THE ENABLERS

THE BANKERS, ACCOUNTANTS AND LAWYERS THAT CASHED IN ON STATE CAPTURE

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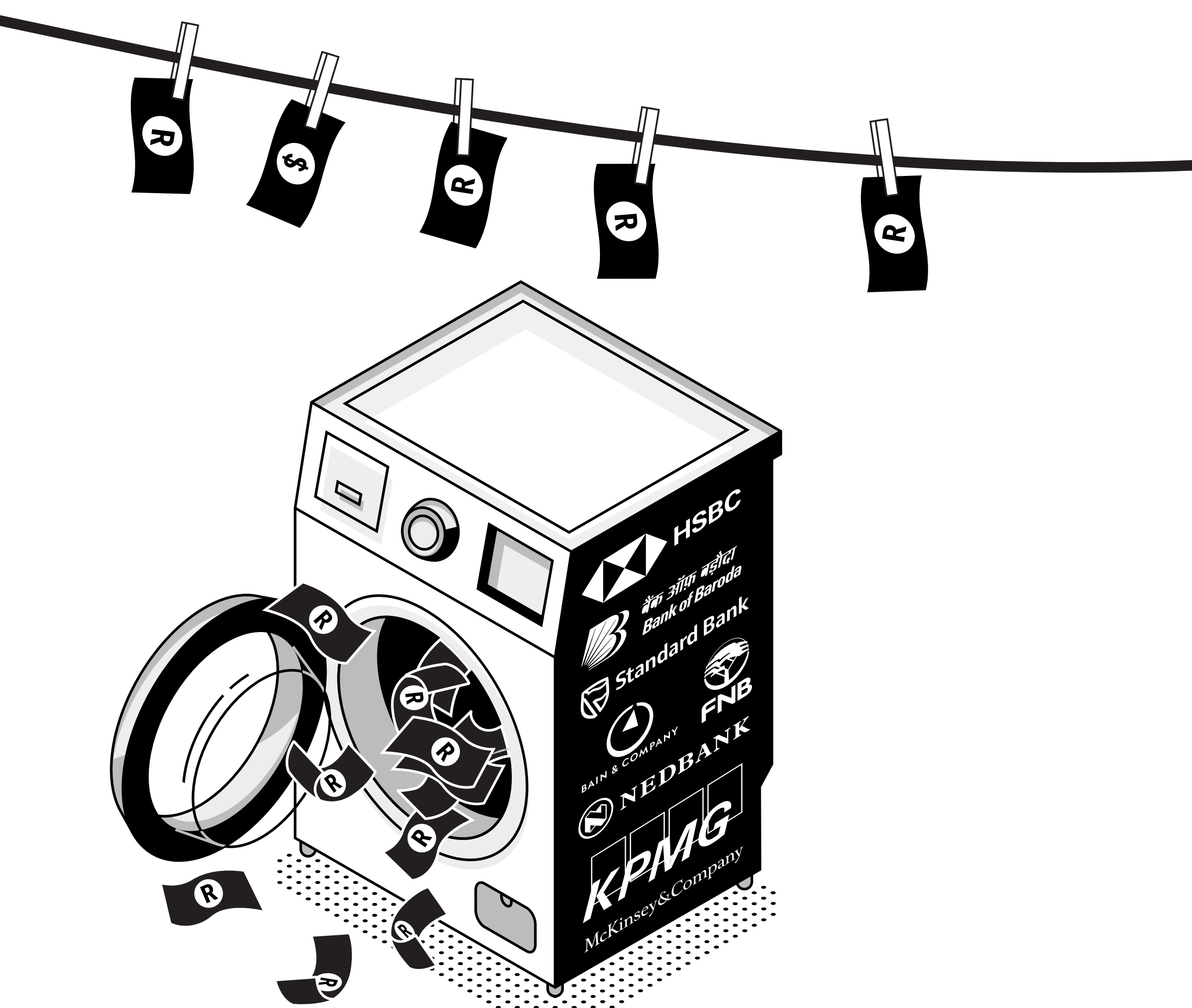


THE ENABLERS

THE BANKERS, ACCOUNTANTS AND LAWYERS THAT CASHED IN ON STATE CAPTURE

Investigation by Open Secrets and Shadow World Investigations

Submitted to the Zondo Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, Including Organs of State

February 2020

open secrets

power & profit | truth & justice

NUMBERS AT A GLANCE:

R100

R16 billion

THE ESCALATION IN COST ON THE TRANSNET 1064 LOCOMOTIVE DEAL, TO FACILITATE KICKBACKS.

R20 billion

IRREGULAR EXPENDITURE AT POWER UTILITY ESKOM BETWEEN 2012 AND 2018.

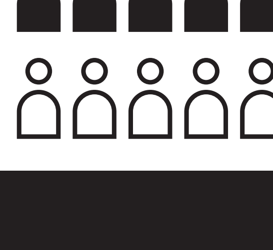
R600 million

IRREGULAR PRE-PAYMENT BY ESKOM TO TEGETA TO ENABLE THE PURCHASE OPTIMUM COAL MINE.

50%

THE PROPORTION OF SOUTH AFRICANS WHO LIVE IN POVERTY...

HAVING LESS THAN R1227 PER MONTH



US$2 TRILLION THE MONEY LAUNDERED IN THE GLOBAL FINANCIAL SYSTEM EVERY YEAR

98% THE PROPORTION OF LARGE CORPORATIONS ON THE UK AND US STOCK EXCHANGES AUDITED BY THE 'BIG FOUR' ACCOUNTING FIRMS.

billion

THE DECLINE IN SOUTH AFRICAN TAX REVENUE FOLLOWING THE ATTACK ON SARS, FACILITATED BY BAIN & COMPANY.

R288 million / 82%

OF THE PUBLIC FUNDS SPENT ON THE ESTINA DAIRY PROJECT WENT TO GUPTA-CONTROLLED COMPANIES IN DUBAI AND SOUTH AFRICA.

R1 billion PER YEAR

THE VALUE OF THE CONTRACT BETWEEN ESKOM AND MCKINSEY. GUPTA-LINKED TRILLIAN WAS TO RECEIVE 30% OF THIS, DESPITE THERE BEING NO SIGNED CONTRACT IN PLACE.

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ENABLERS IN ACTION

Corruption is a major problem which has a devastating human cost. In poor countries it kills people and traps millions more in poverty.... The largely hidden truth is that banks play an integral role in enabling this. Corrupt officials need somewhere to hide stolen money. Yet while laws and regulations apply in most countries, which require banks to do a range of checks to detect the proceeds of the corruption, many banks fail to uphold them. As a result they are leaving the door wide open for corrupt people to launder their funds.[1]

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INTRODUCTION

The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("The Zondo Commission") faces a difficult but vital task. It is expected to help uncover individual acts of corruption and assign responsibility to specific individuals and corporations for their malfeasance. South Africans expect justice and accountability to follow the findings, and they are growing increasingly impatient.

However, to serve the public interest, the Commission has also acknowledged the need to uncover the structural and systemic issues that underpin state capture and corruption in South Africa. To do this requires an understanding of the state and the way in which public officials have both abused their power and violated the law to facilitate the enrichment of a small cabal of individuals and entities. In this category, the Commission has received extensive and damning evidence from a range of whistleblowers, witnesses and accomplices. This is important work.

This investigative report, co-authored by Open Secrets and Shadow World Investigations, argues that an equally important element of the system of state capture has been largely overlooked by much of the testimony before the Commission to date, and receives not nearly enough public attention.

This report aims to address this omission by drawing the public's and the Commission's attention to the extensive evidence of the role of the private sector "enablers" in many of the cases already considered by the Commission. It focuses particularly on the role of banks, accounting firms, consultants and lawyers in facilitating criminal conduct that formed part of the state capture enterprise. Sometimes this conduct constituted gross negligence, but the evidence all too often suggests intentional complicity. In all cases, there was a failure to fulfill legal or professional duties.

A failure to interrogate, fully and energetically, the private enablers of state capture would leave the work of the Commission incomplete; it would also undermine ongoing efforts not only to understand state capture, but to rebuild institutions and systems in ways that guard against similar abuse in the future.

Many of these private actors – from the banks to the accountants and management consultants – seek to portray themselves as innocent parties in the story of state capture. Some claim to have been unwitting participants in the misconduct of others. Mostly, these private sector firms have come to the Commission to provide evidence that they were the victims of political pressure in support of the state capture enterprise. This was certainly the argument put forward by South Africa's large banks that appeared before the Commission in September 2018. Just as the country's business elite did when apartheid ended, they generally present themselves as the hapless victims of injustice.

This report argues that such a narrative, while convenient for these corporations and their executives, does not provide a full picture of their role in enabling criminal activity. Rather, the evidence suggests that their role as enablers was systemic. Moreover, their absence from much of the scrutiny of state capture so far is indicative of a global trend that minimises the essential roles that bankers, accountants and lawyers play in economic crimes.

In a separate submission to the Commission by Shadow World Investigations on corruption related to the Estina Dairy Project, the argument is made that the so-called state capture network can accurately be described as an organised criminal enterprise best understood as racketeering.[2] Without repeating that formulation here, it is useful to keep this framing in mind; namely, that a Gupta family enterprise de facto exists and has engaged in a pattern of racketeering activity aimed primarily at enriching the participants.[3]

Crucially, this enterprise used seemingly legitimate entities to facilitate racketeering activities, particularly by disguising criminal activity and distributing the proceeds of the crimes. Many entities used in the enterprise were presented as and appeared as separate and distinct legal service providers "but … were, instead, employees or associates of the racketeering enterprise ultimately taking de facto direction from the Gupta family or their representatives and associates." [4]

Proceeding from this notion of the racketeering enterprise, this report examines the role of some of the largest banks, accounting firms, consultants and law firms in enabling and facilitating many of the activities of that enterprise.

The report presents comprehensive evidence in support of the following conclusions:

1. Unpicking the Gupta racketeering enterprise requires scrutiny of private sector facilitators. Specifically, the enterprise required banks, law firms, accounting firms and other professionals both to facilitate transactions; and to fail to perform their lawful due diligence requirements.

2. These private actors take advantage of and have in fact co-created a global financial order predicated on secrecy and absence of accountability. Within this system, it has become easy to launder the proceeds of corruption and organised crime in exchange for healthy fees and vast profits. The Gupta enterprise took advantage of this system with the help of various professionals.

3. While many of these corporations have put forward a narrative to the Commission that presents them as innocent victims pressured by political heavyweights, this is not supported by the evidence. The evidence from the case studies in this report reveals that their complicity in many instances appears to result from their decision to privilege profit over their legal duties.

4. The evidence reveals significant gaps in terms of the framework of regulations and institutions of accountability that are meant to hold private actors accountable for unlawful conduct. It is also evident that the capacity of the criminal justice system to hold these actors accountable has been eroded.

This report thus has two aims. Firstly, it seeks to reveal the structural problems that allows these professionals to enable grand corruption with impunity; and secondly, it provides evidence to the Commission of specific instances of complicity of various private actors in the Gupta racketeering enterprise. To fulfil these aims, the report is structured as follows:

SECTION 1: **BACKGROUND & CONTEXT**

The continuities of corrupt networks from apartheid until the present day. This focuses on the ever-present role of private actors in enabling these crimes. This section also discusses the broader problem of impunity for private actors throughout South Africa's history, and the implications of the erosion of state institutions and their capacity as part of the project to entrench impunity. It is in this context that contemporary issues of state capture must be understood.

