to their being reinstated.
232. The haste with which the suspensions were implemented should be contrasted with the leisurely pace at which Mr Mantsha allowed the actual disciplinary process itself to proceed. The alleged conduct of Mr Saloojee and Mr Mhlontlo related to matters of historical record. There was no suggestion that their continued presence in their positions might prejudice Denel going forward. That the board - and ARC - needed an investigation by a firm of lawyers to determine the facts showed that the board itself had no adequate grasp of the facts at the time it suspended the three employees. Surely, in these circumstances, the determination of the facts should have preceded the actions taken?

233. Once the lawyers had investigated, and found no wrongdoing, surely what was obviously required was that justice be done and the employees be restored to their posts? This could have been done without cost to Denel because the employees had been paid their salaries while under suspension. The very fact that Mr Mantsha and the rest of the board decided to spend Denel's money, at a time when it was already in difficulties, to get rid of the employees, reinforces the conclusion that the purpose of the suspensions was not to protect Denel but to advance an agenda of those who devised the suspension scheme.
234. The conclusion is unavoidable that the entire scheme was manufactured to get rid of three senior employees, not because they were guilty of wrongdoing because they were not, but because the employees in question were unlikely going forward to view wrongdoing with approval, their removal was devised to replace them with officials considered more likely to advance the very schemes of wrongdoing that were contemplated by those who had worked to oust the three employees.

## DLS/VR LASER SINGLE SOURCE CONTRACT

235. The next major contract awarded by Denel to VR Laser was for the supply to DLS, of Turret FCMs (Hulls) and related armour steel components such as cradles, outer shields and add-on armour for all of its projects (“the DLS Single Source Contract”). In this section of the Report the focus will be on that contract.
236. Precisely who first came up with the idea to start a process to award the DLS Single Source Contract to VR Laser was a matter of some dispute between certain of the witnesses, in particular Mr Burger, Mr Wessels and Mr Saloojee.
237. Mr Burger said in his main affidavit<sup>9</sup> that the initiative came from Mr Saloojee, and that Mr Saloojee was putting pressure on him to finalize the DLS Single Source Contract award to VR Laser.<sup>10</sup> However, throughout his evidence, Burger made it clear that he in any event was extremely keen to have VR Laser awarded this contract. He said that he was moved to proceed with the project, not truly because he was pressurized by Mr Saloojee, but because he (Burger) wanted such an award to take place, for the advancement of what he believed to be DLS’s business interests.
238. Mr Saloojee denied that he was the initiator of the idea or the process to award the DLS Single Source Contract to VR Laser, or that he had pressurized Mr Burger to finalize the award. His version was that DLS, under Mr Burger, had initiated the process, which was escalated to the Group CEO’s level once it was far advanced.<sup>11</sup>

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<sup>9</sup> W25 Denel-01-657 paras 107 to 109; 01-742 para 200

<sup>10</sup> W25 Denel-01-115.2 to 115.3

<sup>11</sup> Saloojee first affidavit RS-018 to 019

239. Mr Teubes (DLS COO under Mr Burger) said in his affidavit that he understood that it was Mr Burger (to whom Mr Teubes reported) who initiated the Single Source Contract.<sup>12</sup>

#### **Steps taken within DLS to start the process for the DLS Single Source Contract**

240. At a meeting of the DLS Exco on 3 March 2015, it was decided that a submission should be made to DCO (Group Corporate Office) for the award of the contract to VR Laser, for signature by the Group CEO. It stated further:

“An MOU between VR Laser (VRL) and DLS wherein DLS is given priority on orders re fabrication of structures. There will be exclusivity to VRL, but subject to VRL’s performance, regular reviews, price competitiveness, quality and preference. This needs to be a mutually beneficial relationship to enable DLS to execute efficiently on its orders with Armscor and will also ensure VRL’s investment in DLS as a preferential client.”

241. The proposed arrangement, it seems, was intended to achieve “*price competitiveness*” by occasional comparison with the single source supplier’s prices against the market prices, with the possibility that the supplier could be persuaded to lower its prices where it was higher than general market prices. However, the supplier would be given exclusive rights to be the supplier. There would be no open tender or even an RFQ process (a closed tender in which a few suppliers are invited to submit bids).
242. In March 2015, DLS COO Mr Teubes instructed Ms Malahlela, who was then still the DLS Executive Manager: Supply Chain, to prepare a memorandum intended to go to the Denel Group CEO to request approval for DLS to appoint a single-source supplier of the specified type of components referred to above. She was not told (at that stage) that management’s intention was to award this contract to VR Laser.

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<sup>12</sup> Teubes W17.1 Denel-W17-RT-856 para 5.3.1

243. Technical information was provided to Ms Malahlela by Mr Martin Drevin, the Program Manager for Phase 2 of the Hoefyster Contract. Turret FCMs and related armour steel components were critical items, being at the core of ballistic protection offered to turret crews in operations and the performance of the main weapon system, requiring welded FCMs and cradles to be rigid and accuracy. Processing, bending, welding and crack-testing were specialized processes; hence it was recommended that the supplier chosen should have all of these processes in-house. It was recommended further that a supplier be chosen with a proven track-record of manufacturing armour steel structures such as hulls, delivering on time to required quality standards.<sup>13</sup>
244. In preparing the required memorandum, and in fulfilling her role as DLS's Supply Chain Head responsible for ensuring proper compliance with procurement requirements and providing management with advice on this, Ms Malahlela included a "Supply Chain Note" setting out a recommendation that DLS should go out on tender/RFQ. The RFQ process was a reference to Request for Quotes from a limited list of identified potential suppliers the process which had been followed for the Platform Hulls Contract.<sup>14</sup>
245. The intention was to negotiate prices with the Single Source Supplier on a case by case basis - in other words for each item ordered - and this would be tested in the industry to seek adjustments by the supplier to keep its price close to market related prices. However, once it had been appointed, the Single Source Supplier would thereafter have the exclusive right to supply DLS and there would be no motivation for it to quote the lowest prices in the marketplace. Ms Malahlela sent the draft submission to Mr Teubes.

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<sup>13</sup> W10 Denel-01-158 to 159 para 5.2

<sup>14</sup> W10 Denel-01-159 para 5.3

246. Mr Burger stated in his supplementary affidavit<sup>15</sup> that he was unaware at the time that Ms Malahlela had recommended that the DLS Single Source Contract should follow a process involving an open (or closed) tender. He suggested that she had contrived her version and had been influenced by concern over political affiliation of the owners of VR Laser rather than true concerns over process problems.
247. Mr Teubes responded on 20 March 2014, stating that “*I have changed the angle...*” in the draft submission.<sup>16</sup> He attached a revised draft, and requested Ms Malahlela’s input. The passage that Mr Teubes rewrote removed all reference to Ms Malahlela’s recommendation that a competitive procurement process through an open tender or RFQ process be followed. Instead, Mr Teube’s redraft stated:

“Based on the Supply Chain process followed for the Hoefyster vehicle and the AV8 turrets hulls to date and that both these processes are or will be industrialized at VR Laser it is **recommend[ed] that VR Laser is appointed as single source supplier** for fabricated structures for a period of 3 years.”<sup>17</sup> [emphasis added]

248. Mr Teubes testified that he was of the view that the competitive supply chain process advised by Ms Malahlela “**will have the same outcome** as the Hull contract, given the detail Supply Chain process followed for the Hull contract, and to use the Hull contract process as analysis and input to this submission.”<sup>18</sup>
249. The Commission finds this approach by Teubes was manifestly irrational and unlawful. One cannot reasonably find that there is no purpose in having a competitive process because it will have the same outcome as a previous process. The mere fact that a supplier has, through a competitive process, cannot mean that it will inevitably win a

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<sup>15</sup> W25 Denel-10-780 para 97

<sup>16</sup> Malahlela W10 Denel-01-653; Teubes W17 Denel-05-35 to 36 to 37 paras 6.1.5 to 6.1.10

<sup>17</sup> Malahlela W10 Denel-01-159 paras 5.5 to 5.6; 01- 656 para 4

<sup>18</sup> Teubes W17 Denel-05-36 para 6.1.8

second competitive process – unless, of course, the process is not truly competitive but merely a sham with a pre-determined outcome.

250. Mr Teubes acknowledged during his oral evidence that, with the benefit of hindsight, they probably should have complied with the procurement policy requirement to follow a competitive process.

251. In her reply on 23 March 2015,<sup>19</sup> Ms Malahlela stated that she was—

“still of the opinion that should management approve this request, DLS must go out on tender/RFQ for the appointment of the single source for this scope of work. Once we have identified a supplier that meets DLS requirements through a competitive process, then we can appoint such a supplier for maximum of 3 years as a single source. The specification and evaluation criteria must be sent to all suppliers invited before time so that each one know[s] exactly how they will be evaluated and what is required from the successful company.”

252. The Commission finds that Ms Malahlela’s advice was sound, responsible, and lawful. It sought to achieve the requirement under section 217 of the Constitution, read with the PFMA as well as Denel’s Procurement Policy, that the system for procurement be fair, equitable, transparent, competitive and cost-effective.

253. The Commission further finds that to contract with a single supplier on an exclusive basis to supply major costly items and services without prior compliance with a competitive process was clearly a violation of those legal requirements.

254. It seems to have been the attitude of witnesses such as Burger, Teubes and others – at least initially, prior to their giving oral evidence - that the process they followed could somehow be regarded as compliant and competitive because the Single Source Contract would allow DLS to check the suppliers’ prices against prices that could be

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<sup>19</sup> Malahlela W10 Denel-01-159 para 5.7; 01-659



obtained from other suppliers, and that could lead DLS to ask the contracted supplier to reduce its price, failing which DLS could obtain the items elsewhere at the lower price.

255. The Commission finds that that mechanism does not allow a fair and proper process to allow true competition and cost-effectiveness. It would give a manifestly unfair advantage to the contracted supplier, particularly where others have not been afforded the opportunity to put in competitive bids to be awarded that right of exclusivity.
256. Mr Burger's reference (noted earlier) that DLS had for some time had numerous single source arrangements with particular suppliers could provide no justifiable precedent. He had problems with such arrangements only because they were not formalized. He ultimately acknowledged in oral evidence (reversing the stance he had adopted in his affidavit) that such arrangements are unlawful. The concession was correctly made.
257. It is troubling, that a person with such a senior position in management could for a lengthy period have been adopting the attitude that such arrangements should be entered into. This is made far worse by the fact that he and his colleagues – in relation to this DLS Single Source Contract award to VR Laser as well as other contracts dealt with in this Report - were repeatedly given advice by both the DLS Supply Chain Manager Ms Malahlela and the Group Executive: Supply Chain Mr Mlambo about serious violations of the Denel Supply Chain Policy, which Burger and his colleagues chose to ignore.
258. Ms Malahlela went on in the same email of 23 March 2015 to raise another recommendation: that LMT must be allowed to compete for the work. She referred, by way of motivation, to a previous contract which had later been cancelled with LMT for

Trunnion (FCM) machining which was part of the scope of the work now to be procured; and that LMT had been sent a letter indicating that the intent at that time was to continue or finish off the execution of that particular order as part of the Hoefyster FCM order. She added:

“I am not saying that the work must be given to LMT, all I am saying is that LMT and all other capable suppliers, must be given a chance to prove themselves through a transparent, competitive and fair RFQ/tender process.”

259. Ms Malahlela’s advice was legally sound and significant. Ultimately, as we shall see below, it was ignored.

260. Ms Malahlela also responded to the justification which Mr Teubes had advanced for awarding the new work to VR Laser on the basis of the supply chain process already followed for the Hoefyster vehicle and the AV8 turrets hulls to date, where both of those processors were or would be industrialized at VR Laser. She stated:

“I don’t think we should piggyback on the process that was followed for the platform hull. We should go out on a separate RFQ/Tender process where we invite all suppliers that we think are capable and then do such appointment...”

261. Here, again, Ms Malahlela’s advice was prudent and accorded with legal requirements. The mere fact that VR Laser had been awarded the Platform Hulls Contract previously, and would have capacity, did not entitle it to the new DLS Single Source Contract. The award of the Platform Hulls Contract was fundamentally defective, as found earlier in this Report. However, even if that award had been truly competitive and cost-effective, Denel could not ignore the legal requirement that the further items covered by the proposed DLS Single Source Contract should also follow a system that was fair, competitive and cost-effective.

262. Mr Teubes could have been under no doubt from Ms Malahlela's email, which set out her reasoning with clarity, that his approach to simply award VR Laser the DLS Single Source Contract would not comply with legal requirements of fairness, competitiveness and cost-effectiveness.
263. Ms Malahlela did not receive any response from Mr Teubes to her important advice. She was no longer updated or informed as to the progress of the draft submission.<sup>20</sup> She was simply kept in the dark. She was not involved in subsequent steps such as negotiation of the terms of the MOU and MOA discussed below. She only came to find out three months later, in June 2015, that an MOA had been concluded a few weeks earlier (on 19 May 2015).
264. Mr Burger stated in his evidence that Denel had many other single source suppliers but Denel were financially vulnerable due to the arrangements not being formalized. What was now proposed was a formal commitment, and he felt that this would be a good idea and could be extended to other smaller firms. He later stated that he was frustrated with the slow pace at which procurement processes worked within Denel and that this could be avoided through Single Source Contracts.<sup>21</sup>
265. Mr Burger believed that it "could only be to the benefit of DLS, given the fact that VR Laser was also the most suited and cost-effective supplier of complex fabricated structures."<sup>22</sup> He also stated that DLS had recently awarded the Platform Hulls Contract to VR Laser and that "I had little doubt that, on the back of that procurement process, it

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<sup>20</sup> W10 Denel-01-159 para 5.8

<sup>21</sup> W25 Denel-10-762 para 40

<sup>22</sup> W25 Denel-01-657 para 111; Denel-10-763 para 43

was justifiable to appoint VR Laser as a single source supplier for complex steel welding manufacturing.”<sup>23</sup>

266. That comment, of course, does not address the crucial question of whether it was lawful to award VR Laser a second contract without a competitive process because it had won the first contract through a competitive process. If it made sense to award the two types of work to a single supplier, Mr Burger failed to explain why the scope of the initial contract (for Platform Hulls) was not extended to include the steel manufacturing, so that both types of work could be dealt with in a single but competitive process.
267. Mr Burger continued to pursue the award of the DLS Single Source Contract to VR Laser, along with Mr Saloojee.
268. Mr Wessels gave evidence that in April 2015, when he was busy in a meeting with clients at the Arniston Hotel, Mr Saloojee called him out and rushed him into another meeting Saloojee was having with Mr Burger. They had before them a memorandum prepared by Mr Burger, which he had signed, recommending that a draft MOU should be signed with VR Laser with a view to ultimately awarding it a Single Source Contract with DLS.
269. The memorandum was signed also by Mr Ntshepe, then Group Executive: Business Development.<sup>24</sup> In his evidence, Mr Ntshepe testified was that the MOA had been signed during Mr Saloojee’s time and that he (Ntshepe) had signed as a witness<sup>25</sup>.

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<sup>23</sup> W25 Denel-10-762 para 40

<sup>24</sup> W6-JMW-10 paras 7.3 and 7.4; W6-JMW-51

<sup>25</sup> Ntshepe W23 Denel-08-518 para 4.3

270. That version, the Commission finds, is untrue. The signing of the MOA – which took place later –was not witnessed by Ntshepe.<sup>26</sup> It is probable that Ntshepe had in mind the submission memorandum which, in its original form, Ntshepe did sign on 16 April 2015<sup>27</sup>. However, he signed that document, not as a mere witness, but to show that he endorsed its contents – Ntshepe’s signature appears under the note “RECOMMENDED FOR APPROVAL”.
271. According to Mr Wessels, he was irritated by being taken out of the important meeting with client, and wanted to know why this was happening. Saloojee said he needed Wessels to give his recommendation for the proposal for the MOU with VR Laser before Saloojee approved it as GCEO. Saloojee said Denel was under pressure to show radical improvement in transformation through promoting BBBEE in procurement; that, if it failed to do so, it could not get future government support for big contracts; and that the motivation he was asked to recommend was for an MOU to appoint VR Laser – since it was one of the most suitable companies as a Black owned partner - to become a single source supplier for fabrication of complex engineering systems for DLS on the Hoefyster program.<sup>28</sup>
272. Mr Wessels testified further that he did not recall seeing the draft MOU, but there was a discussion, in which he expressed the view that the envisaged contract should provide parameters to the exclusivity given to VR Laser. This was to be done by allowing Denel to validate or scrutinize each procurement to check that VR Laser’s prices were

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<sup>26</sup> MOA W17 Denel-08-807

<sup>27</sup> W6 Denel W6-JMW-51

<sup>28</sup> W6 Wessels W6-JMW-10 to 11 para 7.4

competitive, failing which Denel would be entitled to look elsewhere.<sup>29</sup> Mr Wessels further testified that there was—

“the most tense interaction between me and Mr Saloojee in the almost 4 years we were colleagues. He impressed on me that he always trusted me with technical and operational judgment calls in these years, and in return I should trust him with political-strategic judgment calls which were in the interest of the company Denel.”<sup>30</sup>

273. According to Mr Wessels, he agreed to sign a revised version of the motivating memorandum, which was amended from the original version signed by himself and Mr Ntshepe, to address the concerns that he had raised.<sup>31</sup>

274. The amended version of the memorandum was then signed by Mr Saloojee on 16 April 2015.<sup>32</sup>

275. Mr Wessels testified further that later that evening, Mr Saloojee called him out of a function they were attending and said that he (Saloojee) felt that Wessels and Mhlontlo were no longer supporting him to the extent he needed at a difficult time. Mr Wessels testified that thereafter, the relationship between them became distant.<sup>33</sup>

276. The Commission finds that Burger distorted the true facts about what Mr Saloojee approved. He approved the selection of VR Laser for a possible award to it as a Single Source supplier. He approved this on the basis of a draft MOU that accompanied the submission. He did not approve the final text of the MOU. On the contrary, those terms were yet to be presented to VR Laser and negotiated with its representatives. The

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<sup>29</sup> W6 Wessels W6-JMW-11 para 7.5

<sup>30</sup> W6 Wessels W6-JMW-11 to 12 para 7.6

<sup>31</sup> Wessels W6-JMW-47 to 49

<sup>32</sup> Wessels W6-JMW-49; Teubes W17 Denel-05-37 para 6.1.13

<sup>33</sup> Wessels W6-JMW-12 paras 7.7 and 7.8

proposed draft MOU presented to Saloojee – even if it had been signed in that form with VR Laser – would not have constituted a binding contract, for the proposed MOU would merely be a commitment in principle to explore the possibility of ultimately negotiating and concluding an agreement at a later stage. Mr Burger was merely given approval to enter into negotiations to that end with VR Laser.<sup>34</sup>

277. What Mr Saloojee approved was the process for concluding an MOU initially, with a binding Memorandum of Agreement to be negotiated thereafter.
278. The draft MOU which accompanied the memorandum that (in amended form) Saloojee approved had been drafted by the Legal Executive; Ms Govender.<sup>35</sup>
279. A negotiation process then followed in which Mr Teubes, Mr Burger and Ms Govender were actively involved for DLS, and VR Laser was represented by its CEO, Mr Pieter van der Merwe.<sup>36</sup> During this negotiation process, Mr van der Merwe proposed various changes which were ultimately accepted by DLS. These included the point that the draft was no longer for an MOU but an MOA. An MOU is a Memorandum of Understanding whereas an MOA is a Memorandum of Agreement. The crucial difference is that an MOU is merely a statement of intent, with broad principles shared by both sides, to pursue a process with a view to hopefully entering into a binding agreement in due course. An MOA is a binding contract.