SECTION 2: **THE BANKERS**

The role of South African and global private banks in facilitating economic crime and corruption. Before exploring case studies specific to the Gupta enterprise, this section reveals the broader structural problems in the banking sector.

SECTION 3: **THE OFFSHORE WORLD, AUDITORS, & CONSULTANTS**

The role of the banking sector in the context of a global financial system that has entrenched secrecy and aids illicit flows of money. These flows often form part of laundering the proceeds of organised crime and corruption. This secretive financial system is created and sustained by teams of professionals, including accountants, auditors and other professional consultants.

SECTION 4: **THE LAWYERS**

The legal profession as an equally important role player in these systems that enable criminal activity. In particular, lawyers often enable the illicit flow of money by, among other things, helping set up front companies and bank accounts. Lawyers often decide to privilege loyalty to clients over their obligations to uphold the law.

SECTION 5: **CASE STUDIES**

An analysis of some of the most conspicuous instances of crimes comitted by the Gupta racketeering enterprise.
This looks at three case studies that have already featured prominently at the Commission:
5.1. Transnet's procurement of locomotives;
5.2. Allegations of corruption at Eskom;
5.3. The Estina/Vrede Dairy Project.
Each case study shows how the role of banks, accounting firms, consultants and lawyers was not just incidental to, but essential to setting up, facilitating and perpetuating elements of criminality.

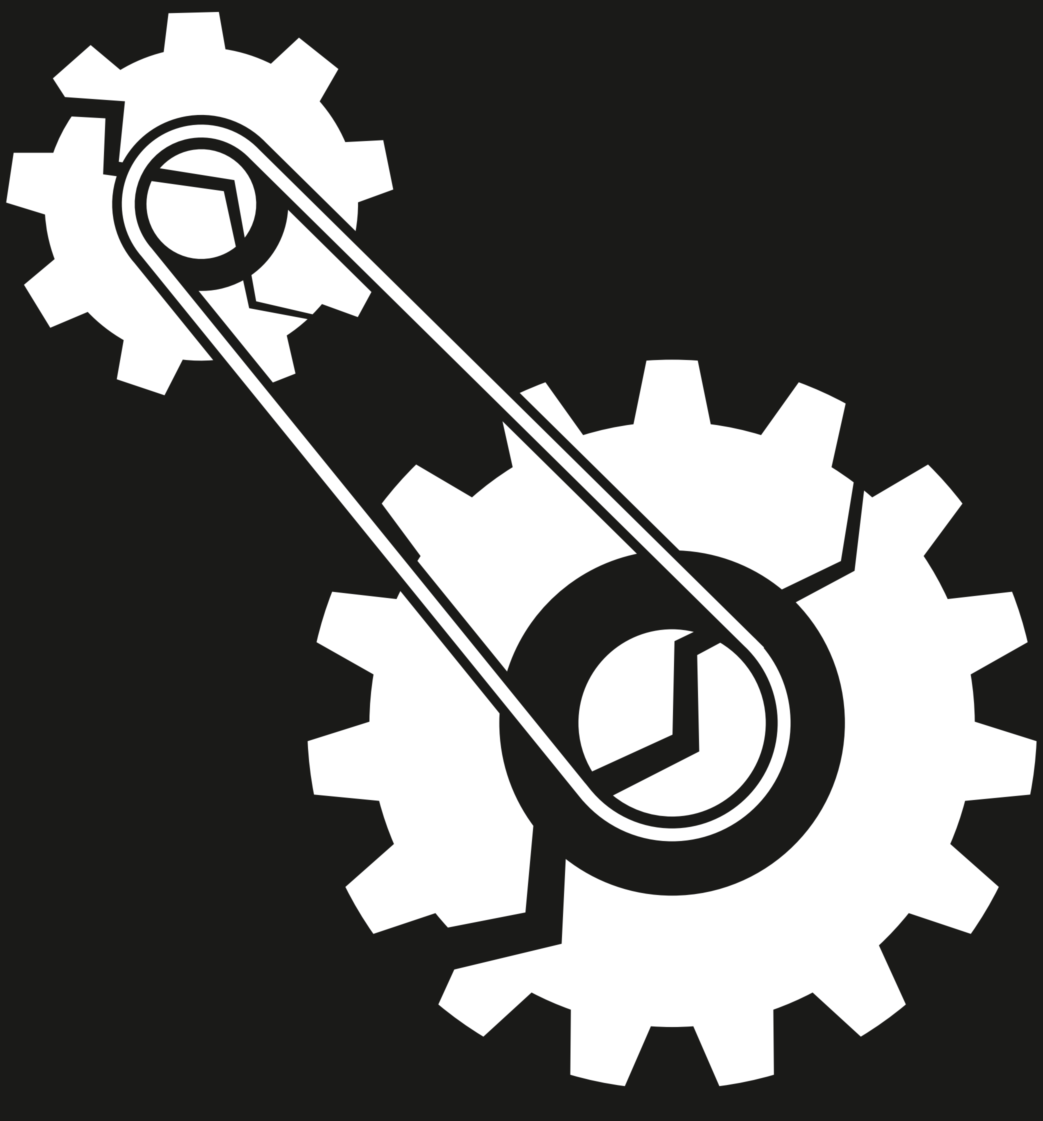
SECTION 6: **RECOMMENDATIONS**

This section identifies where specific actors need to be held accountable for their conduct. It also provides broader recommendations on how to reform institutions and mechanisms tasked with holding private sector actors to account.

The decision to focus on these actors who so often escape the spotlight is deliberate. Any efforts to reform the political and economic system to root out grand corruption and organised crime requires turning attention to the private sector actors that facilitate it. Addressing the University of KwaZulu-Natal at the end of 2017, Chief Justice Mogoeng highlighted the way in which private actors have escaped scrutiny in South Africa's discussion of corruption:

> *There is a lot of wrong doing, I dare say, in the public sector. A lot, as corruption and as mismanagement, but there is a lot of wrongdoing in the private sector. How it escapes the public space or find[s] some space there for a little while and immediately disappears, has confounded me for a very long time…*[5]

In the same speech, the Chief Justice also reminded the audience that such a discussion was not academic. Rather, obscuring the role of the private sector undermines efforts at addressing impunity and achieving social justice. He added: ''For as long as we pretend that wrongdoing is only in the public sector but never in the private sector – we are not going to achieve our Constitutional aspirations.''[6]



2

BACKGROUND AND CONTEXT

This report looks at three contemporary case studies that exemplify the role of private enablers in the looting of South Africa's state. These are the Transnet locomotive procurement deal; the theft of public money intended for the dairy project in Vrede; and corruption at Eskom. We have chosen these examples because they allow us the opportunity to examine the overwhelming evidence implicating banks, consultants, lawyers and accountants in participating in and enabling the criminality in each case. There are also active investigations and legal processes linked to each of these, and we hope that this report generates the impetus to demand urgent accountability for the enablers involved in each instance.

However, the contemporary focus of the report should not be seen as an endorsement of the position that state corruption and grand corruption are symptoms of Jacob Zuma's administration alone, nor something to be understood in relation to South Africa's democratic period since 1994. In fact, we firmly reject such arguments as inaccurate and ahistorical. The reality is that the kind of deep state networks that define contemporary state capture are emblematic of continuities between the secretive and profit-driven networks that thrived under apartheid and those of today.

The fact that these networks were left relatively undisturbed in South Africa's transition is an important factor in explaining the current impasse we face. It is also a reminder that the Zondo Commission and other ongoing investigations provide an opportunity to break from a past that has turned its gaze away from the private facilitators of grand corruption and grave crimes. This is why we have submitted this report to the Commission with the urgent recommendation that the actors implicated here be investigated.

CORRUPTION AND CONTINUITIES: THE LONG SHADOW OF APARTHEID

The contemporary challenges of corruption and state capture are deeply rooted in our history. Such discussions are unfortunately often subverted by partisan debates aimed at comparing apartheid and contemporary corruption, often with the purpose of minimising one or the other. Not only does such an approach undermine the struggle for accountability for both past and contemporary crimes, but it also ignores the continuities in the networks that have profited from these crimes over a long period. The powerful are only too happy to watch from the sidelines while their complicity is obscured.

There is clear evidence that the apartheid state was itself captured by a powerful conservative network that derived profit from propping up that regime. Open Secrets has argued elsewhere that this conservative network is best understood as representing a "deep state" – a secret network of corporations, banks, arms companies, intelligence agencies and politicians that exerted (and continue to exert) significant power behind that state's formal institutions, in order to benefit themselves.[1]

This deep state network was both local and global, and just like the contemporary stories of state capture, local and global banks were indispensable participants in their schemes. In the case of the apartheid regime, the military-industrial complex operated in the shadows, and enabled a few to profit significantly.

The United Nations' compulsory arms embargos were intended to make the survival of the white minority military state impossible by cutting off its access to the weapons and weapons technology it needed to wage war domestically and in the region. The apartheid state's response was to entrench a highly secretive system around the military and the state-owned company Armscor, which would procure weapons in contravention of the embargo. This secrecy provided an opportunity for arms companies, banks and middlemen to profit from the significant premiums the regime was willing to pay.

Many local and international corporations became rich through assisting the apartheid state in this way. The military industrial complex in South Africa profited handsomely from the military state. By the 1980s, military spending constituted more than 20% of the apartheid state's annual budget, with approximately 100 000 people employed in the armaments industry. Yet due to the need for secrecy, and in response to the UN arms embargo, the state increasingly directed production from private companies without any open tender of procurement processes. Thus, more than 70% of these employees worked for over 3 000 private corporations fulfilling Armscor contracts.[2] This resulted in growing "mutual dependence" between the military and business during apartheid.[3]

Many of the country's largest private corporations profited from war, and their links extended far beyond the military industry – being ultimately owned by South Africa's biggest financial and mining houses. The Centre for Conflict Resolution told the Truth and Reconciliation Commission that "there was a high degree of integration between the public and private sectors…. Three industrial groups, namely Reunert, Altech and Grintek, dominated the private sector defence industry. These groups were in turn owned or controlled by one of the six large financial, mining and industrial conglomerates. Reunert was controlled by Old Mutual, Altech by Anglo American, and Grintek by Anglovaal."[4] Tellingly, these corporations have never had to answer for their crucial role in propping up the apartheid state, nor the profits derived from these activities in support of the regime.

Yet there were even more important allies on hand to assist the apartheid military state. Not unlike the Gupta racketeering enterprise, the apartheid state faced the central challenge of moving vast sums of money linked to illegal activity and keeping it a secret. As in the

case studies discussed later in this report, the apartheid state had the help of global banks.

Research by Open Secrets uncovered the money laundering network used by the apartheid state to facilitate illegal weapons transfers. The centre of this network was a secret Armscor office housed on the top floor of the South African embassy in Paris. Hosting up to forty Armscor officials at any time, the office became the central node of Armscor's illicit trading activities, serving as a thoroughfare for much of the regime's arms trafficking.[5]

Armscor officials in turn relied on two crucial banks to undertake almost all of their transactions. Officials based in Paris travelled regularly to Luxembourg to meet with officials at Kredietbank Luxembourg (KBL). KBL and its sister bank in Belgium – Kredietbank – were together the most important participants in the global network that supported apartheid. They helped Armscor manage a network of around 130 secretive front companies and over 800 bank accounts used to obscure the money flows that enabled the weapons trade. Most of the front companies were registered in secretive jurisdictions like Liberia and Panama, but the bank accounts were with Luxembourg banks, and the majority of those were KBL accounts. By way of example, 76 front companies identified as being registered in Liberia held a total of 198 bank accounts at KBL alone. [6]

This architecture was created with the help of the banks just as electronic money transfers became possible. While it was a sophisticated system, it was a precursor to what has become commonplace in the modern economy for corrupt elites and organised criminals alike. The modus operandi for moving stolen money from the Gupta enterprise mirrors this system, just with different names and places. Instead of Panama and Liberia, the Guptas' secret jurisdictions of choice were Hong Kong and Dubai. They also relied on the assistance of an army of bankers, lawyers and consultants who have made corporate secrecy and illicit money flows their main business. Such systems not only help the corrupt to hide and then spend ill-gotten gains, but they make it difficult for law enforcement authorities and investigators to follow the trail of money.

Thus, there are significant continuities in the modus operandi when it comes to the money-laundering systems used by corrupt elites throughout modern South African history. But there is an additional story of continuities from apartheid until the present day: a continuity in the actors involved in criminal networks, and their role in undermining institutions in order to secure their own impunity.

WEAKENING SOUTH AFRICA'S INSTITUTIONS

Apartheid's money-laundering system was used to facilitate payments to arms companies around the world that were willing to aid and abet a crime against humanity in exchange for profits derived from selling weapons at a premium. One crucial ally was the French arms company Thomson-CSF. The company's relationship with the apartheid state was entrenched as early as the 1960s when PW Botha (then Minister of Defence) visited the wine-region of Bordeaux to meet with Thomson's senior executives during a missile testing retreat.[7] The apartheid archives show that Thomson-CSF remained close to the apartheid military establishment throughout the sanctions period in order to assist them in procuring weapons. Thomson-CSF was thus a long-standing supplier of military material to South Africa, no doubt with the explicit or tacit support of the French state. Yet, as with most of apartheid's corporate accomplices, Thomson was never held to account or questioned by French or South African authorities for its willingness to violate the arms embargo. [8]

In the absence of scrutiny, it is not surprising that Thomson-CSF, albeit under a different name, continued to do business as usual in democratic South Africa. It now operates as Thales, a Fortune 500 company in France that earns around R250 billion a year. Thales is well known in South Africa as the co-accused alongside former president Jacob Zuma in his pending criminal trial. The charges indict both parties, and are related to allegations of bribes paid by Thales to Zuma during the 1999 arms deal. An Armscor fixer turned whistleblower has infamously alleged that Zuma accepted a bribe from the French company with the code words "I see the Eiffel tower lights are shining today." [9]

The alleged bribery of Jacob Zuma, as well as the litany of other bribes that defined the 1999 arms deal, have become defining scandals of South Africa's democratic era. Perhaps most importantly, their legacy is the weakening and erosion of very institutions South Africans rely on to investigate and stop corruption. The alleged bribe Thales paid to Zuma was purportedly in return for Zuma's promise to protect the French arms firm and long-time apartheid ally from any prosecution linked to corruption in the arms deal. Schabir Shaik, Zuma's financial advisor, was in fact found guilty on two counts of corruption, including for soliciting a bribe from the French arms firm Thomson-CSF in return for protection from investigation from Zuma.[10]

Other examples of continuities in actors involved in criminal activity both during and after apartheid abound. For many individuals and corporations, the democratic transition presented an opportunity to pivot towards and work with a new elite, instead of accounting for their complicity with the apartheid state. For example, Tony Georgiadis (through his company Alandis) assisted the apartheid state in the supply of oil in contravention of an oil embargo.[11] He then ingratiated himself with the ANC elite during the transition, and has been identified as facilitating contact between senior politicians and German arms companies ThyssenKrupp and Ferrostaal in the 1999 arms deal.[12] Ferrostaal, for whom Georgiadis allegedly acted as middleman, was itself party to an apartheid-era sanctions-busting deal to supply submarine blueprints to the apartheid Navy.[13]

There is no doubt that South Africa's institutions of accountability have been systematically under attack since the arms deal. All evidence suggests that as the net closed around those implicated in corruption in the arms deal, those close to the implicated networks launched a fierce campaign to undermine and weaken the institutions that might hold them to account.

This campaign led to the disbanding of the Directorate of Special Operations (the Scorpions), a hitherto highly effective and specialised anti-corruption unit, in favour of the Hawks – a unit with insufficient independence that has been neutralised by political interference. This has not only resulted in an unwillingness to investigate fully explosive evidence of the most serious corruption and economic crimes; it has also led to an exodus of skilled staff, and thus a dramatic erosion of the state's capacity to successfully prosecute complex financial crimes in both the private sector and the state.[14]

There have been similar attempts to undermine the National Prosecuting Authority (NPA). Testifying to the Zondo Commission in September 2019, Mxolisi Nxasana (the former head of the NPA) alleged that external political interference at the NPA had undermined its integrity and effectiveness.[15] Commenting on the consequences of the exodus of skilled staff and lack of resources and management, new National Director of Public Prosecutions (NDPP) Shamila Batohi has admitted that the state of the prosecuting authority is "much worse than expected".[16]

A weakened Hawks and a crippled prosecuting authority guarantee impunity for the individuals and corporations engaged in committing and enabling grand corruption and other economic crimes. While not all the corporations implicated in this investigation can be said to have aided the undermining of South Africa's anti-corruption architecture, they have undoubtedly extracted short-term profit from this situation. That is why rebuilding these institutions is an essential part of rebuilding integrity across the state and private sectors.

If we follow the trail backwards, we must acknowledge that the challenges faced by many of these institutions, and their failures, are inextricably linked with deliberate attempts to undermine them by criminal networks from South Africa's past and present. These institutions are the bulwark against the kind of looting that has defined South Africa for far too long. But they were not only undermined to protect the Gupta family; they were targeted to ensure impunity for many of the secretive networks that have engaged in criminal activity in South Africa from the apartheid era until the present day.

LOOKING BACKWARDS AND FORWARDS

These brief observations on some of the continuities in corrupt networks across South Africa's past are not academic. We choose to foreground them because until we understand grand corruption in South Africa today as a legacy of and continuous with our past, we cannot hope to tackle it. Addressing the covert networks of the past remains "another kind of 'unfinished business' of the transition: the ghosts of our tortured past will continue to haunt us until they are exorcised fully and publicly." [17]

In February 2018, just days before Jacob Zuma resigned as president under immense public pressure, the first hearings of the People's Tribunal took place at Constitution Hill in Johannesburg. The Tribunal was a process led by civil society to hear evidence, publicly, related to corruption and state capture in South Africa from the late apartheid period until the present day, and to act where the state had not.

After considering all the evidence, some of which is mentioned above, the Commission's panel, consisting of legal minds and civil society activists, highlighted the importance of understanding the continuities in corruption across South Africa's history. The findings, read out by former Constitutional Court Justice Zac Yacoob, emphasised that state capture is a continuation of the corrupt activities that preceded it.

> **Absent the violation of United Nations sanctions, and the corrupt Arms Procurement Package, the kind of state capture described in the evidence would probably not have occurred. The examples of state capture mentioned here are the tip of the iceberg.** [18]

The Tribunal members acknowledged that in the absence of an active process to dismantle criminal networks from the past, these have survived, adapted, changed shape and continue to operate and profit at the expense of South Africans.

When the Zondo Commission comes to write its findings and make its recommendations, it will not be able to avoid a question on many people's lips about the depth of criminality in both the South African state and global economy: "How did it get this bad?" We suggest that this cannot be answered without a longer view of South Africa's history and the deep state networks that have enabled crimes from apartheid until today. The impunity of these networks over time has emboldened those actors who profit hugely from grave injustice. In turn, these networks are able to use their leverage to undermine the very constitutional framework and institutions that we rely on to keep them in check.

Without anticipating the recommendations contained at the end of this report, there are important ways in which the Commission can break with the tradition of allowing private actors off the hook. The first is to bring them to the centre of their narrative about state capture. Bringing the evidence regarding the complicity of banks, consultants, lawyers and accountants into the public domain is an important first step in addressing this gap in our understanding of state capture. This will require the Commission to investigate, summon and interrogate these actors.

The second step cannot be achieved by the Commission alone, but requires the support of the NPA: to institute prosecutions and civil litigation against the private actors implicated in enabling some of the most egregious wrongdoings linked to contemporary state capture. These should not be afterthoughts. Priority targets among those corporations complicit in state capture should be identified, and their prosecutions treated as priorities.

Those private enablers of crimes under apartheid have never faced prosecution or sanction in South Africa or elsewhere. This has bred a culture of impunity that has allowed these networks to thrive. For far too many individual and corporate interests that profited from wrong-doing during apartheid, the South African transition simply meant "business as usual". [19]

> **We now have the opportunity to hold these corporations complicit in state capture to account. This is the end of "business as usual".**

3

THE BANKERS

LAUNDERING DIRTY MONEY

Corruption and money laundering are inextricably linked. Motivated by profit, the activities of corrupt politicians bear stark similarity to the actions of those involved in organised crime, drug trafficking and corporate crime. For both corrupt politicians and private actors, illicitly obtained assets are useless unless they are placed, layered and integrated into the global financial system in a way that obscures their illicit origin and makes them appear legitimate.[1] (See infobox on next page)

While money laundering is now an independent criminal offence in many jurisdictions, including South Africa, it is also an essential part of enabling other serious offences, including corruption, terrorism financing, racketeering, drug and human trafficking. All money laundering should thus be viewed in the context of two crimes; money laundering itself; and the underlying economic, financial or violent crime that the laundering facilitates. [2]

What should be apparent from the definition above is that the banking system and individual banks are central role players in modern-day money laundering. Particularly at the stage of "layering", the banking system is used to facilitate multiple suspicious transactions that should be flagged and reported. Consider the process of layering by those implicated in corrupt deals in South Africa's history of state capture. This regularly included significant payments into the bank

The Financial Action Task Force (FATF) is an inter-governmental body set up in 1989 and tasked with providing recommendations to all countries regarding means of combatting money laundering and the crimes it enables.[3] South Africa is one of 36 member countries. FATF identifies the three-stage process of "placement, layering and integration" as the typology for money laundering.

1. Placement

Illicit proceeds are first "placed" into the financial system by deposit into a bank account (often after splitting that money up into smaller deposits).

2. Layering

These proceeds are then "layered", which entails various processes to disguise their origin and distance them from their source. Though this might include purchasing different financial instruments, a common route is simply to route the funds through multiple bank accounts across different jurisdictions.

3. Integration

After this, it is easy to "integrate" the funds back into the legitimate economy by transferring them into a new bank account or purchasing assets like property or other businesses.[4]

accounts of front companies with no evidence of actual activity (much less whether the activity matched the services listed on the invoice). Banks are legally required to create and enforce anti-money laundering systems in order to identify these kinds of suspicious activities and break the money-laundering chain. However, as discussed below, "breaches" or "failures" of these systems are increasingly commonplace in the banking system.[5]

Another way in which banks are central to money laundering is that they are an essential component of a global financial system that uses secrecy to obscure the movement of illicitly obtained funds. Most sophisticated corruption and organised crime networks and syndicates rely on the ease with which shell companies can be established in low-tax secrecy jurisdictions in which there is no need to disclose true ownership of a company. [6]

Often, the company is no more than a post-box that simply gives the shell legal personality, and it has no purpose other than to facilitate financial transactions as part of the process of obscuring the origin of those funds. The ability to dismantle this system of secrecy has been identified by the South African Treasury as a key step in halting illicit financial flows and other criminality.[7] The use of front companies in secrecy jurisdictions such as Dubai, Hong Kong, Mauritius and Bermuda as part of South Africa's state capture story will be explored in this report.