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<sup>34</sup> Saloojee W4.2 Denel-10-811 to 812 paras 11.3 to 11.7

<sup>35</sup> Teubes W17 Denel-05-38 to 40 paras 6.2.1 to 6.2.7

<sup>36</sup> Teubes W17 Denel-05-40 to 43

280. On 19 May 2015 Mr Burger, representing DLS, and Mr van der Merwe, representing VR Laser, signed the Memorandum of Agreement (MOA).<sup>37</sup>
281. In terms of the MOA, VR Laser was appointed as the single source supplier to DLS for the provision of all fabricated steel services and goods such as fabrication of hulls, fabricated structures and turret hulls for a period of 10 years - not for the originally intended period of 3 years which had been provided for in Ms Malahlela's draft submission.
282. DLS, in procuring this extensive range of items, was now to be bound for an entire decade to VR Laser – without any attempt having been made to follow a competitive procurement process. The strong and correct advice that Ms Malahlela had previously provided to Mr Teubes, that a competitive process needed to be followed, was simply ignored.
283. There was a dispute between Burger and Saloojee in their evidence as to the true effect of what Saloojee had approved when, on 16 April 2015, he had signed the memorandum approving VR Laser for purposes of a Single Supplier Contract.
284. Burger's version was that Saloojee had, on 16 April 2015, approved the proposal that VR Laser would be appointed by DLS as its supplier on a Single Source basis, and that Burger was mandated by him to sign the agreement. Burger further contended that there was no difference in substance or effect between an MOU and an MOA. On the strength of this, he argued that he had Saloojee's authority to sign the MOA concluded on 19 May 2015.<sup>38</sup>

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<sup>37</sup> Teubes W17 Denel-05-44 para 6.2.26. The MOA is at Denel-05-800 to 807

<sup>38</sup> Burger W25 Denel-10-664 to 666; 718



285. Mr Saloojee's version was that he had merely approved the selection of VR Laser as a potential single source supplier for DLS, and he approved an MOU in draft form – not an MOA. Mr Saloojee said that the draft MOU did not purport to constitute a contract and it was subject to a number of criteria, checks and balances that would have to be satisfied before any future transactions could be entered into.<sup>39</sup>
286. The Commission finds that Mr Burger's version is plainly wrong. The memorandum signed by Mr Saloojee on 16 April 2015<sup>40</sup> refers to a recommendation that VR Laser—
- “be categorized as a strategic supplier of core sub systems, for the supply of fabricated structures and that the attached MOU, which outlines the basis of the working relationship with VR Laser for the industrialization of the fabricated structures, be favourably considered for signature between DLS and VRL.”<sup>41</sup>
287. This refers to a draft MOU. The draft MOU itself was merely a statement of intent, not a binding contract. What was ultimately signed by Mr Burger was an MOA, not an MOU. The terms signed by Mr Burger were substantially different in content and legal effect to those of the initial MOU. Further, the memorandum signed by Mr Saloojee did not say anything about who was authorized to sign the envisaged MOU – let alone the final MOA prepared after negotiations between DLS and VR Laser's Mr van der Merwe.
288. The Commission finds accordingly that Burger lacked the necessary authority to sign the MOA for the DLS Single Source Contract with VR Laser.

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<sup>39</sup> Saloojee Denel-RS-018 paras 76 to 79

<sup>40</sup> Wessels W6 Denel W6-JMW-47 to 49

<sup>41</sup> Wessels W6 Denel W6-JMW-49 final paragraph

289. Mr Saloojee stated that, although he had insisted – when being pressured by Mr Essa and the Guptas to give their companies Denel business – that proper processes should be followed, he was by this stage weary of the Guptas' and Essa's involvement.<sup>42</sup>
290. Apart from the lack of a competitive procurement process (discussed above) there was a further problem that Ms Malahlela identified in relation to this award to VR Laser: it conflicted with a recently introduced clause 6.10 of the Denel Group Supply Chain Policy. Shortly after the Platform Hulls Contract had been awarded to VR Laser on 16 October 2014, a new clause 6.10 was introduced on 19 November 2014 which read in the relevant parts:

“6.10 Intergroup and Group Procurement/Contracts

6.10.1 Under no circumstances shall products or services that can be procured from a Group Entity or Division be procured from an external Supplier or non-Denel company unless there is approval by the Group Supply Chain Executive based on sound business reasons.”

291. The emphatic wording is clear: there was now a definite, express prohibition placed on procuring goods and services from sources outside the Group where they were capable of being procured from one of the Group's own entities or division. The only exception would be where the Group Executive: Supply Chain granted approval for this, and there had to be sound business reasons for such a deviation.
292. The then Group Executive: Supply Chain, Mr Mlambo, had not even been consulted - let alone being asked for his approval for the MOA to be concluded. The lack of his

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<sup>42</sup> Saloojee Denel-RS-019 para 80

approval when the MOA was concluded meant that there was a clear violation of clause 6.10 of the Group Supply Chain Policy.

293. In his affidavit Mr Teubes acknowledged that this was a violation of the policy.<sup>43</sup>
294. Five months after the DLS Single Source Contract with VR Laser had been signed by Mr Burger, the problem relating to the lack of approval from the Group Executive: Supply Chain, required under clause 6.10, was discussed in a DLS Exco meeting on 29 October 2015.
295. The minutes of that meeting<sup>44</sup> refer in the heading to “A CONCERN [that] WAS NOTED WITH REGARD TO PLACEMENT OF ORDERS ON VR LASER”. The minutes then refer to a “predicament” having arisen because the GSCE had “approved this deviation from the procurement process on the following condition ‘Under no circumstances shall products or services that can be procured from a Group Entity or Division be procured from an external Supplier or non-Denel company unless there is approval by the Group Supply Chain Executive based on sound business reasons.’ This is also in line with the Group supply chain policy and the DLS supply chain procedure.”
296. The reference to an earlier decision by the Group Executive: Supply Chain appears to relate to the fact that previously, in the context of procurement for another project, the T5 demo project, Mr Mlambo had instructed that DLS should first explore how both LMT and another Group subsidiary, Denel Vehicle Systems (“DVS”) could be used as sources of supply on an inter-group basis, provided that they met requirements for price, quality and delivery.<sup>45</sup>

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<sup>43</sup> Teubes W17 Denel-05-44 para 6.2.29

<sup>44</sup> W10 Denel-01-672 to 673

<sup>45</sup> W11 Denel-01-716 para 6.3

297. The so-called “predicament” did not truly arise from Mr Mlambo’s previous instruction. It related instead to the specific provisions of the new clause 6.10 referred to earlier and the condition subject to which the approval for the deviation had been given on clause 6.10.
298. The minutes correctly noted that there was a “direct conflict” between the conclusion of the MOU providing for VR Laser to be the single source supplier of steel components and fabrications.<sup>46</sup>
299. The DLS Exco then adopted the following resolution:

“The Committee took a decision that **the MOU takes precedence over the GSCE’s condition and the Group supply chain policy** and the DLS supply chain procedure. The committee ... also stated that given the recent history with regards to price and turnaround time **VR was the preferred supplier with all opportunities**. It was further stated that in terms of the MOU, VR Laser prices must be market related and in line with the provisions of the MOA before an order can be placed on them. Due to this reason and previous experience with VR Laser, the committee felt confident that the VR Laser prices will be market related and reasonable...Celia Malahlela was tasked **to draft a letter to the GSCE and explain the decision taken** in this regard.” [emphasis added]

300. What was decided, and the reasoning on which it was based, is seriously troubling. The matter was in truth simple. It was not complicated by any previous decision of the Group Executive: Supply Chain. The problem lay in a violation of clause 6.10 of the Group Supply Chain Policy. The services and items to be supplied under the MOA were awarded to VR Laser, which was an external supplier. This could not take place under clause 6.10 because there were internal Group divisions or subsidiaries from which these services and items could be procured, and the Group Executive: Supply Chain

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<sup>46</sup> W10 Denel-01-672 second arrow point

had not approved such a deviation based on sound business reasons. Indeed, Mr Mlambo had not even been consulted or even informed, let alone asked for approval, before the MOU was concluded.

301. The “solution” determined by Exco in the form of its decision of 29 October 2015 was based on its contention that the MOU “*takes precedence over*” clause 6.10 of the Policy. This is apparent from the minutes referred to above, and Teubes’ affidavit.<sup>47</sup>
302. How this could be possible under basic principles of logic and law is unexplained. It is plainly untenable. The whole point of the Group Supply Chain Policy was to impose process and other requirements which had to be complied with before a procurement contract could validly be concluded. This Policy – including clause 6.10 in particular - was an important part of Denel satisfying the requirement under section 217 of the Constitution and the PFMA that it should have, and follow, a procurement system that was fair, equitable, transparent, competitive and cost-effective.
303. It is frankly inconceivable how the DLS Exco could simply decide that the conclusion of an agreement in violation of clause 6.10 of that Policy would now “take precedence” over the SCM Policy. To put it simply, the DLS Exco took the attitude that it was able to conclude such an agreement, and where this conflicted with the Policy, the agreement would prevail. In other words, that a violation of the Policy meant that the Policy did not prevail: to breach a clause of the Policy meant that the Policy can be ignored. Boiled down to its most basic, these executives were in effect saying: “We can go ahead with violating the rules: our violation conflicts with the rules; how do we sort out the conflict between the rules and the violation? We decide that our violation ‘*takes precedence over*’ the rules” and then that means we have not violated the rules. I cannot think of anything more nonsensical! What these executives were saying amounted to somebody

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<sup>47</sup> Teubes W17 Denel-05-45 para 6.2.33

saying: I see that the law prohibits me from doing X but I will do X and my decision to do X takes precedence over the law that prohibits X. it is difficult to think that anybody can genuinely think like this. Only somebody who is not acting in good faith would say this.

304. This attempt at “logic” is, to put it bluntly (as one should), ridiculous. It makes a nonsense of the fundamental principle underlying the Constitution, legislation such as the PFMA and binding measures such as the Supply Chain Policy and the Delegation of Authority properly put in place by Denel as an organ of state.
305. The DLS Exco, having irrationally found that they were allowed to deviate from the Supply Chain Policy in this way without the necessary approval from the Group Executive: Supply Chain, went on to decide that they would simply communicate this to that Executive (Mr Mlambo) by way of a letter or memorandum to “**explain** the [DLS Exco] decision taken in this regard” [emphasis added]. In other words, they would say that they were not seeking his approval, despite the fact that the recently introduced clause 6.10 of the Policy required his prior approval for such a contract for services and items that could be sourced within the Group.
306. Ms Malahlela was tasked to prepare the memorandum Exco had requested in this regard. She prepared and sent the memorandum to Mr Mlambo, dated 29 October 2015<sup>48</sup>. Instead of simply informing Mr Mlambo in the memorandum of the decision taken by DLS Exco and explaining its supposed basis, Ms Malahlela requested Mr Mlambo to give his “permission to implement the Exco decision”. This should be construed as being a request, in effect, for his ex post facto ratification to achieve compliance with clause 6.10. Ms Malahlela was no doubt motivated by her correct belief

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<sup>48</sup> W11 Denel-01-824 to 825

that the DLS Single Source Contract had not been awarded properly and should not be implemented without Mr Mlambo's approval.

307. Understandably, Mr Mlambo refused to grant his approval. Instead of signing in the space provided for in the memorandum to signify his approval, Mr Mlambo instead wrote in the words: "NB: DVS and LMT must submit proof that they cannot meet the requirements prior to the contract being awarded to VR Laser."<sup>49</sup>

308. Mr Mlambo was correct in this approach. He was entitled indeed required to apply clause 6.10 of the Supply Chain Policy. It was necessary for him to have approved the appointment of an external supplier rather than an in-house entity, prior to its award, and only if he was satisfied that sound business reasons existed for such deviation. Two Group entities were potentially able to supply such items, DVS and LMT. Mr Mlambo was indicating, in the words he wrote down on the memorandum, that, before he could be asked to approve the award of such a contract to VR Laser, as an external supplier, information (as he put it, "proof") would have to be submitted to him to show that the in-house suppliers DVS and LMT were objectively unable to meet the requirements for the contract. Only once he had received such information, could he take a decision on whether or not sound business reasons existed to justify the grant of approval to use an external supplier.

309. Mr Mlambo was also concerned that this was a contract which would involve placing orders substantially over R20 million. Under clause 5.1 of the Delegation of Authority,<sup>50</sup> he, as Group Executive: Supply Chain had to be consulted before such a decision was taken, which was not done. This was a requirement over and above the need for his

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<sup>49</sup> W11 Denel-01-825

<sup>50</sup> W11 Denel-01-757 item 5.1

approval for procurement from external sources under clause 6.10 of the Supply Chain Policy. This requirement, too, had been violated.

310. A further fundamental difficulty was correctly identified by Mr Mlambo: the process followed had been blatantly uncompetitive. As he put it: "The MoA effectively gave VR Laser ... an unassailable competitive advantage over all other competitors, including Denel Group divisions, subsidiaries as well as external companies."
311. After a delay of around six months, a further attempt was made by Mr Burger to obtain Mr Mlambo's retrospective approval of the award to VR Laser of the DLS Single Source Contract. On 28 April 2016, they met (with Mr Odwa Mhlwana).
312. A memorandum sent to Mr Mlambo by Mr Burger on 29 April 2016<sup>51</sup> argued that the approval of the award by DVS to VR Laser as a single source supplier by the Group CEO was in accordance with Regulation 16A6.4 of the National Treasury Regulations of 2005.
313. Mr Burger's memorandum also summarized the rationale for the decision to appoint VR Laser as the sole supplier of the relevant items. He wrote:

"1. Its unparalleled expertise on fabrication of complex engineering systems which includes but is not limited to turrets, outer shields, add on armour and vehicle hull structures;

2. It is a key supplier and strategic partner to DLS;

3. It offers the best value having, inter alia, committed to invest capital and resources in its facilities in order to ensure that the capability remains intact and available to DLS for a minimum period of 10 (ten) years;

4. it is prepared to assist and has assisted DLS with its obligations in foreign jurisdictions (such as Malaysia) in transferring skills relating to its manufacturing

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<sup>51</sup> W11 Denel-01-837 to 838



process (...intellectual property); and it promotes a black industrialist entrepreneurial company within the defence industry....”

314. It is unsurprising that Mr Mlambo again rejected this request for his retrospective approval. In a handwritten note he made at the end of the memorandum<sup>52</sup>, Mr Mlambo stated:

“NB: 1. The evidence on how VR Laser was selected is not available to support its appointment as a single-source supplier.

2. The approval process of the MOA excluded Supply Chain and the reasons thereof have not been furnished.

The recommendation is, given the fact that Denel Executives committed the company to place orders on VR Laser for specified products for 10 years, to have the same Executives to approve future orders.

The paragraph in Treasury Regulations that is cited in the motivation is irrelevant because it was not impractical to test the supply market.”<sup>53</sup>

315. The Commission finds that Mr Mlambo’s decision was fully justified. He was entitled – and obliged – to ensure compliance with the Group’s Supply Chain Policy. Apart from the failure to seek his approval before – rather than long after – the contract was concluded, the reasons advanced for VR Laser’s appointment where similar sources of supply could be found within the Group did not constitute sound business reasons to justify the deviation requested. There was the further fundamental problem that the award was uncompetitive. Mr Mlambo correctly pointed out, Mr Burger had provided no

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<sup>52</sup> W11 Denel-01-838

<sup>53</sup> See also Mr Mlambo’s affidavit W11 Denel-01-718 to 719

evidence from the market. He (i.e. Mr Burger) was simply expressing a vague opinion, without providing supporting facts.<sup>54</sup>

316. Further, Mr Mlambo was correct in rejecting the argument raised by Mr Burger relying on Treasury Regulation 16A6.4 (as published in 2005 and as amended)<sup>55</sup>. It reads:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

317. Mr Burger had provided no evidence that it was impractical to invite competitive bids. This was not a case of an emergency having arisen, which might have justified a deviation under Treasury Regulations.

318. Reference has been made earlier in this Report (when dealing with the Platform Hulls Contract to VR Laser) to the fact that (1) Mr Burger's main affidavit went to great lengths to defend the award of the DLS Single Source Contract (as well as the Platform Hulls Contract) to VR Laser; (2) he stated in his main affidavit that it had been awarded “*with the necessary authorization and in compliance with the supply chain management policies and delegations of authorities within Denel*”<sup>56</sup>; but (3) eventually in oral evidence, he said that he had come to “realize”, with the benefit of hindsight, that the process followed had been irregular.

319. In relation to the DLS Single Source Contract, just as with the Platform Hulls Contract, Mr Burger's main affidavit correctly noted<sup>57</sup> that approval from Denel's Corporate Office was required for contracts valued at over R20 million. In fact, clause 6.10 required

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<sup>54</sup> W11 Denel-01-720 para 6.19

<sup>55</sup> W11 Denel-01-718 to 719

<sup>56</sup> W25 Denel-01-612 para 13

<sup>57</sup> W25 Denel-01-721 para 162.3

approval from the Group Executive: Supply Chain. DLS had sought that approval after the fact and Mr Mlambo twice informed him that it was rejected. Mr Burger then stated in his affidavit that it was for Mr Mlambo's objections to be raised with the Group CEO and that "If the Group CEO took note of Mlambo's input, and for good business reason decided to disregard his input and approve the submission, then I would imagine it was his right and authority to do so."

320. The Commission finds that that approach by Burger was reckless and wrong. The Supply Chain Policy clause 6.10 required the Group Executive: Supply Chain to make the decision whether or not to approve outsourcing items which could be sourced within the Group (through LMT), and this had to be decided on the basis of whether or not sound business reasons existed for such deviation. No such reasons had been produced. Mr Mlambo, as the duly delegated authority, had taken the decision that approval had to be refused where Burger had not provided proof that sound business reasons existed. It was not open to Mr Ntshepe, as Acting Group CEO, to overrule him. In any event, Mr Ntshepe simply authorized the transaction without getting to grips with whether or not there was factual evidence to prove a sound business case for deviation.
321. Further, and in any event, this was not simply a case that clause 6.10 had been breached in relation to outsourcing: the process followed had not been competitive at all. Mr Ntshepe acted in breach of policy in purporting to give approval.
322. In his supplementary affidavit<sup>58</sup>, Mr Burger stated: "In hindsight, although I must acknowledge that proper appointment proceedings [sic] may not technically have been followed in the appointment of VR Laser as a single source supplier, I was frustrated at the time with the lack of decisive decision making and the lack of progress with this particular project, the lack of progress which have [sic] jeopardized the entire

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<sup>58</sup> W25 Denel-10-763

programme. For this reason, I did not hesitate to follow and give effect to Saloojee's instruction to enter into a single source supply agreement with VR Laser."

323. This begrudging concession of irregularity is troubling. This was no mere "technical" non-compliance in the sense that it was trivial. It was instead fundamental. Even if Burger felt frustrated at the slow progress of Denel's procurement processes, this provided no basis to violate the law. Nor was any instruction by Saloojee any basis to justify a violation of the legal requirements. That is if Mr Saloojee did give such an instruction. Mr Saloojee disputed the assertion that he gave such an instruction.
324. A further contention raised by Mr Burger in his supplementary affidavit<sup>59</sup> was that an open tender was impractical, due to the need to keep intellectual property confidential. However, he did concede that a "closed tender" process could have been followed. His affidavit did not explain why that was not done, especially after both Ms Malahlela and Mr Mlambo had repeatedly advised that a competitive process was a prerequisite. In his oral evidence, Mr Burger conceded that the failure to follow such a process was irregular.
325. In his supplementary affidavit.<sup>60</sup> Mr Burger said that Mr Mlambo was "obstructive rather than of any assistan[ce] in the procurement process"; that on relevant aspects Mr Mlambo had "limited or no knowledge at all"; and that the appointment of the single source supplier was "a strategic relationship rather than a supply chain contract", apparently suggesting that Mr Mlambo's approval was not required at all. This is clearly wrong. Mr Mlambo was not being obstructive; he was doing his job to ensure that Denel acted lawfully. The problem was Mr Burger who seems to have thought little of compliance with the legal requirements. Mr Burger was the one not producing a

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<sup>59</sup> W25 Denel-10-773 to 774 paras 76 to 77

<sup>60</sup> W25 Denel-10-779 also argued that

substantiated basis for the approval that he sought, and then refused to communicate with Mr Mlambo thereafter. Mr Burger's attitude was not only wrong in law; his behaviour towards Mr Mlambo during the process – and in his affidavits - was uncollegial, disrespectful and insulting. He seems to have thought that his view should prevail over Mr Mlambo's view when the policy was clear that on this issue, Mr Mlambo's view had to prevail over Mr Burger's view.

326. Mr Mlambo received no response from Mr Burger, or other executives from DLS or from Denel at Group corporate level.
327. It is difficult for the Commission to comprehend how Mr Mlambo's serious concerns could simply be left unanswered by his executive colleagues. At the very least, one would have expected some rational and collegial steps to be taken to consider and debate the implications, and to escalate the matter to the level of the Group CEO, to assess the seriousness of the problem and how to address it. For example, they ought reasonably to be expected to have investigated how this situation had occurred; considered possible disciplinary action against those implicated; taken legal advice on how to address the legal dilemma; debated how to deal with VR Laser in relation to an irregularly awarded contract which had already been concluded; considered and taken legal advice on whether to seek judicial review of the contract, and other possible legal steps to achieve compliance with legal requirements.
328. None of that happened. Mr Mlambo was effectively again ignored and undermined.
329. Sometime later, in 2016, Mr Mlambo came to learn that the first memorandum sent by Mr Burger, dated 29 October 2015, asking for Mr Mlambo's retroactive approval of the award - which Mlambo had refused - had now been "approved" by Mr Ntshepe. Mr Ntshepe was by then the Acting Group CEO, in the place of Mr Saloojee, who had

been suspended in September 2015. On the memorandum itself<sup>61</sup>, after the words that Mr Mlambo had written in during October 2015 (to the effect that proof would have to be provided that LMT and DVS could not meet the requirements before an external source were awarded the contract), Mr Ntshepe simply wrote: "Approved" and signed.