Yet these "front companies" can only operate in the context of a banking system that facilitates their inherently suspect transactions. Front companies need bank accounts to move money around. Techniques such as "layering" (moving assets through multiple accounts to make them untraceable) and "smurfing" (breaking up large amounts into much smaller transactions) require the use of multiple bank accounts. It is only with the use of the legitimate banking system that front companies can become the conduit for the "washing" of dirty money.

Banks continue to fail to tackle money laundering or to impose anti-money laundering (AML) systems as their complicity in economic crime allows them to reap significant profits from illicit flows. It is difficult to estimate the value of money laundering, given its illicit nature. The more proceeds of crime are integrated into the international banking system, the more difficult they are to identify. The upper bound of estimates by the United Nations Office for Drugs and Crime (UNODC) suggest that up to US$2 trillion is laundered every year – a staggering five per cent of global GDP.[8] Banks, of course, earn a fee for every transaction that they facilitate, and can also use the deposit of vast sums to expand other income-earning parts of their business.[9] This means that they have a powerful incentive to look the other way when handling suspicious transactions,[10] in order to keep reaping the profits from such high-value transactions. This also explains why the current system of relying only on fines for those banks who commit the worst money-laundering breaches is insufficient.

This report aims to shine a light on the role of South Africa's banks and financial sector in facilitating the grand corruption involved in state capture. However, their part must be understood in the global context of a struggle to make private banks accountable for their role in these crimes.

TOO BIG TO FAIL. TOO BIG TO JAIL. TOO SMALL TO MATTER.

There is an increasing awareness of the complicity of banks in financial crime. This cannot be divorced from recent world events, and the direct role banks have had in affecting political and societal change. In the aftermath of the 9/11 terror attacks, an increasing amount of anti-terror and anti-money laundering legislation was passed across the world. One aspect that was considered instrumental to the elimination of terror threats has been eliminating terrorists' revenue streams. It is for this reason that current anti-money laundering laws and discourse makes extensive reference to "counter-terrorist financing". [11]

Yet it was the 2008 financial crisis that awakened the world to impunity for economic crime. The financial crisis and subsequent recession decimated the global economy, and crucially, the jobs and the savings of millions of people. The lengths that financial institutions were willing to go to make profits, and the widespread impunity for financial crimes and their consequences, were powerfully brought to public attention. Many argue that the crisis was spurred on by the collapse of what was the fourth largest investment bank in the United States at the time, Lehmann Brothers. The bank's use of "cosmetic accounting tricks" [read: fraud] in subprime mortgages issued to borrowers who were unable to pay back the loans eventually led the bank to file for bankruptcy.[12] In 2016, global banking giant Goldman Sachs paid fines totalling around $5 billion to the US government, after admitting that it had defrauded investors in the run-up to the crisis by misrepresenting the risk associated with investing in subprime mortgages. [13]

The 2008 financial crisis highlighted the interconnected nature of the global economy. The collapse of Lehmann Brothers had a profound ripple effect on the global economy, as the contagion, referred to with remarkable understatement as the "global credit crunch", spread rapidly. Many governments, including the United States, opted to "bailout" banks ostensibly to avoid another Great Depression similar to the crisis of the 1920s. It was this that led then US Treasury Secretary, Hank Paulson, to convince the US government of then President George W. Bush to stabilise the economy through the Emergency Economic Stability Act of 2008.[14] This act saw the US government buy around US$700 billion in distressed assets from banks to prevent the total collapse of the global economy.[15] Banks were deemed "too big to fail". [16]

The lack of punitive repercussions for banks and their executives for their predatory lending that led to the near collapse of the global economy introduced a new phrase: "too big to jail". In the uproar that followed these multi-billion dollar bail outs by governments, many social movements asked: "if banks are too big to fail, are people too small to matter?"[17] The people who had lost their homes, their jobs and their pensions in the crisis did not receive compensatory bailouts from their governments. Curt Goering argues that this illustrates that government and corporate executives are "cosy bedfellows".[18] In fact, despite the United States having some of the best resourced investigative agencies in the world, federal prosecutions of white-collar crimes were at a twenty-year low by the end of Obama's Presidency in 2017. [19]

It is within this context – too big to fail, too big to jail, too small to matter – that the banking sector continues to enjoy impunity for facilitating large-scale money laundering. Though banks are legally required to institute anti-money laundering (AML) systems in order to track illicit transactions, AML system failures and breaches are widespread. In 2012, HSBC paid US regulators US$1.9 billion for failing to uphold AML laws; at the time, the largest fine levied against a bank for crimes of this type. The US Department of Justice found that the bank had violated the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act "by failing to maintain an effective anti-money-laundering program and to conduct appropriate due diligence on its foreign correspondent account holders."[20] The investigation that led to this fine found that HSBC washed money for the Mexican Sinaloa cartel through its branches in Mexico between 2006–2010.[21] The bank also failed to flag suspicious transactions linked to Al Qaeda, Hezbollah, Russian criminal networks, and helped Iran, North Korea and Sudan to evade sanctions. [22]

At least US$881 million in drug trafficking proceeds, from the Sinaloa Cartel in Mexico and the Norte del Valle Cartel in Colombia, were laundered through HSBC Bank USA.[23]

In some Mexican branches of HSBC, they "widened tellers' windows to allow bigger boxes of cash to be pushed across the counters."[24] The Sinaloa cartel is known to be one of the more vicious cartels in Mexico – involved in crimes including beheadings, kidnappings, torture and the bribery of officials.[25] Four families of Americans murdered in Mexico by the Sinaloa cartel sued HSBC in 2016. The suit claims that HSBC "knowingly provided continuous and systematic material support to the cartels and their acts of terrorism by laundering billions of dollars for them. As a proximate result of HSBC's material support to the Mexican drug cartels, numerous lives, including those of the Plaintiffs, have been destroyed." [26]

> **While the US$1.9 billion fine might sound significant, it amounted to less than a month of HSBC's profits. It represented what many have come to see as "velvet accountability" for the banking sector. Even when there is significant evidence of egregious law-breaking, authorities decline criminal charges, do not prosecute any executives or employees in their personal capacity, and rely on settlement agreements and penalties that have little impact on super-wealthy banks.** [27]

The year 2018 proved to be a prolific one for money-laundering scandals involving big banks. Goldman Sachs (US), Deutsche Bank, UBS (Switzerland) and US Bancorp all faced serious allegations of facilitating money laundering through failing to maintain adequate AML systems.[28] While South Africans were reeling from the endless revelations about state capture, banks were assisting the same processes around the world. Goldman Sachs arguably facilitated a Malaysian state capture. According to Malaysian prosecutors and US investigators, the bank helped Malaysian financier and businessman Jho Low and former Malaysian prime minister, Najib Razak, to misappropriate US$2.7 billion from the Malaysian development fund 1MDB.[29] The bank is said to have participated in bribing officials, and underwriting US$6.5 billion in bonds for 1MDB.[30] In November 2018, Goldman's lead banker on the 1MDB deals, Tim Leissner, pleaded guilty to participating in bribery and money laundering.[31]

For the first time, in 2018, the Organised Crime and Corruption Reporting Project (OCCRP) named a bank, instead of a politician, as its most corrupt actor.[32] In what is now increasingly assumed to be the biggest money-laundering scheme of all time, Denmark's largest bank, Danske Bank, and its Estonian branch, laundered €230 billion between 2007–2015 for Eastern European autocrats and oligarchs.[33] The scheme's magnitude is so vast that it has enveloped banks across the Nordic region, including Swedbank and Nordea. The German bank, Deutsche Bank, has also been implicated in the scheme, as it is said to have processed 80% of the money laundered by Danske.[34] These examples are but a few of what is now a commonplace trend of neglect of AML systems by banks.

The example of Danske Bank brings us neatly to the intersection of corruption, state capture and money laundering. Former Eastern-bloc states are often held up as perfect examples of how private interests, in the form of politically connected corporations and oligarchs, have captured the state to extract rents – one of the earlier instances where the term "state capture" was utilised.[35] Yet what the Danske Bank scandal reveals is that those networks of extraction are deeply entwined with the global banking system, which allows them to move, hide and benefit from the proceeds of their crimes.

The evidence shows that networks implicated in state capture in South Africa have similarly used the banking system to facilitate corruption and launder the proceeds. They do so despite an extensive AML framework in South Africa that regulates the conduct of our banks.

SOUTH AFRICA'S AML LEGAL FRAMEWORK

Since the late 1980s, the integral role of the global banking system in facilitating corruption has been widely recognised in international law. It has also been understood that private banks were not doing enough to combat this pattern.[36] In an effort to tackle these issues, there has been a proliferation of international standards and other soft-law mechanisms to provide a framework for how banks should be supervised, and how countries can go about crafting effective anti-money laundering (AML) legal frameworks.

FATF recommendations are among the most important with regard to AML frameworks, and are generally recognised as representing best practice. Over 180 countries now subscribe to these, including South Africa. FATF conducts country evaluations on a regular basis to assess whether countries are meeting the prescribed standards.[37] In addition the World Bank, IMF, European Union and Basel Committee on Banking Supervision all have issued notices, advisory regulations and other soft-law principles that seek to address the problem of money laundering. [38]

Despite these international standards, it remains the duty of states and their governments to pass binding and enforceable national AML laws that empower authorities to stop these crimes and police the private financial sector. The fundamental pillars of South Africa's anti-money laundering legal architecture are the Prevention of Organised Crime Act (POCA) and the Financial Intelligence Centre Act (FICA), which in turn established the Financial Intelligence Centre (FIC) as South Africa's Financial Intelligence Unit.[39] POCA criminalises money laundering, rendering it a distinct crime in South African law.[40] However, when it comes to placing legal duties on private financial institutions to combat money laundering, the most important piece of legislation is the FIC Act (FICA) which has as its aim, *inter alia*, to:

> *establish a Financial Intelligence Centre in order to combat money laundering activities and … to impose certain duties on institutions and other persons who might be used for money laundering purposes and the financing of terrorist and related activities … [and] to provide for a risk-based approach to client identification and verification.*[41]

The provisions of FICA reflect South Africa's attempts to meet the requirements and recommendations of FATF. In doing so, they place a range of important obligations on private financial institutions that the Act counts as "accountable institutions" – namely, banks, attorneys, insurers and other financial service providers.[42] The Act requires these actors, among other things, to set up anti-money laundering systems, conduct due diligence, and keep records of that work, as well as records of all transactions. [43]

Arguably the most important provisions of the Act relate to the requirement that banks and financial institutions "know their customer" (KYC), and, secondly, that they report all suspicious transactions to the relevant body – the Financial Intelligence Centre (FIC). As is evident from the discussion above, these provisions strike at the heart of the money-laundering modus operandi – the desire to obscure the identity of the person/entity behind the transaction, and simulating transactions for the purpose of moving money (such as paying a company for a service it clearly does not provide).

Section 29 of FICA requires banks to report any transaction to the FIC when it has or is about to receive the proceeds of a crime, which have no apparent lawful or legitimate purpose, and which have facilitated the transfer of unlawful proceeds.[44] How should a bank know when this is the case?

To begin with, the there are several types of transactions that should be flagged as strong *prima facie* indications of suspicious or unusual activity:

SUSPICIOUS ACTIVITY:

Transactions that should be flagged as strong prima facie indications of suspicious or unusual activity: [45]

- **A deposit with an instruction to immediately pay those funds on;**
- **An unwarranted desire to transact with foreign jurisdictions, or unwarranted use of trust and other corporate vehicles;**
- **When goods and services are traded at prices significantly higher or lower than actual market prices; and**
- **The appearance of simulated transactions, including loans made with no loan documentation.**

Two important things should be noted with regard to a bank's obligation with regard to reporting suspicious transactions. Firstly, a mere suspicion (not actual knowledge) that the transaction is illicit creates a requirement to report a transaction. This should be judged according to the bank's knowledge of the client, their history, the nature of their business and financial history.[46] Secondly, there is no monetary threshold attached to this requirement – any and all suspicious transactions should be reported. According to the FIC's 2018 annual report, they received 331 200 suspicious activity reports (SARs) in the previous year. [47]

This report shows that many of the transactions in the state capture story exhibited these hallmarks. They were integral to the ability of corrupt players to extract, move and store their loot. Some transactions were flagged while others were not, but regardless, banks continued to facilitate these transactions for years before taking any proactive measures to close accounts often being used solely for illegitimate ends. This suggests a crisis within the system meant to detect financial crimes.

An important tool in a bank's ability to determine when a transaction is suspicious is knowledge of the customer behind each account that it manages. This is why, in line with FATF recommendations, sections 20, 21 and 22 of FICA require all financial institutions to identify and verify all customers before undertaking any relationship with them. There are also extensive requirements for upfront and continuous due diligence on those clients.

Crucially, ongoing due diligence requires banks to consider "the background and purpose of all complex, unusual large transactions, and all unusual patterns of transactions, which have no apparent business or lawful purpose."[48] There is thus an entrenched overlap between the requirements for banks to know their customers, and their requirements to identify and report suspicious transactions. However, as will be shown below, this requirement is undermined by the lack of beneficial ownership legislation in South Africa's legal framework.

It is generally held that South Africa's legal framework for tackling money laundering is relatively strong. Although the last FATF review noted areas for improvement, many of the most important tools are in place, including the requirements that banks know their customers, and flag and report suspicious transactions. However, this does not mean that the system is effective. Effectiveness means not only having the right tools, but that the desired outcomes are being realised; that due diligence and reporting leads to reduced illicit transactions, and accountability in the for of prosecutions, convictions and forfeitures. [49]

One of the reasons that AML systems may be inadequate is that they place almost all legal duties of detecting and halting suspicious activity on the banks themselves. International AML expert Phyllis Atkinson[50] states that this reliance on the banks falls short for several reasons. One is a lack of capacity caused by the fact that private banks tend to under-invest in their compliance departments. The second is that banks often become complicit with other crimes by choosing to turn a blind eye for the sake of financial benefit. She adds that the current "tick box" approach to compliance will never work, and that issues with money laundering will not go away as long as this approach remains. [51]

IGNORING THE RULES FOR THE SAKE OF PROFIT

In light of the extensive legislative rules above, how was it that South African and global banks were used for years to launder billions in proceeds of corrupt and unlawful activity? Further, how was this possible when so many of the transactions were conspicuously suspicious?

As should be apparent, this is not a uniquely South African problem. Rather, it is another story of state capture and the ability of actors to use the banking system to launder the proceeds of crime. It is also indicative of several broader global challenges in holding banks accountable for their complicity in money laundering.

For one, FICA, like most similar legislation, places the onus of identifying and flagging suspicious transactions on the financial institutions themselves.[52] This makes sense – the banks are in the best position to understand the transactions in question, in relation to the parties carrying them out, and as they occur. However, this effectively gives banks the option of wilfully ignoring suspicious transactions "in the interest of profit". Global trends reveal that this is a common occurrence. [53]

This is a particular risk when there is evidence that reports of suspicious activities to the relevant financial intelligence units regularly fail to lead to further action or accountability. In such cases, banks can fall back on the minimum requirement of reporting transactions while calculating that they can continue the client relationship with little likelihood of follow-up. In cases of the largest money-laundering scandals, it has been said that "banks may even find paying the non-compliance fines to be an optimal response, rather than playing an active AML role, so that the level of scrutiny applied is inversely related to the profitability of the client." [54]

A further question regards the manner in which the relevant financial intelligence units fit into the broader framework for accountability. In the case of South Africa, the limitations of the FIC are to be found within the limitations on the broader criminal justice system upon which it relies. Crucially, the FIC has no prosecutorial powers, and relies on the police and the National Prosecuting Authority (NPA) to act upon the intelligence they provide in order to find evidence and successfully prosecute economic crimes.[55] The manner in which the criminal justice system has had its capacity eroded by powerful corrupt networks, as a means of entrenching impunity, has a profound impact on the ability of these institutions to tackle complex economic crimes.

These concerns were confirmed by Phyllis Atkinson in our interview with her. Her experience in training law enforcement agencies around the world about anti-money laundering leads her to conclude that FIUs are "the heart of combatting money-laundering".[56] However, she argues that these units are often not treated sufficiently seriously because they do not have enforcement capacity in the form of penal, investigative and subpoena powers. She finds this this "disheartening" – while they are best placed to access high-quality information needed for effective investigations, if other parts of law enforcement don't even know what the FIU's role is, any contribution they might make loses its value.[57]

Yet the weakness of these parallel mechanisms does not mean that private banks should not be held to a higher standard when it comes to accountability for complicity in grand corruption and money laundering. The public's right to hold banks accountable arises from their ability to profit from enabling activity that has disastrous social, economic and political consequences. More needs to be done to detect crime and hold enablers accountable:

> **Every effort must be made to detect those responsible. Individual culprits must be struck off by their professional bodies, and bank licences revoked. The fines handed out to some banks are perhaps very meagre, taking into account the excessive profits that they make from their involvement in aiding corruption and money laundering.**[58]

In the case of state capture in South Africa, the grave concern is that when banks finally acted to halt their role in facilitating suspicious transactions, they did so far too late, and only once there was reputational risk attached. All the evidence in the public domain strongly suggests that if any of the banks had been undertaking the ongoing due diligence required by FICA, they could not have avoided knowing that their accounts were being used to launder the proceeds of illicit activities.[59]

The consequences of these failures are easy to see: first, when banks and their regulators fail to act to stop illicit transactions, corrupt deals move apace, and an opportunity to halt them in their tracks is lost. Secondly, the primary purpose of money laundering is successful – the underlying crimes, including corruption, are rendered profitable, and those involved are able to enjoy the proceeds of those crimes. Often these proceeds have been secreted away through the banking system to offshore jurisdictions, beyond the reach of local authorities. [60]

LESSONS FROM THE WORLD?

As stated above, South Africa has a multi-agency approach to combatting financial sector corruption. Yet despite the efforts of some of those agencies, including the FIC and the Special Investigating Unit (SIU), to identify and report economic crimes, the

NPA has not acted on its mandate; it has been severely criticised, for good reason, over a number of years, for failing to prosecute corrupt actors in exchange for partisan political gain. The NPA routinely failed to prosecute watertight corruption cases. The challenges it now faces in tackling complex financial crime and rebuilding capacity under new leadership must be understood in this context.

In 2018, Special Investigating Unit (SIU) head, Advocate Andy Mothibi, said that 686 cases referred to the NPA by the SIU had not been prosecuted. The cases referred by the SIU were for offences committed by public and private actors for offences in terms of the Prevention and Combating of Corrupt Activities Act, the Prevention of Organised Crime Act, the Public Finance Management Act, and the Municipal Finance Management Act.[61] Yet the NPA argued that only the NPA, SAPS and the Hawks were in charge of these investigations, indicating a lack of clarity on roles and co-ordination amongst departments meant to tackle corruption. Another important explanation of the lack of criminal prosecution of economic crimes is the misdiagnosis of the roots of corruption. Some journalists and civil society groups have characterised state capture as a political problem, centering the role of a few key figures, such as Jacob Zuma and the Gupta family. This has narrowed discussions on state capture to political actors and issues of governance, while failing to account for the cosy relationship between the financial sector and the corrupt, and the ways in which private actors profit from aiding and abetting economic crimes.

This problem is not unique to South Africa. Internationally money laundering continues to be characterised as a crime committed by drug traffickers, terrorists, corrupt governments in the global South and all sorts of nefarious "others", rather than something that is systemic and entrenched in the global economy. Powerful and wealthy countries in the global North claim that they are "corruption free" while failing to hold their financial institutions accountable for laundering billions in illicit money, and profiting from the proceeds of corruption, authoritarianism and violent conflict in the global South.

Another difficulty in combatting money laundering is that different jurisdictions apply different standards and have different reporting requirements; corrupt networks can and do take advantage of this. For example, the United Nations Office on Drugs and Crime (UNODC) administers and maintains the International Money-Laundering Information Network (IMoLIN) on behalf of ten different bodies.[62]

Within these groups are regional bodies, intergovernmental organisations and economic communities, each with their own unique and yet generally similar standards and punitive measures. Each group is made up of member states that are often party to several of these conglomerations, as well as having domestic procedures regulating financial crime and/or money-laundering.

There is thus both the problem of duplication and divergence. Furthermore, the application of criteria for money-laundering risks associated with certain countries often has the effect of reinforcing stereotypes and geopolitical power dynamics. For example, members of FATF are considered the financial centres of the world; as such, FATF's annual blacklist of money-laundering countries never includes members of FATF. This is arguably disingenuous given that some members of FATF, including Switzerland, the United Kingdom (and its crown dependencies) and the United States (and its overseas territories), are known for banking secrecy and acting as offshore tax havens.[63]

Oliver Bullough, author of *Moneyland: The Inside Story of the Crooks and Kleptocrats Who Rule the World*, points out that Danske's money laundering was facilitated by Britain's opaque corporate laws, such as the obscuring of identity allowed by Britain's Limited Liability Partnerships (LLPs). According to Bullough, by 2013, more than 25% of Danske bank's "non-resident clients" were nominally British, while ten per cent were from the British Virgin Islands.[64] Bullough states: "These were not Britons banking in Estonia, but corporate vehicles, which moved billions out of Russia and Azerbaijan, helping the elites of two egregiously corrupt autocracies secure their wealth."[65] Like FATF, the EU's dirty money blacklist is also arguably reflective of geopolitical vested interests, as it excludes its own member states. This illustrates the need for international legal reform that takes into consideration the transnational nature of money laundering, and encourages co-ordination by banks and authorities across jurisdictions.

The Tax Justice Network has also recommended co-ordinated approaches to combat money laundering rather than the current regime of banking secrecy, which allows dirty money to circulate through multiple jurisdictions without any prohibition.[66] This system would seek to apply one standard for monitoring risk rather than allowing banks the sole power to determine who is risky, based on their own appetite for risk. For this to work, there is a need for broader application, which requires the inclusion of governments and monitoring bodies, as financial sector self-regulation has not resulted in compliance.