330. This action by Mr Ntshepe purportedly overruled Mr Mlambo's decision to refuse his consent. It purported to grant approval for the transaction retrospectively. It ignored all of Mr Mlambo's concerns – not only those he raised in his handwritten note endorsed on the memorandum immediately above where Mr Ntshepe signed to signify approval. It also ignored the concerns raised by Mr Mlambo in his handwritten note added to the second memorandum from Mr Burger dated 29 April 2016.
331. There is nothing on either memorandum or elsewhere which shows whether, and in what way, Mr Ntshepe may have come to the conclusion that:
- 331.1. he had the authority to take such a decision;
  - 331.2. there was a lawful reason to overrule Mr Mlambo;
  - 331.3. the serious issues of non-compliance and irregularity identified previously by Mr Mlambo had been or were capable of being overcome;
  - 331.4. there was good reason for effectively ignoring Mr Mlambo, and not engaging with him further on the issue, or even telling him that this decision was being contemplated;

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<sup>61</sup> W11 Denel-01-825

- 331.5. the implications of implementing a potentially unlawful contract with VR Laser despite the serious defects, and incurring of potentially irregular and wasteful expenditure, were properly addressed.
332. Mr Ntshepe had been one of the executives who had previously recommended to Mr Saloojee that the Sole Source Contract should be concluded between DLS and VR Laser. That was done without first obtaining the necessary approval from Mr Mlambo. Sometime later, when the problem arose with Mr Mlambo's refusal to give retrospective approval, Mr Ntshepe – wearing his new hat of Acting Group CEO – was now purporting to approve the award to overcome Mr Mlambo's refusal. This was clearly irregular. Particularly so, where the Delegation of Authority did not provide that the Group CEO or someone acting in his place could give approval where this was refused by the Group Executive: Supply Chain.
333. Mr Ntshepe did not even discuss the matter with him, or furnish his reasons for overruling him. Mr Mlambo is correct in his complaint that it was important for Mr Ntshepe to have done so “in line with standard protocol, professionalism and more importantly, due regard to the relevant [Supply Chain] Policy and Delegation of Authority.”<sup>62</sup>
334. Mr Ntshepe failed to give any acceptable reason to his own involvement in approving the DLS Single Source Contract awarded to VR Laser. In his affidavit he said that he knew that an MOU/MOA had been signed; that Mr Saloojee had informed him that he would be required to be a witness; that he did not understand that there was truly a difference between an MOU and an MOA and that he felt it was just a question of semantics; but he did not have anything to do with the change from MOU to MOA as well as processes followed; that those involved in taking the decision, not him, should

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<sup>62</sup> Mlambo W11 Denel-01-721 para 6.23

be asked about this; and that the process was handled by the DLS divisional officials, and he was not privy to their discussions.<sup>63</sup>

335. Mr Ntshepe's version to be improbable and untrue. He took an active role in approving the DLS Single Source Contract awarded to VR Laser. Although he may not have been involved in the earlier stages, it was Mr Ntshepe – in his new capacity as Acting Group CEO – who signed the memorandum of 29 October 2015 under the word "Approved"<sup>64</sup>, effectively overruling Mlambo's rejection of the award, and ignoring Mlambo's advice and basis for the rejection.
336. Mr Ntshepe attempted to justify the award of the DLS Single Source Contract to VR Laser on the basis that Denel required a service provider with superior expertise for the project, that having a single source served that purpose, and he was satisfied that VR Laser was reliable.
337. That approach simply ignores the fundamental problem that the award of such a substantial contract, effectively giving exclusivity to a single supplier, was legally required to follow a system that was fair, transparent, equitable, competitive and cost-effective. Those requirements – including the requirements of Denel's Supply Chain Policy - were not complied with in the award of the DLS Single Source Contract to VR Laser.

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<sup>63</sup> Ntshepe W23 Denel-08-516 paras 3.1 to

<sup>64</sup> W11 Denel-01-824 to 825



**DVS/ VR LASER SINGLE SOURCE CONTRACT**

339. The award of a Single Source Contract to VR Laser by DLS was followed, a few months later, by a similar Single Source Contract awarded by another Denel Group subsidiary, DVS - Denel Vehicle Systems (Pty) Ltd.
340. The decision was taken by the newly appointed Acting Group CEO, Mr Ntshepe. The process leading to this decision was pursued with speed, at his insistence.
341. Early in November 2015, during the Dubai Air Show, Mr Ntshepe instructed the then Group COO, Mr Wessels, to work with the DVS CEO, Mr Steyn, and his team – as a matter of priority – to establish a relationship between DVS and VR Laser. This was to be similar to the Single Source Contract which had just been concluded between DLS and VR Laser for the fabrication of complex engineering systems. This was during the suspension of Mr Saloojee, Mr Mhlontlo and Ms Afrika.
342. Mr Ntshepe also instructed the CEO of DVS, Mr Johan Steyn, that he should take the necessary steps to have an MOA put in place for a Single Source Contract between DVS and VR Laser. From this, it is clear that Mr Ntshepe, as Acting Group CEO of Denel, in Mr Saloojee's absence, was moving with speed to impress the Guptas and their associates.
343. Mr Ntshepe rejected any suggestion that this was unlawful, on the basis that “we already signed a single source agreement with VR Laser. They could have found each other and they could have not.”

344. Mr Ntshepe's reasoning makes no real sense, and shows a disregard for the serious concerns that had been raised by his colleagues with him to the effect that the award of the DVS Single Source Contract to VR Laser would be in breach of the legal requirements for procurement. The facts relating to those concerns, and how they were dealt with, will be analysed below.
345. Mr Ntshepe confirmed in his evidence that he instructed Mr Wessels and Mr Steyn to negotiate the terms of the DVS Single Source Contract with VR Laser's CEO, Mr van der Merwe.
346. Mr Wessels and Mr Steyn proceeded to have discussions with Mr van der Merwe. Mr Wessels told the Commission that he gained the impression from what Mr van der Merwe said that "the envisaged agreement is a foregone conclusion" and the process could be expedited, and that Mr van der Merwe seemed dissatisfied with the lack of concrete progress.
347. Mr Wessels testified that he told Mr Ntshepe that a contract of this type between DVS and VR Laser was not possible, because the work Mr Ntshepe wanted to outsource to VR Laser on a Single Source basis was part of the core in-house business of DVS, and this could not truly be compared with DLS because it routinely outsourced such work.
348. Mr Wessels testified that Mr Ntshepe rejected this advice and told Mr Wessels that he was now giving him a definite instruction to go ahead with the DVS Single Source Contract with VR Laser. He said that this award had been approved by the Denel Group Chairman, Mr Mantsha. Mr Wessels said that Mr Ntshepe told him to get on with the work without further debate.

349. In his evidence Mr Ntshepe simply adopted the stance that the award of the DVS Single Source Contract to VR Laser was in the best interests of the business of Denel and that he believed the process followed to have been lawful.
350. Mr Ntshepe denied in his evidence before the Commission that he had been advised by DVS officials that the DVS Single Source Contract would take away the core business of DVS and hand it over to VR Laser or that he forced them to proceed with the agreement. In an effort to support this denial, he further said that he had “already stated that the MOA had been signed during Mr Saloojee’s time and I signed as a witness”.
351. Here again, Mr Ntshepe’s evidence is confusing and probably false. He was presumably referring to the MOA signed for the DLS Single Source Contract. However, the MOA for the DLS Single Source Contract was signed by Mr Burger, not Mr Saloojee.
352. What Mr Ntshepe may possibly have had in mind was the memorandum he signed on 16 April 2015 in which he recommended the approval of the awarding of Single Source supplier status by DLS to VR Laser, with a proposed MOU attached.
353. Mr Ntshepe’s evidence was untruthful in this regard and he probably told this untruth to hide the full extent of his involvement in the process. In particular, when he approved the Single Source Contract between DVS and VR Laser, he deliberately ignored and overruled Mr Mlambo, the Group Executive: Supply Chain, and his justified objections to that contract, because it violated legally binding provisions. He also deliberately ignored and overruled the sound business reasons Mr Wessels raised to the effect that the award of a Single Source Contract would deprive DVS of a major part of its core business, for which there was no rational basis.

354. Mr Steyn also informed Mr Mlambo, who was then still the Group Executive: Supply Chain, that he had reservations about implementing Mr Ntshepe's instruction. It related to manufacturing and related work which DVS was doing in-house at the time. DVS had the necessary capacity and capability to do such work, which was needed to make it sustainable. Mr Ntshepe's instruction to Mr Steyn (and others such as Wessels) was for DVS to outsource this work to the external supplier, VR Laser.
355. This, Mr Steyn said, would deprive DVS of work needed to keep it sustainable and cost DVS an additional 15% for the work once it was outsourced.
356. Mr Wessels confirmed that Mr Steyn made it clear that the proposed award was not in the business interests of DVS, "since a significant portion of DVS's existing business was actually to manufacture hulls and structures in-house."
357. Email correspondence involving other executives reflects further expressions of concern. The Group COO, Mr Wessels, referred to himself as having:
- "thought long and hard after receiving the instruction from Zwelakhe [Ntshepe] but said that there was a need for "agreements to be reached without delay".
358. Effectively, Mr Wessels felt it necessary to comply with Mr Ntshepe's instructions.
359. Mr Ntshepe has not provided any satisfactory explanation as to why he felt that there was such urgency about this deal.
360. An email dated 17 November 2015 from Mr Wessels to Mr Ntshepe refers to the request (noted earlier) that had been conveyed to him by Mr Ntshepe, when they were attending the Dubai air show, that Mr Wessels should "urgently support Johan Steyn to progress the strategic supplier process with VRL [VR Laser] management".

361. Mr Wessels, in his email, expressed the following note of caution and concern: "I have to repeat . . . that the process & complexity differs from when DLS appointed VRL as preferred single source hull fabricator (DLS had no in-house capability anyway and used a variety of outsourced fabrication) from now with DVS (with DVS having a strong in-house capability which need[s] to be converted in an optimal way." He referred to the fact that DVS had a big in-house fabrication works (including people, facilities, infrastructure) and that in terms of what was envisaged those resources "will need to be migrated to VRL partially or fully when an agreement is reached".
362. A further point raised by Mr Wessels in the same email was that "the DVS business plan (budget for 2016/17 plus 4 years) will be affected (DVS becomes more of a [systems] company than a manufacturer)".
363. Mr Wessels further stated that in pursuing the plan to outsource, "DVS is working full blast to convert the hull datapacks for the RG31 and RG32 (till now fabricated in-house) to a format where these can be supplied to VRL (as outsourced fabricator) to prepare time/cost/impact quotes so that when the new orders come in around February (IGG and/or Namibia) the process can be initiated without delay, and VRL can have their own plans in order etc."
364. It is clear from this email from Mr Wessels that, in his view, the proposed award of the DVS Single Source Contract would have a major effect on one of the Denel Group's subsidiaries, involving the outsourcing of manufacturing work which it was already doing in-house, and that it would have major implications from the point of view of finances, personnel, technology and proprietary information.
365. It is also clear from this email (together with his evidence about what he had previously told Mr Ntshepe orally) that Mr Wessels was repeatedly conveying to Mr Ntshepe strong advice, with solid reasons, to the effect that the proposed award of the DVS Single

Source Contract was seriously problematic and not in the best interests of the Denel Group.