THE POWERFUL PUSH-BACK

On the rare occasions across the globe where banks have been investigated for criminal misconduct, the resulting fines and settlement agreements have not proven to be deterrents for the companies implicated. If anything, banks that have been forced to admit their role in money laundering and pay fines are often later found to have committed similar crimes in other jurisdictions. Deutsche Bank, for example, has paid US$18billion in legal settlements for misconduct over the past decade.[67] Credit Suisse is another example of a bank that has repeatedly been fined for misconduct: in the past fifteen years it has been fined US$268 million for economic sanctions violations and US$76 million for violations of the Foreign Corrupt Practices Act.[68] These numbers may seem immense, but in these instances, the fine often amounts to only a few weeks of that bank's profits.

There is no clearer example of how insignificant current penalties are than the continued payment of bonuses to bankers. Similar to the 2008 financial crisis meltdown – when bank executives continued to receive bonuses despite the meltdown – Danske employees received a memo in February 2019, telling them that they would still receive their bonuses despite the bank having just been implicated in possibly the world's largest case of money laundering. [69]

In 2012, HSBC's US$1.9 billion fine for AML systems breaches did not result in bonus cuts or the firing of top executives at the bank. This fine was said to be inconsequential and incongruent to the crimes committed by HSBC and its staff. The argument that some financial institutions are just too precious to the global economy to be fined sums that materially impact on their profitability has guaranteed impunity for financial crime. While convicted drug traffickers, terrorists and mob bosses are likely to face criminal sentences lasting lifetimes, the same cannot be said of those who facilitate their crimes, and without whom the crimes of the former would be unprofitable. This impunity for banks, and the lack of individual criminal accountability, means that the proceeds of crime far outweigh any penalties that they might suffer. Indeed, settling fines becomes merely a cost of doing business.

The impact of this impunity has been compounded by decades of dogmatic free market discourse that places a premium on deregulation in pursuit of cutting red tape and earning greater profits. Yet it is this deregulation that has provided space for outright financial fraud. Deregulation and impunity, when combined, have created a potent and toxic mix that empowers and rewards secrecy and criminality.

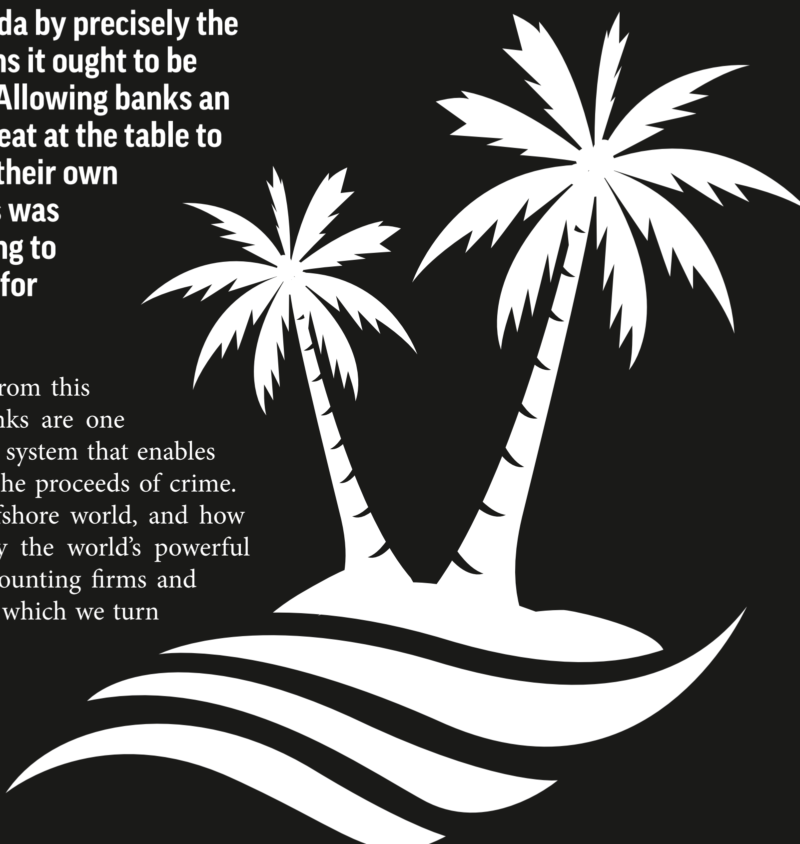
> **Impunity is compounded by the fact that the banking sector and accounting firms often have powerful links with regulators and financial sector actors; a phenomenon known as regulatory capture. This is most vividly seen in the "revolving door" between financial institutions and regulators, in which senior employees of both move frequently between the two domains.**

These institutions play a fundamental role in constructing financial sector regulation for national governments, international non-governmental organisations, economic communities, regulatory boards and bodies such as the OECD. [70]

Recent developments in the United Kingdom, one of the most important jurisdictions for laundering of the proceeds of corruption and crime, confirm this trend. Recognising that London banks and property continue to be used to launder billions of pounds in dirty money every year,[71] the UK government has established an Economic Crime Strategic Board to determine a way forward to combat money laundering, and hold complicit corporations to account. [72]

Yet despite the key culprits in this system being banks, the government has turned to them to sit on this board and determine the policies that are supposed to hold them to account. These banks include the Royal Bank of Scotland (RBS), Barclays, Morgan Stanley and even HSBC, whose litany of AML violations has been described above.[73] Commenting on the obvious conflicts of interest involved, NGO Global Witness said that:

> **To all intents and purposes, this economic crime plan is formalised policy capture of the economic crime agenda by precisely the corporations it ought to be policing.... Allowing banks an exclusive seat at the table to determine their own regulations was always going to be a recipe for disaster.** [74]



As is evident from this discussion, banks are one cog in a global system that enables laundering of the proceeds of crime. It is to this offshore world, and how it is shaped by the world's powerful "Big Four" accounting firms and consultants, to which we turn next.

4

THE OFFSHORE WORLD, AUDITORS, AND CONSULTANTS

The role of banks explored in the previous section needs to be placed in the context of a global financial system that has entrenched secrecy and aids illicit flows of money – often linked to corruption and other crimes. This secret financial world is supported and run by teams of professionals, including accountants, auditors, lawyers and other consultants. This section considers the crucial role played by these actors in facilitating state capture.

THE OFFSHORE WORLD

The offshore world is shrouded in mystery and thrives in the shadows. According to the German newspaper *Süddeutsche Zeitung*, this world and the global economy is now largely run by big banks, consultants and asset management companies. These actors utilise the secrecy offered by "offshoring" to secretly manage the assets of the world's richest figures: "from politicians, FIFA officials, fraudsters and drug smugglers, to celebrities and professional athletes." [1]

Süddeutsche Zeitung is well placed to make this assessment. Together with the International Consortium of Investigative Journalists (ICIJ) and other media partners, they investigated and exposed the stories drawn from millions of leaked documents from both the "Panama Papers" and the "Paradise Papers". These investigations were led by investigative journalists and civil society, rather than by state investigative agencies. They not only revealed widespread abuse of secret jurisdictions and offshore structures to avoid tax and hide illicit wealth, but the central role of lawyers, accountants and bankers in this system.

In 2015, an anonymous whistleblower leaked 11.5 million documents from Panamanian law firm and corporate service provider Mossack Fonseca, revealing 214 488 offshore entities.[2] These documents, named the Panama Papers, have led to criminal investigations in over 80 countries. To date, US$1.2 billion has been recovered by 22 countries reacting to stories emerging from these leaks.[3]

The offshore world provides corrupt and criminal actors with an escape from their own jurisdictions and the laws that govern them. The countries (and cities) that are part of the offshore world form a network that operates in the shadows to shield the wealthiest and most powerful from the rule of law in their home countries.[4] Moreover, the places that constitute the offshore world are often referred to as "secrecy jurisdictions" or "tax havens"[5] interchangeably. The reference to "secrecy jurisdictions" is important because such places do not just offer an escape from tax; they also provide secrecy, an escape from financial regulation, and a chance to shrug off the laws and rules of other jurisdictions.[6]

This secret network should not be considered purely a devious offshoot of the global financial industry. Rather it is a critical and defining characteristic of the modern global economy and financial sector.[7] The French magistrate Eva Joly, during a major investigation into a complex system of offshore accounts held by one extensive money-laundering network, said:

> **I do not see this as a terrible multi-faceted criminality, which besieged [French onshore] fortresses. I see a respectable, established system of power that has accepted grand corruption as a natural part of its daily business.** [8]

Author and journalist Nicholas Shaxson argues that while secrecy jurisdictions are found across the world, from London to the Pacific islands, there are certain common characteristics that define them.[9] Firstly, they offer low or zero taxes on income and wealth; secondly, they allow for secret ownership of corporate vehicles, and refuse to share information with other jurisdictions. Lastly, it is usually the case that the size of the financial industry is far greater than the local economy, and that local politics and political discourse favour financial services and the financial sector.

Within this framework, one can begin to understand how these secret jurisdictions work to undermine taxation laws by encouraging tax avoidance and, sometimes, tax evasion;[10] encourage the illicit outflow of critical capital (particularly in the global South, where it is most needed);[11] and thwart attempts by law enforcement to practice due diligence. [12]

According to the Tax Justice Network, an estimated US$500 billion's worth of tax is avoided globally by being diverted into secrecy jurisdictions.[13] The International Monetary Fund (IMF) has previously put this estimate at $600 billion.[14] Tax havens' Corporate Income Tax (CIT) rates are sometimes as low as three per cent or less[15] significantly lower than South Africa's CIT rate of 28% for the 2019/20 tax year. It is also much lower than the global average for CIT, which averages just over 23% across 208 jurisdictions. [16]

It is the wealthiest individuals and corporations that can best take advantage of the loopholes afforded by secrecy jurisdictions.[17] This is the case for South Africa as well. Recent studies show that in South Africa, the fiscus loses at least R7 billion per year (a conservative estimate) due to large multinational companies shifting revenue to lower tax jurisdictions. Crucially, new research shows that it is the largest firms that are the most aggressive in terms of shifting profits to avoid tax. In South Africa, the "top 10% of foreign-owned firms account for 98% of the total estimated tax loss." [18]

While some of this activity complies with the law (in a strict sense), much of it is illegal. Regardless, tax avoidance and tax evasion have a dire human cost. The most obvious is the loss of tax revenue by the countries that experience the capital outflow, which denudes the state of its ability to meet spending requirements for key services. Further, the outflow of resources sparked by the shifting of funds to tax havens is, more often than not, offset by higher taxes, which disproportionately affect middle- and low-income workers. [19]

As is explored in greater detail in the submission to the Zondo Commission by the Alternative Information Development Centre (AIDC), these problems have been exacerbated in the South African context by the erosion of the state's capacity to collect revenue, partly due to deliberate attempts to undermine the South African Revenue Service (SARS).[20] Yet capacity issues aside, there are more fundamental weaknesses in the legal framework, particularly around beneficial ownership and transparency, that undermine efforts to combat tax evasion in South Africa. This report will return to these issues below.