366. Mr Wessels was at the time the Group COO – the second most senior official in management, reporting directly to Mr Ntshepe. It is a matter for serious concern that Mr Ntshepe did not take his COO's concerns with the degree of seriousness that was necessary in the circumstances.

367. Mr Ntshepe replied by email to Mr Wessels's email of 17 November 2015 later the same day. He did not respond directly to – or express any concern about – the cautionary remarks from Mr Wessels on the implications. Instead, Mr Ntshepe stated:

“Your email is too long and as you usually say some of the issues you put on paper can be discussed. You forgot to mention that I showed you, Johan [Steyn], Odwa [Mhlwana] and.... Stephan [Burger] a letter from the Chairman instructing me to divisionalise and optimize DVS and DLS and show savings whilst the process is being carried through. I have asked Johan and Stephan to do just that because we were taking too long to come to a final conclusion on this matter. The process will of course involve you as a third independent party. We are required to present a plan for the board and I have asked Stephan to take the lead on this.”

368. Mr Ntshepe's email shows that he was not even willing to enter into a serious discussion about whether the award of the Single Source Contract by DVS to VR Laser was in the best interests of the Denel Group, or about its implications. He did not deal meaningfully with the concerns that Mr Wessels had raised. While he commented in a highly critical (and disrespectful) tone about the length of Mr Wessels' email and suggested that such issues could rather “be discussed”, no further serious discussions took place.

369. Mr Ntshepe's email made it clear that the process would be moving forward to that end (concluding the DVS Single Source Contract with VR Laser) – which he indicated was consistent with an instruction he had received from the recently appointed Chairperson, Mr Mantsha, to divisionalize and optimize DLS and DVS.

370. The only reason advanced by Mr Ntshepe (both in his email and in his evidence) was that the new Chairperson had instructed that there should be “divisionalisation”, and “optimization” of DVS and DLS. How that could rationally translate into stripping DVS of its core business (by outsourcing it on a single source basis to VR Laser) was never satisfactorily explained by Mr Ntshepe.
371. While Mr Ntshepe said in his email that he would not leave Mr Wessels out of further steps, the clear implication was that Mr Wessels’ concerns would not be allowed to divert or stop the process. Mr Ntshepe also stressed the urgency of finalizing the process. As the evidence shows, Mr Wessels was in fact left out of the later steps.
372. After this email, Mr Ntshepe informed Mr Wessels that the Chairperson, Mr Mantsha, had decided that Mr Wessels should no longer attend Denel Board meetings as he had done previously.
373. Mr Wessels was also largely excluded from the process for the DVS Single Source Contract with VR Laser. He was effectively marginalized as Denel Group COO, given little productive work, and excluded from most business meetings. After he had complained, he was moved from the GCOO post to serve as interim CEO of LMT, until – at a stage when he felt considerable frustration - he resigned in August 2016.
374. The Commission finds that the probable explanation for the sidelining and exclusion of Mr Wessels is that he was now identified by both Mr Ntshepe and Mr Mantsha as someone who was obstructive to their plan to serve the interests of Mr Salim Essa and the Guptas, through VR Laser. Furthermore, the Commission concludes that the dominant purpose of the Single Source Contract between DVS and VR Laser was to bind Denel, its associated and subsidiary companies ever closer to VR Laser and, thus, to the Guptas, and improperly to gain control over an aspect of the business of Denel.

By so doing, the Guptas, through Mr Mantsha and Mr Ntshepe, sought to stifle competition between the Guptas and other potential suppliers to Denel.

375. If either Mr Ntshepe or Mr Mantsha had genuinely felt that there was a proper, objective and rational basis for their decision to award this contract (along with others) to VR Laser, they could and would have engaged with people such as Mr Wessels and Mr Mlambo, showing due respect and recognition for their roles and their input; discussed the matter properly; and then come to a carefully considered decision accompanied by proper reasons. That was not done.
376. It is also significant that this occurred shortly after Mr Mantsha had assumed the role of Chairperson of the Board of Directors of the Denel Group. As discussed in later sections of the Commission's Report, the evidence shows that from the earliest stage, Mr Mantsha was actively involved in discussions with Mr Essa and the Guptas aimed at securing for them substantial portions of Denel business.
377. The sidelining and ignoring of Mr Wessels were part of a pattern which emerges from the evidence. The same applied to Mr Mlambo as Group Executive: Supply Chain. He likewise had his repeated efforts to advise against proposed deals with VR Laser effectively ignored, and he was sidelined, ultimately leaving in a state of frustration and despair. The same occurred with Ms Malahlela of DLS.
378. Mr Wessels protested this state of affairs to Mr Ntshepe and the Acting CFO, Mr Mhlwane. Mr Wessels was then moved to become the Acting CEO of LMT. LMT by this stage was in a poor financial state as its major Saudi client, the Saudi Ministry of the Interior, through its trading company SCC, was in dispute with LMT and had stopped paying. Mr Wessels was forced to approach the LMT shareholders for loans to pay staff and other overhead expenses but LMT remained in financial difficulties. Mr Wessels left LMT and Denel on 31 August 2016.



## THE DENEL ASIA VENTURE

379. Authorisation for a project such as Denel Asia had to be provided by both the Department of Public Enterprises and the Treasury. The 2015 board lost no time in initiating the process by which approval might be given. Its pre-notification letter under s 54(2) of the Public Finance Management Act (PFMA) to the Department of Public Enterprises was dated 29 October 2015. A similar letter dated 10 December 2015 was sent to the Minister of Finance. As at the 10th December 2015 the Minister of Finance was Mr Des van Rooyen who had replaced Minister Nene as Minister of Finance the previous day. The evidence before the Commission makes it clear that Mr Des van Rooyen had the approval of the Guptas and was prepared to advance the agenda of the Guptas when he was appointed as Minister of Finance. Therefore, the arrival of Denel's letter of 10 December 2015 on Minister Des van Rooyen's desk was not fortuitous. It was well-planned because Mr van Rooyen visited the Gupta residence several times between the end of October 2015 and the date of his appointment as Minister of Finance. Even the day before the announcement of his appointment as Minister of Finance he was at the Gupta residence.
380. The relevant section in the PFMA requires that, before a public entity such as Denel concludes a transaction such as the Denel Asia project the accounting authority for the public entity must promptly and in writing seek the approval of the transaction from both these Departments.
381. In short the Denel Asia project contemplated a joint venture between Denel and VR Laser to market Denel to India and Asia generally. For this purpose, it was proposed that the venture parties form a company in Hong Kong called Denel Asia and open an office in Hong Kong to further the venture.

382. Officials from both Departments raised queries which had the effect of delaying the implementation of the joint venture. In memoranda to Denel and Minister Brown drafted by a team under Mr Tlhakudi, the Minister and Denel were advised, in language suitable to the status of the officials as mere advisors, that a decision on the proposed joint venture ought not to be taken because certain critical information was missing. The officials highlighted the need for Treasury approval; the apparent lack of funding plans; an inadequate business plan; questions about the suitability of VR Laser and its shareholders; the political implications. The team emphasised the questions around the suitability of VR Laser as a potential partner in the regions in question.
383. The team of officials received no further communication of substance on the subject either from the Minister or from the Director-General of the Department of Public Enterprises. The Director-General of Department of Public Enterprises at this time was Mr Richard Seleka who was associated with the Guptas.
384. On 5 February 2016 Denel informed the Department of Public Enterprises that it had proceeded to implement the transaction on the strength of s 54(3) of the PFMA. This measure provides that a public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms s 54(2) within 30 days or within a longer period as may be agreed to between itself and the executive authority.
385. Mr Tlhakudi testified that he found this hasty recourse to s 54(3) unusual and, on the face of it, discourteous. However, he said, from subsequent engagements between Minister Brown and the 2015 board it was clear that the Minister had come to terms with the Denel board decision and that both Minister Brown and the 2015 board were looking for ways in which the Treasury could be persuaded to accept the Denel position that Treasury approval for the transaction had been deemed to have been given. I note that

Minister Brown challenges the detail of Deputy Director-General Tlhakudi's testimony. It is, in my view, unnecessary to resolve these evidentiary conflicts.

386. What is indisputable, however, is that the Treasury did not give its approval. Denel then sued the Treasury. By notice of motion dated 23 March 2017, under Gauteng Division of the High Court case no. 20749/17, Denel applied for an order against the Minister of Finance and the Department of National Treasury for an order declaring that Denel had obtained approval or was deemed to have obtained approval for the joint venture with VR Laser. Denel's founding affidavit was signed by Mr Ntshepe as the Acting CEO of Denel.
387. The application was ultimately withdrawn by Denel.
388. Mr Tlhakudi was threatened with not having his contract of employment extended but ultimately retained his job. Mr Tlhakudi further drafted letters dated 15 July and 20 September 2016 to Mr Mantsha and the then Minister of Finance, Mr P Gordhan MP respectively, indicating that Minister Brown accepted the deemed approval status of Denel Asia. Pressure was put on Mr Tlhakudi by Mr Richard Seleke, the Director-General of the Department of Public Enterprises, and Mr Mantsha at a meeting in February 2018 to amend the initial memorandum, which had effectively been highly critical of the proposed joint venture. The memorandum was amended to read that Minister Brown had granted conditional approval for the joint venture on 24 December 2015.
389. Although the company, Denel Asia, was incorporated in Hong Kong, the Denel Asia venture never came to fruition. In short the tide of public opinion turned against the Guptas. The Guptas' dealings within and concerning Denel were made public in great detail in a report in the Mail and Guardian newspaper edition of 5 February 2016.

Perhaps more importantly, the commercial banks in South Africa closed all the accounts of Gupta linked entities, including VR Laser.

390. It is, however, quite clear that the Denel Asia venture made no commercial sense from the perspective of Denel. VR Laser and the Guptas had no established expertise in the field in which it was proposed Denel Asia would operate. The Guptas were politically exposed persons at the time and no research had been done to investigate either the need for such a venture or the relative merits of other potential partners. Denel Asia was a shameless attempt to benefit the Guptas.

**CHARACTER OF INTERVENTIONS IN AFFAIRS OF DENEL BY ESSA, GUPTAS AND THEIR PROXIES WITHIN DENEL**

391. It is necessary to analyse the character of the interventions by the Guptas and Mr Essa in the affairs of VR Laser and Denel from the perspective of terms of reference of the Commission:

- 391.1. Were any attempts made, and if so to what extent and by whom, through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or directors of the 2015 boards of Denel to facilitate or advance the interventions of Denel into the affairs of Denel?
- 391.2. Did the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breach or violate the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with Denel?
- 391.3. What was the nature and extent of corruption, if any, in the awarding of contracts to companies or business entities by Denel?
- 391.4. Were there any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts and any other governmental services in the business dealings of the Gupta family with Denel?