Evidence suggests that it is high-income countries that provide the most secrecy, while also being the largest "consumers" of secrecy.[21] The Tax Justice Network's Corporate Tax Haven Index found that the ten jurisdictions responsible for over half of the world's tax avoidance were predominantly wealthy countries. These include the United Kingdom and their foreign territories, as well as Switzerland, Luxembourg and Hong Kong. [22]

These jurisdictions facilitate much of the capital outflow that exacerbates economic inequality, thereby diminishing the capacity of economies in the global South to use taxes for development and social welfare.[23] Yet secrecy jurisdictions are not uniform in the types of services or secrecy that they provide, and there is growing evidence that corrupt actors in one jurisdiction are likely to seek secrecy in particular jurisdictions. For example, "while Cyprus has been a favourite tax haven for Russian depositors and combines both low taxation and high secrecy, Mauritius has been notoriously secretive and important for multinational enterprises active in India". [24]

This is important to note because the evidence presented in the case studies that follow will show that the state capture enterprise used corporate vehicles and bank accounts in a select few secrecy jurisdictions repeatedly in order to move and hide the proceeds of varied criminal activities. In this regard, Hong Kong and Dubai were two of the most important, and housed multiple shell companies that formed part of the financial architecture used to launder money.

SECRECY JURISDICTIONS ARE NOT JUST ABOUT TAX

The offshore world is about so much more than tax. In the increasing attempts by countries to attract money flows, many places have loosened regulations. In doing so, they have created the perfect enabling environment for criminal activity. In the words of the Tax Justice Network:

> **The problems go far beyond tax. In providing secrecy, the offshore world corrupts and distorts markets and investments, shaping them in ways that have nothing to do with efficiency. The secrecy world creates a criminogenic hothouse for multiple evils including fraud, tax cheating, escape from financial regulations, embezzlement, insider dealing, bribery, money laundering, and plenty more. It provides multiple ways for insiders to extract wealth at the expense of societies, creating political impunity and undermining the healthy 'no taxation without representation' bargain that has underpinned the growth of accountable modern nation states.** [25]

One of the most important ways in which secrecy jurisdictions enable money laundering for those involved in organised crime and grand corruption is through legal provisions that shroud corporate vehicles in secrecy. Front companies (also known as letterbox or shell companies) have no active business operations or staff, and effectively only exist on paper. Often, their only physical presence is a letterbox, and their directors are merely placeholders used to obscure the real ownership of a company[26] While shell companies often have no operations, many of them still receive and pay forward millions as key conduits of money-laundering schemes.

As described previously, setting up multiple shell companies allows actors to engage in a process called "layering", whereby the proceeds of crime are routed through different bank accounts belonging to different shell companies multiple times to make them untraceable.[27] While shell companies are often created to avoid monitoring and regulation, and particularly to minimise tax, they also allow corrupt actors to keep illicit proceeds while hiding that they are the ultimate owner benefitting from that company's activities.

COMPANY FORMATION AGENTS

In 2011, the United Nations Stolen Asset Recovery Initiative (StAR) undertook a review of over 150 cases of grand corruption around the globe. Unsurprisingly, it found that the majority of cases involved the use/abuse of a corporate vehicle (such as a company or trust) to launder the proceeds of crime.[28] In most cases, beneficial ownership (the technical term for the real people who ultimately own or control a company) information for the company was not available. However, if it was available, the company was almost always "established or managed by a professional intermediary."[29] These "company service providers" (sometimes called company formation agents) are staffed by lawyers, accountants and other professionals, and specialise in quickly setting up a company with a bank account for any client, often with few questions asked.

While efforts have been made to address these issues, a recent report by FATF and Egmont Group[30] reveals that many problems remain. In over a hundred case studies, the investigation found that "the use of specialists and professional intermediaries is a key feature of schemes designed to conceal beneficial ownership, particularly in cases where the proceeds of crime are significant." [31]

Some jurisdictions around the world specialise in the supply of secret corporate vehicles to corrupt elites – the City of London is a perfect example, and attracts vast inflows of the proceeds of corruption as a result.[32] These jurisdictions profit from attracting this money, while undermining governance and the rule of law elsewhere by allowing illicit flows to be moved and stored in secret. [33]

Evidence presented to the Commission indicates that to profit from corrupt procurement deals, the Gupta racketeering enterprise (as we have termed it) registered multiple shell companies in Dubai and Hong Kong. Hong Kong and Dubai are amongst the top ten most secretive jurisdictions in the world, predominantly because of the ease with which secrecy is preserved, and corporate vehicles can be abused to launder illicit proceeds in these jurisdictions. [34]

Unsurprisingly, many of the registered offices of state-capture network companies in Dubai and Hong Kong were vacant and had no active business. Many only existed on paper, but nevertheless received large sums of South African public money that originated from corrupt deals.[35] This report will later show how kickbacks paid to secure the 1064 locomotive contract with China South Rail (CSR) were funnelled through HSBC bank accounts held by front companies registered in Hong Kong. These are discussed in much greater detail in the case study dedicated to Transnet below.

This is not to say that shell companies were not also operating locally. Many illicit transactions were "layered" through front companies registered in South Africa. Here too, it remains easy to buy a ready-made shell company that can easily be abused. We also lag behind many countries in terms of our requirements for publicly available information on beneficial ownership. Nowhere is this more obvious than in the case of BEX, the front company that received the massively inflated R647 million contract related to Transnet's corrupt deal with China North Rail (CNR).[36] This will be discussed in the section on Transnet.

While company formation agents play an important role in this regard, other key enablers include the 'Big Four' auditing firms (listed below). These giant corporations now operate with an explicitly dual character. On the one hand, they offer extensive consulting services including advice and assistance in "structuring" finances, which often involves establishing shell companies. On the other, they provide audit services. Often, both legs of work are carried out for the same clients at the same time. The dual nature of this work has the potential to create fundamental conflicts of interest and undermine accountability in the sector; at worst, it leads auditors to look the other way when it comes to illicit conduct. [37]

AUDITING AND CONSULTING FIRMS

The auditing world is dominated by four large firms, often referred to as the "Big Four". They are KPMG, Price Waterhouse Coopers (PWC), Deloitte and Ernst & Young (EY). These firms employ around a million people in roughly 3 000 global offices, including a notable presence in tax havens.[38] Together, these four firms posted combined revenue of US$134 billion in 2017. They provide services to more than 98% of the largest firms on the British and American stock exchanges.[39]

Their size and the concentration in the market make these firms powerful players in the world of global finance. While they are traditionally known for their auditing services, they also provide tax, advisory and consulting services. These non-audit functions are increasingly important in terms of their profitability. [40]

Equally important, these firms and their employees inform policy and legislation. Increasingly, there is evidence of a "revolving door" between government departments, tax authorities and regulators on the one hand, and senior executives at the "Big Four" firms on the other.[41] This process is similar to the manner in which banks have captured their regulatory space. An example is that complex tax law in the United Kingdom is largely written, on secondment, by employees from the "Big Four" companies – which essentially provide tax avoidance services. This system has thrived under recent austerity regimes, which have justified massive cuts in public spending for government departments, including tax authorities. There is evidence that the firms use knowledge of the system to then assist their clients to avoid tax.[42]

According to economic commentator and chartered accountant Khaya Sithole, there are three categories of audit services provided by these firms that are important to distinguish. These are internal, external and forensic auditors.[43] The Independent Regulatory Board for Auditors defines the role of these as follows:

The Independent Regulatory Board for Auditors defines the roles of internal and external auditors as follows:

Internal audit services:

These auditors are hired by the company, work in-house, and are responsible for, among other tasks, developing risk and compliance services, and the review and monitoring of internal financial controls and policies. [44]

External audit services:

These are the auditors who are hired to conduct an audit on the "reasonability" of a company's financials. External auditors are responsible for reviewing financial statements, providing assurance services such as "regulatory reporting, sustainability, compliance and performance reporting"; [45] and "company accounting advisory services such as preparation of accounting records and financial statements in accordance with recognised financial reporting standards and applicable statutes." [46]

Forensic audit services:

These services are procured on the basis of a belief that the other forms of audits were insufficient, and often on the suspicion of malfeasance of some sort.[47] The main role of these auditors is to investigate irregularities, alleged fraud and consider where audit systems have failed, and perhaps where laws and regulations have been breached. [48]

The "Big Four" auditing firms provide all of the above-mentioned services, and this poses various potential conflicts of interest. While external audits are the most comprehensively regulated, there is a lot of money to be made in providing internal audit services.[49] This presents the risk that firms providing external audit services will seek to avoid "rocking the boat" with a client who employs their other services and pays lucrative fees.[50] Consequently, this is where many external auditors fail to fulfil their legal duties in terms of reporting irregularities. Section 45 of the Auditing Profession Act (APA) requires a registered auditor responsible for providing audit services to any client to report any "reportable irregularity" to the Independent Regulatory Board for Auditors (IRBA) "without delay". [51]

According to the APA "reportable irregularity" is:

> *any unlawful act or omission committed by any person responsible for the management of an entity, which … is fraudulent or amounts to theft; or represents a material breach of any fiduciary duty owed by such person to the entity or any partner, member, shareholder, creditor or investor of the entity under any law applying to the entity or the conduct or management thereof.* [52]

> **The legislative guide for registered auditors, issued by IRBA to provide clarity on the legislation, makes it clear that discovery of any bribery, corruption or kickbacks would constitute a "reportable irregularity".** [53] **The case studies in this report show that these legal requirements have not been diligently met in many instances. When these failures occur, an important check in the system falls away, and illicit conduct can continue undetected.**

As discussed, although the "Big Four" firms are commonly referred to as auditing firms, they do not only provide auditing services. They also provide consulting and advisory services, including tax advisory services, financial risk management and financial management advisory services, among other things.[54] A balance between these functions has to be struck in order to avoid facing an "independence conundrum".[55] That is, the commercially lucrative activities of the auditing firm – the extensive consultancy services – ought not to compromise the credibility of the auditing side of the firm.[56] Unfortunately, evidence increasingly suggests that the "Big Four" firms have repeatedly failed to achieve and maintain this balance both within South Africa and internationally. [57]

These factors can lead accountants and auditors to become enablers of corruption and economic crimes in two important ways. First, they often play a key role in setting up corporate structures that facilitate the illicit flow of money, either to evade tax, or to hide the proceeds of crimes.[58] This may be in the form of setting up shell companies in secret jurisdictions[59] or helping clients exploit loopholes in financial regulations (which they often helped to write). [60]

Second, audit reports can suffer a precipitous decline in quality, veracity and integrity. While examples of auditing failures will be discussed in more detail in the case studies below, one important example can be found in the case of KPMG. KMPG repeatedly produced unqualified audits for Oakbay Investments. Oakbay not only benefited from funds linked to the Estina project, but is linked to the sale of Optimum Coal to Tegeta, an Oakbay subsidiary (all discussed in more detail below). The company's financial statements were later described as containing numerous "material misstatements", yet none were identified during audit.[61] A review by KPMG International admitted that their South African auditors "failed to show enough professional scepticism" when dealing with accounts linked to various Gupta-linked companies.[62] Systemic errors like these have resulted in trust in the auditing industry plummeting across the globe. [63]

ENABLING ILLICIT FLOWS: A SYSTEMIC ISSUE

A few examples provide important indicators of the auditing industry's modus operandi in circumventing or violating tax and other financial regulations.[64] In 2014, two whistle-blowers, Raphaël Halet and Antoine Deltour, exposed hundreds of secret deals that PWC had negotiated with the tax authorities in Luxembourg on behalf of over 300 multinational companies. This was a part of a leak known as "LuxLeaks". At least 548 secret tax deals, whereby loans were directed to shelf companies specially set up by PWC in Luxembourg, aided the companies in question to pay tax at a rate under one per cent. [65]

While these deals in Luxembourg were secretive but legal, there is evidence that accounting firms and professionals sometimes cross the line and become complicit in establishing financial structures that enable other crimes.