- 391.5. Were there any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts in the business dealings of the Gupta family with government departments and Denel; in particular, did any member of the National Executive (including the President), public official, functionary of any organ of state influence the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest?
392. In the Commission's view, the entry of Mr Essa and the Guptas into VR Laser was conceived for the purpose of using VR Laser as a vehicle to achieve the capture of Denel. While the capture process proceeded and broadened, the legitimate business of VR Laser would continue. The denial by Mr van der Merwe that he participated in any illegal dealings is credible. It deflected attention from the capture by presenting VR Laser as a legitimate business.
393. The Guptas were not prepared to compete for Denel's business. From the outset, they put pressure on Mr Saloojee to privilege their chosen vehicle, VR Laser, above any other competitor suppliers. This is shown by their conduct, at the start of Mr Saloojee's term of office, in getting the then Minister of Public Enterprises, Mr Gigaba, to make clear to Mr Saloojee that he was to exert himself to favour the Guptas. For this purpose, Mr Saloojee was brought to the Guptas' stronghold, the Saxonwold compound, to meet his ultimate boss, a man who had not previously found it necessary to meet Mr Saloojee. The very brevity of the meeting proclaimed to both Mr Saloojee and Minister Gigaba that they had been brought together for just that one purpose.
394. Then, when Mr Saloojee showed that he would not dance to the Guptas' tune, steps were taken to gain control and oust Mr Saloojee. At that stage, Denel must have appeared an attractive target for capture. It was showing a profit, surely rare for an SOE

at that time, had been given a clean audit by the Auditor General and was praised both by the private sector, including the banks and by the new Minister, Ms Brown.

395. The first step was to remove control of Denel from the hands of a competent and honest board. The cover for this was the end of the terms of office of the members of the 2011 board. By then the Guptas had taken control of VR Laser. Their cover was in place. The evidence shows quite conclusively that the means used by Minister Brown to replace the members of the 2011 board and replace them with her own appointees excluded the Department of Public Enterprises' officials from any input into the process and ensured that no criticisms of Minister Brown's appointees would be raised by officials who might have had concerns about their lack of probity, skills and expertise.
396. In this regard, it is significant that Minister Brown's choice for board chair, Mr Mantsha, was an attorney who, had previously been struck off the roll of attorneys for something to do with his trust account and then later re-admitted. Surely, a prudent Minister would have had nothing to do with bringing an attorney who had been struck off the roll of attorneys for something to do with his trust account into the board of an SOE, not to mention making him the chair of such a board. Were there no attorneys who had never been struck off the roll, if the Board required an attorney? Gauteng has thousands of attorneys. Why go for one who had previously been struck off the roll of attorneys when you could easily get one who had never been struck off the roll of attorneys? Did Mr Mantsha have any particular good experience or expertise? No. So, why did Minister Brown choose him?
397. Minister Brown was asked why she chose Mr Mantsha despite him having been struck off the roll of attorneys a few years earlier. First of all, she did not do her homework before appointing Mr Mantsha and did not know that Mr Mantsha had previously been struck off the roll of attorneys until after she had appointed Mr Mantsha as the

Chairperson of the Board of Denel. It would have been very simple to find that out about an attorney. The fact that she did not do that homework is an indication that she must have been given this name by the Guptas and there was, in her view, no need to do that kind of background check because she sought to appoint whoever the Guptas wanted. Ms Brown was then asked why she kept Mr Mantsha as the Chairperson of the Denel Board after she had learned of Mr Mantsha's professional history. Her answer was that Mr Mantsha needed to be given a second chance. Yes, this was the answer that a former Minister gave when she had to explain her decision. Here was a former Cabinet Minister who was saying she thought that the Board of as important an SOE as Denel should be chaired by an attorney who had the record of having been struck off the roll of attorneys for something connected with his trust account a few years earlier.

398. Mr Mantsha was one of the central actors in the Gupta and Essa scheme to capture Denel. He was not duped into acting as he did: he was a witting agent of state capture. He acted as he did in the expectation that he would be rewarded for his efforts on behalf of the Guptas, as he was when he travelled at their expense. Mr Mantsha almost certainly anticipated that, as the Guptas strengthened their grip on the South African state, he would be rewarded by access to positions of power and the fleshpots of power. Mr Mantsha enjoyed a taste for the fleshpots of power when he travelled overseas, in luxury, at the expense of the Guptas in early October 2015, only days after he had, with apparent success, managed the suspension of the three Denel executives.



## **EVALUATION OF THE CONDUCT OF MINISTER BROWN**

399. It seems clear that on Minister Brown's own evidence, she did not appear to appreciate that she was individually, not collectively with her party and cabinet colleagues, responsible for the appointments she made. However, there is a more serious aspect to consider: whether by abdicating her decision making function to, effectively, an outside organisation in relation to the appointment of the 2015 board and failing to investigate and consider the probity of the disciplinary action taken against the three suspended Denel executives, she acted with the intention of promoting the campaign of state capture directed at Denel by the Guptas, Mr Essa, Mr Mantsha and perhaps other members of the 2015 board.
400. Minister Brown's failure to respond to Mr Saloojee's letter dated 25 April 2016 asking her to intervene is a cause for concern. To a Minister who had Denel's interests at heart, this letter would surely have come as a shock. Here was an executive of Denel, whom she had previously commended in public and had offered an extension of his contract, being accused of wrongdoing in relation to a transaction that had been comprehensively vetted both by her predecessor, by the Treasury and by the Competition Commission. Surely this, when brought to her notice, warranted an investigation, if not an intervention?
401. There is a lot from how Ms Brown dealt with certain matters relating to SOEs that indicates that she was assisting the Guptas. The Commission also obtained cellphone records relating to her, Mr Salim Essa and Mr Tony Gupta.
402. By notice dated 19 July 2021 I issued a Regulation 10(6) directive against Ms Brown and directed her to respond to a schedule containing evidence of telephone records which showed that there had probably been a telephone conversation between, firstly,

Ms Brown and either Mr Nazim Howa or Mr Atul Gupta and secondly, several telephone conversations between Ms Brown and Mr Salim Essa.

403. The conversation between Ms Brown and Mr Howa or Mr Atul Gupta was recorded as taking place on 12 March 2015 and lasting 48 seconds. Minister Brown initiated the call. She suggested that the conversation might have been about a certain breakfast event. This conversation took place on the day after the suspension of four Eskom executives. It would have been an extraordinary coincidence if Mr Howa were to have been discussing a breakfast event with Minister Brown during the very period when a crucial phase of the plan to capture Eskom was being effected.
404. The evidence of telephone conversations between Ms Brown and the user of the cellphone belonging to Mr Salim Essa, and, therefore, probably between Minister Brown and Mr Essa is however of a different calibre. The evidence of Ms Brown before the Commission was unequivocal: she said that she did not know Mr Salim Essa and had never spoken to him. However, the records show that she had a total of eight telephone conversations with the user of Mr Essa's cellphone, and therefore Mr Essa, in duration a total of 1 398 seconds, i.e. more than 23 minutes. Each of these calls was probably initiated by Mr Essa. In addition, Mr Essa probably tried to initiate twelve additional calls with Ms Brown but was unsuccessful and the call is recorded as lasting zero seconds. The telephone conversations between Ms Brown and Mr Essa are recorded as having taken place during the period 24 November 2014 to 19 March 2015, after which no more attempts were made from Mr Essa's cellphone to contact Ms Brown. Within that period fall the appointment of the new Board of Directors of Eskom in December 2014 and the suspensions of four executives of Eskom on 11 March 2015.
405. Ms Brown responded in an affidavit signed by her on 30 July 2021 to this evidence of calls between her cellphone and Mr Essa's cellphone as follows:

“... I do not know Mr Salim Essa as I have indicated ....

... I have racked my brain trying to recall and place these calls. I cannot deny the empirical evidence of the calls .... i simply cannot recall these calls, much less, the content of the conversations, if any.

Let me explain it this way: before I received this Rule 10.6 Notice, it never occurred to me that a number believed to be used by Mr Salim Essa ever called me. Even when reading about him in the media, this never crossed my mind.

I am afraid I cannot take this much further and assist the Commission.”

406. In her response to the Regulation 10(6) directive, Ms Brown does not dispute that she had the conversations with Mr Essa. In my view, there is no innocent explanation of the fact that Ms Brown talked on the telephone with Mr Essa while she was Minister of Public Enterprises on eight occasions during the period that the Guptas were putting into effect their scheme to capture Eskom. That scheme required that a board which would not resist the Guptas' capture initiative be put in place and that officials who might resist the Gupta capture be neutralised. That was the period during which the cellphone conversations between Minister Brown and Mr Essa took place. Four long such conversations, 407, 189, 289 and 279 seconds respectively, took place on 24 November (two conversations within less than half an hour), 29 November and 1 December 2014, when the appointments to the new board were being made. For example, Mr Mark Pamensky was appointed to the Eskom board with effect from 11 December 2014 and there is no reason to believe that the timing of Mr Pamensky's appointment was any different to those of the other new board members.

407. The assertion by Ms Brown that she cannot remember anything about the conversations is rejected. She has told a deliberate untruth in this regard. Why would she lie about her telephone conversations with Mr Essa? The only possible conclusion is that Ms Brown was a witting participant in the Guptas' schemes to capture Denel and Eskom. In this regard reference can be made to the fact that the evidence placed before the Commission in regard to Eskom included evidence that on 10 March 2015 Mr Salim

Essa had introduced himself as an advisor to Minister Brown when she met on that day either with Ms Daniels or Mr Abraham Masango.

408. In the case of Denel, Ms Brown participated in state capture by using the powers of her office to install as members of the Denel Board of Directors persons whom she believed, probably because she was told so, would facilitate or at least not oppose the Guptas' state capture scheme. She had failed to use the powers of her office when asked to exercise those powers to curb the manifest injustice of the scheme to oust the three Denel executives.

## **TRUE CHARACTER OF SOLE SUPPLIER CONTRACTS IN FAVOUR OF VR LASER**

409. The sole supplier contracts can now be seen in their proper perspective. They were designed to ensure that VR Laser effectively became able to participate in any lucrative undertaking in which Denel became involved within the borders of the Republic. Through the Denel Asia joint venture, the Guptas believed, no doubt with some justification, that they could do the same to a large extent outside our borders. In the hands of the Guptas, these opportunities enabled them, almost legitimately, to pass themselves off as actually being Denel. All it would take would be a suitably worded business card and a glib tongue. Any scepticism could be overcome by a call to the potential customer, or client, from Mr Mantsha. The Denel Asia joint venture, the Guptas no doubt thought, would gain them entry into the world wide arms industry.

### **Capture of Denel Established**

410. The entry into VR Laser by the Guptas and Mr Essa was effected with the intention of using it as a vehicle with which to capture Denel. The answer to the question whether the Guptas and Mr Essa were knowingly abetted in their capture design by former Minister of Public Enterprises, Mr Gigaba must be answered in the affirmative. The decisions of the Board of Directors of Denel to suspend the three executives on 23 September 2015 and not to convene a disciplinary inquiry over a long period, not to accept the three executives' proposal for an expedited process to test the allegations made against them and to pay them out were all aimed at facilitating the capture of Denel by the Guptas. It may be that not all Board members were conscious of this but certainly must have been conscious of what was happening willingly took part. Mr Mantsha knew about what was going on and was prepared to play the role that he played to assist the Guptas and their associates. Ms Mandindi testified and told the

Commission how she disassociated herself from the decision to suspend the three executives.

411. VR Laser, the formerly premier supplier of steel armour plate within South Africa, fell along with the rest of the Gupta companies because of the withdrawal of its banking facilities and decline in reputation when it was cast as a Gupta controlled company. VR Laser's main customer, Denel, could not pay what it owed VR Laser. According to Mr van der Merwe, its former CEO, the amount owed by Denel and overdue for payment reached R15 million.
412. The reputational damage which Denel suffered from its capture and the fact that the control of Denel passed into unscrupulous hands was enormous. The evidence shows that rebuilding Denel will take a long time. That is if Denel does not go under. As at mid-2021 Denel was associated with litigation in the media. In fact, Denel has been reported in the media to be facing liquidation. It is reported as having difficulties in paying its employees.
413. There remains the need to recognise that the capture of Denel caused harm to several individuals at a personal level. Mention has been made of the suspended executives and the other executives whose careers at Denel came to an end through no fault of theirs. It is hoped that the exposure of the conduct that led to these sad results and the recommendations which follow will go some way towards ensuring that state capture and corruption generally are eradicated from our national life.

## KEY FINDINGS AND RECOMMENDATIONS

414. The evidence heard by the Commission with regard to Denel is that at some stage this was a state owned entity that was highly regarded internationally. Yet now it is an entity that is almost on its knees. The question that arises is: how did this come about and why was it allowed to happen? It is quite clear that a very important reason relates to the quality of leadership or lack thereof that is given to these SOEs. By Minister Lynn Brown's own admission, the 2011-2015 Board of Directors performed its duties very well. She even said that their performance had placed Denel in a position which was "music" in her ears. By her own admission that Board had achieved 88% of its targets in the 2014/2015 financial year. That, by any standard was excellent performance. The Board only served one term and it could have been asked to serve another term. It was not. The question that arises is: why did Minister Brown not ask it to?
415. During the period 2011 to 2015 it was not only the Board that was performing excellently at Denel but also the Group CEO, Mr Riaz Saloojee. Early in 2014 the then Chairperson of the Board of Directors, Mr Z Kunene, had written to Mr Saloojee extending his term of appointment and had said in the letter that one of the reasons the Board was extending his term was that he had shown exceptional performance and leadership as Group CEO of Denel. Yet, the 2015 Board made sure that one of the first decisions it made was to suspend the Group CEO with the Group Chief Financial Officer and the Company Secretary. Consequently, from the second half of the new Board's first year in office and the whole of their second year Denel was without these exceptional performers, namely the 2011 Board and the Group CEO. The result in the year that followed tells it all. In media reports Denel is now associated with liquidation and business rescue.

416. The appointment of members of Boards of Directors and of Chief Executive Officers for state owned entities is a matter of serious concern. The evidence heard by the Commission in regard to not just Denel but also certain other state-owned entities has revealed that the Executive very often failed to appoint the right kind of people these positions in SOEs. In regard to Denel, Minister Brown appointed as Chair of the Board an attorney who had previously been struck off the roll of attorneys for a long lists of acts of misconduct. In SAA, as is reflected in Part I Volume 1 of this Commission's Report the Executive appointed Ms Dudu Myeni who went on to do serious damage to the national airline. In Transnet the Executive appointed Mr Mafika Mkhwanazi and certain other Board members in December 2010 who went on to enter into the strangest settlement agreement in regard to a dismissal dispute that has ever been seen which was very prejudicial to the interests of Transnet and they reinstated Mr Gama as CEO of TFR in circumstances that even Mr Mkhwanazi conceded made their decision indefensible. Also at Transnet the Executive appointed both Mr Brian Molefe and Mr Siyabonga Gama to the position of Group CEO one after the other and they caused serious damage to Transnet.
417. It was also the Executive who appointed Dr Ben Ngubane as Chairperson of the Eskom Board of Directors after Mr Zola Tsotsi had effectively been expelled by that Board and he went on to allow not only himself but also his Board to be dictated to by the Guptas or their associates what resolutions it should pass and, of course, he and his Board caused serious damage to Eskom. Even though this does not relate to an SOE, it is, of course, also true that it was the Executive who appointed Mr Tom Moyane as Commissioner of SARS and he went on to cause untold damage to SARS, an organization that was once the envy of other similar organization internationally.
418. When regard is had to all of the above, it is quite clear that the appointment of members of Boards of Directors of SOEs as well as senior executives such as Chief Executive



Officers and Chief Financial Officers can no longer be left solely in the hands of politicians because in the main they have failed dismally to give these SOEs members of Boards and Chief Executive Officers and Chief Financial Officers who have integrity and who have what it would take to lead these institutions successfully. They are all going down one by one and, quite often, they depend on bail outs.

419. It is therefore necessary that a body be established which will be tasked with the identification, recruitment and selection of the right kind of people who will be considered for appointment as members of Boards of SOEs and those who will be appointed as Chief Executive Officers and Chief Financial Officers at these SOEs.
420. It would be completely unacceptable to allow this situation to continue as before without any change in how members of Boards of SOEs and Chief Executive Officers and Chief Financial Officers are appointed. However, the actual recommendation of the body that will be recommended to play a key role in this regard will be dealt with in Part III of the Commission's Report when other SOEs which have not so far been covered in Part I and Part II of the Report will have been covered.
421. On the evidence heard by the Commission the 2015 Board of Directors of Denel that was led by Mr L D Mantsha failed to carry out its fiduciary duties in suspending the three executives, in failing to ensure that a disciplinary inquiry was or inquiries were held within a reasonable time, in failing to agree to reasonable proposals made by the suspended executives which were aimed at and would have ensured that the allegations against the executives were tested expeditiously and the matter was resolved without undue delays and in making the payments that the Board made to the Executives to get them to leave Denel. In this regard it is recommended that law enforcement agencies should conduct such further investigations as may be necessary with a view to possible prosecutions of members of the Board of Directors of Denel

appointed in 2015 who supported the decisions taken by the Board in regard to the Executives for possible contravention of Section 51 and 51 of the Public Finance and Management Act no 1 of 1999.

422. Mr Mantsha and the other directors who supported his campaign against the three executives have prima facie shown themselves unfit to be directors of a company. Section 162 of the Companies Act prescribes that certain specified persons and bodies may apply to court for an order declaring a director or former director delinquent or under probation, amongst other situations where the director or former director grossly abused the position of director, intentional or by gross negligence inflicted harm to a company or its subsidiary. The court on making a declaration of delinquency may make a range of consequential orders, including orders precluding such a person from exercising the office of a director or imposing conditions on the exercise of such an office.
423. However, all the persons and institutions entitled to apply for such orders must do so at the latest within 24 months after the director ceases to hold office as a director. The measure does not necessarily count this period from the time the director left the company where he misconducted himself. It is sufficient if the allegedly errant person was a director within 24 months of the institution of proceedings,
424. Denel itself, the DPE and the Companies and Intellectual Property Commission established by s 185 of the Companies Act would all have standing to consider bringing appropriate proceedings against Mr Mantsha and other erstwhile members of the 2015 Denel board shown to have abetted Mr Mantsha in his efforts to capture Denel for the Guptas. It is therefore recommended that they all be asked by the Government to consider bringing such proceedings.

425. The Legal Practice Council should be made aware of the findings made by the Commission against Mr Mantsha so that that body may conduct such investigation as it may consider necessary to establish whether Mr Mantsha is fit and proper to practise as an attorney.
426. The facts before the Commission have shown the inadequacy of punitive measures which currently form part of our law. Egregious violations of the Constitution have been demonstrated. Two forms of that abuse have been demonstrated by the evidence regarding Denel: the constitution of a board of directors for the purpose of achieving a result in direct conflict with the obligations imposed on directors by the Companies Act and other applicable legislation and measures; and the use of the suspension power in an administrative context for improper purposes. The methods by which unscrupulous persons can abuse public power are legion and abuses of public power pervade our public life. The present case merely demonstrates two of the potential violations of the duties attendant on public power which can arise.
427. Abuse of public power per se is not a criminal offence and, as has been shown in the present case, egregious abuses of public power tend not to be identified by legal processes until the perpetrators or those that protect them are out of power and then the assessment of the relevant facts will be a cumbersome, time consuming exercise, requiring as it does procedural fairness towards those accused of such abuse.
428. It is therefore recommended that the Government give consideration to the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such potential violations might range from the case of a president of the Republic who hands a large portion of the national

wealth, or access to that wealth, to an unauthorised recipient to the junior official who suspends a colleague out of motives of envy or revenge.

429. Such a statutory offence would therefore require considerable sentencing powers and might provide as follows in the operative section of the statute creating the offence:
430. Any person who exercises or purports to exercise any public power, including any such power vested in such person by the Constitution, national or provincial legislation, any regulation made pursuant to national or provincial legislation or by municipal bylaw, otherwise than in good faith and for the purpose for which such power was conferred, shall be guilty of an offence and liable on conviction to a fine of up to R200 million or imprisonment for up to 20 years or to both such fine and imprisonment.
431. The Hulls contract, the DLS Single Source Contract and the DVS Single Source Contract that Denel awarded to VR Laser were all irregularly awarded in breach of section 217 of the Constitution. It is recommended that the law enforcement agencies should conduct such investigations as may be necessary to establish whether the provisions of sections 38, 50 or 51 of the PFMA were contravened.
432. It is recommended that the law enforcement agencies should conduct such further investigations as may be necessary to determine whether those members of the Board of Directors of Denel who supported the suspensions of the three executives and failed to agree to the executives' proposal for an expedited process to test the allegations against them and failed to convene a disciplinary inquiry against the three executives and supported the decisions to pay out the large amounts that were paid out to the three executives did not act in breach of section 50(1)(a), (2) – and section 51 of the PFMA with a view to their possible criminal prosecution.