FATF and Egmont Group's 2018 research describes an interesting phenomenon; accounting professionals were found to be less often directly involved in setting up corporate vehicles to obscure beneficial ownership, with company formation agents and lawyers being more commonly involved.[66] However, where accountants were involved, they were most likely to be directly and knowingly complicit in schemes to disguise ownership to obscure crimes, rather than being unwitting participants.[67] The study found that "accounting professionals represented the highest proportion of scheme designers and promoters in the case studies, and were more likely to promote their own scheme to prospective clients than to simply facilitate a scheme designed by their client." [68]

Crucially, the study adds that the financial training and acumen of the accounting professionals means that they are much less likely to be duped into participating or enabling criminal activity. It concluded that:

> **It is likely that the financial acumen of the accounting profession, and the ease with which accountants can identify suspicious activities indicative of money laundering or other financial criminality, may limit their unwitting involvement in these schemes. It may also be indicative of the nature of the case studies provided, which often involved the predicate offences of tax evasion and fraud, many of which were orchestrated by corrupt professionals.**[69]

This finding is unsurprising. While anyone willing to carry out basic administrative work can register a company and become a company formation agent, certified accountants at the major auditing firms are qualified accountants with specialised knowledge of the field.

> **The Commission should keep this in mind when accounting professionals implicated in testimony argue that they were unwitting participants in illicit and criminal transactions.**

AUDITING FAILURES

As the consultancy and advisory services described above have become more important to these firms, many have claimed that there has been a simultaneous decline in the quality of audit services they provide. Speaking to the *Financial Times* about the industry, University of Michigan business school academic Professor Erik Gordon noted that firms are settling for lower quality work because it is less expensive, and that executives as their clients "seem happy with audits that do not challenge their view of how well they are performing." [70]

Some of these failures have contributed to crises in corporations that have had far-reaching consequences, including obliterating many pensioners' savings. The case of the dramatic implosion of Steinhoff International Holdings NV (Steinhoff) is a clear example of this. In late 2017, the Stellenbosch-based multinational's share price crashed by 90% with the news that company's financials were being scrutinised for "accounting irregularities requiring further investigation".[71] The chief executive officer, Markus Jooste, resigned as the scandal was unfolding. He did so as news broke of the potential for seven separate investigations into the company. [72]

Corporate executives at Steinhoff had conducted a sophisticated fraud to loot the corporation and mis-state its assets and value in the process. From the outset, one of the central questions was how the company's auditor, Deloitte, had managed to provide unqualified audits of Steinhoff's financial statements in 2015 and 2016 – essentially assuring the public that these records were accurate.

The unqualified audits were provided only months before the company had to restate the financial statements in 2017 because it was "unsure" of nearly R100 billion in non-South African assets.[73] How did professional auditors miss such glaring holes in the company's balance sheet?

Steinhoff was eventually required to hire another firm, PWC, to conduct a forensic audit.[74] Among other findings, this investigation revealed that, between 2009 and 2017, a group of Steinhoff executives made use of "irregular transactions" in order to inflate the company's profit and asset value by 6,5 billion euros.[75] Part of this fraud included the extensive use of shell companies, described in the report as companies where the "legal and beneficial ownership … were, in some cases, currently unknown to Steinhoff."[76] The multinational corporation paid fictitious incomes to a myriad of small and/or unknown companies, under the guise of "… so called 'contributions' that took many different forms and either increased income or reduced expenses." [77]

An apt description of the scheme was provided by investigative journalists who said that "for years, former CEO Markus Jooste and his inner circle wove an intricate web of opaque deals hidden from shareholders to covertly enrich themselves."[78] This web made use of the tax haven island of Jersey, a jurisdiction that exemplifies the murky financial world described earlier in this section.

As the long-time auditor of Steinhoff, Deloitte would have had the time to pore over Steinhoff's financial statements and qualify the audit due to the "irregularities". It is for this reason that Dutch investors, through representative group VEB, have sued Deloitte in the Netherlands for damages caused by their alleged failure to perform their task. In particular, VEB have indicated that they want establish why Deloitte was unable to prevent the multi-billion-euro fraud – and why it took so long for Deloitte to withdraw its unqualified auditor's report. [79]

These failures do not only have consequences for shareholders of private companies. Many of the companies implicated in grand corruption related to the state capture enterprise received clean audits despite irregularities in their accounts. In the South African context, KPMG has come under scrutiny for providing clean audits of financial statements that were later found to contain gross misstatements.[80] This includes for Linkway Trading and Oakbay Investments, companies implicated in benefiting from the Estina dairy project. These cases will be discussed in greater detail below.

INSUFFICIENT REGULATION AND ACCOUNTABILITY

While the legal framework for professionals is often set by legislation – the Auditing Profession Act is one example – the public also relies on professional associations and bodies to regulate these professions and hold them accountable. Yet these regulatory bodies often lack the power and will to provide effective and rigorous supervision, and appropriate sanction to those implicated in wrongdoing.

The professional association in South Africa tasked with governing auditors is the Independent Regulatory Board for Auditors (IRBA). IRBA has a code of conduct for registered auditors, and in addition to demanding mandatory rotation of audit firms, it has recently recommended that legislation be amended to grant IRBA greater and more intrusive powers of investigation.[81] This has been met with significant resistance by audit firms and their executives. Yet the efforts by IRBA reflect an acknowledgement that current efforts at regulating the industry have fallen short. Some auditors have been found to have "played a central role in state capture and have been fairly active in the increasing incidence of corporate capture." [82]

IRBA regulations do stipulate extensive "norms and standards" that ought to guide auditors to ensure independence and professional scepticism.[83] However, there are several central shortcomings in the approach to accountability, many of which reflect the shortcomings discussed in the preceding section on the role of the banking sector.

The first is a reliance on fines. Fines are often levied by oversight bodies, but although the cost of these may appear significant to ordinary members of the public, these fines are insignificant compared to the profits these firms amass each financial year.[84] This means they often fail to act as a sufficient deterrent. Khaya Sithole argues that an additional problem in South Africa is a lack of follow-through.[85] Specifically, when a fine has been levied against a firm, and the firm pays, the process appears to end. There is little evidence that IRBA monitors the sanctioned auditor thereafter in order to ensure improved conduct. It is not currently industry practice to place previous offenders under a higher level of scrutiny for a certain period of time after the fine has been levied. [86]

Another significant concern is the lack of transparency and public access to information. At present, the IRBA does not publicly list the names of auditors who have been found guilty of misconduct. As such, companies cannot opt out of working with an auditor that has been fined for their noncompliant behaviour in a previous audit. [87]

Unfortunately, these issues with the regulatory bodies do not only plague South Africa – they are a global phenomenon. A range of efforts to enforce better due diligence and accountability have not proven to be effective.[88] One such effort adopted by IRBA in 2016 is that of mandatory rotation of audit firms to try and break the cosy relationship between auditors and their clients. [89]

While laudable, the concentration of power in the market, with essentially only the "Big Four" as options, undermines the efficacy of rotating auditors. This is particularly true if conflicts of interest preclude the appointment of one or two firms for a given company. In such cases, rotation may only occur between two or three firms.[90] This undermines the ability to create greater distance between the clients and the auditors:

> **When so few actors occupy such a large part of the market, the chances of collusion dramatically increase, and it becomes very difficult for governments to regulate them. If one of them collapsed, it would lead to a crisis in the audit market because there are no real alternatives.**[91]

Returning to the issue of the role of the audit and accounting firms in the facilitation of money flows: many of the necessary reforms include those that would require greater transparency for all types of corporate vehicles. The Stolen Asset Recovery Initiative (StAR) has provided a series of recommendations that would act as strong safeguards against the abuse of corporate structures. They include having companies' registries and information about beneficial ownership easily accessible to the public, and stricter requirements that professional service providers be required to collect and check this information. [92]

The Transnet case study, dealt with in more detail below, highlights that South African law still does not require private companies to reveal their beneficial owners. This makes it much easier to abuse these entities for the purpose of money laundering.

In South Africa, the primary responsibility for conducting due diligence of this type falls predominantly to the banking sector: the FICA Act of 2001 requires banks to identify beneficial ownership, as well as conducting ongoing due diligence of their clients and all suspicious transactions, as discussed above. They are also required to report any suspicious activity that they identify. [93]

Here there is an additional shortcoming: FICA does not, as yet, apply to auditing and consulting firms. An amendment to the Act that would extend FICA's powers and legal duties to accounting and consulting firms was proposed in 2018. The potential amendment to FICA would broaden its reach to include any professional:

> *…assisting a client in the buying or selling of a business; the opening or management of a bank, investment or securities account; the organisation of contributions necessary for the creation, operation or management of a company outside South African; the organisation of contributions necessary for the operation or management of a close corporation; the creation, operation or management of a company or a close corporation; and the creation, operation or management of a trust outside the country.* [94]

This expansion would bring FICA into line with many of the international guidelines, and as such should be welcomed. Yet there remains a concern regarding non-compliance by those financial institutions purportedly bound by the Act. Given the failure to hold the banking sector to account for failing to meet the requirements of the Act, it seems that legislative amendments alone will not be sufficient to reduce the role of accounting and auditing firms in enabling economic crimes.

This is confirmed by international experience. In a review of why it was proving so difficult to enforce beneficial ownership requirements, FATF found that "insufficiently rigorous implementation" of due diligence by professionals (including company formation agents, lawyers and other service providers) was an important factor. [95]

More effective and intrusive state regulation is thus essential. This also requires refocusing and rebuilding the capacity of state agencies tasked with investigating and prosecuting financial and economic crimes in the financial sector. We return to these recommendations later in this report .

THE OPAQUE WORLD OF MANAGEMENT CONSULTANCY

It is ironic that despite not being dedicated consulting firms, the consulting revenues of the Big Four accounting firms are all larger than those of the so-called "Big Three" consultancy firms. These "Big Three" –McKinsey and Co, Bain & Co and Boston Consulting Group (BCG) – have increasingly been at the centre of major scandals involving potential criminal conduct.

The Big Three are much newer to the financial world than the Big Four. While accounting firms date from nineteenth-century Britain, the consultancy firms emerged during the twentieth century, and are all American. McKinsey was the first to be established in 1926 by accounting professor, James O. McKinsey.[96] However, an early director, Marvin Bower, is credited with creating the institutional ideology and approach of the firm. This includes its controversial "up-or-out" policy (if associates are not promoted, they are fired).[97] McKinsey is described as the first firm to apply scientific approaches to management: "solving business problems with a method of hypothesis, data, and proof". [98]

McKinsey is the name immediately associated with management consulting. It is a global force, present in 133 cities across 66 countries, employing around 17 000 consultants.[99] McKinsey's total global revenue is estimated at over US$10 billion, the highest amongst the Big Three.[100] A recent CNBC report revealed that the company is contracted by 90 of the top 100 corporations in the globe, making it one of the most powerful companies in the world. [101]

McKinsey only began operating in South Africa in 1995, and their website boasts of their role in developing transformation programmes for government agencies and supporting government ministries in transforming their organisational structures.[102] Notably, it advertises its work in the public sector as "advising on industrial development issues in specific industry sectors, such as energy and mining" as well as "advising state-owned enterprises on how to improve operations and delivery of services". [103]

McKinsey's conduct at Eskom and Transnet tell a different story: of a company willing to place profit above principle, and perhaps even the law. These stories are told in more detail in the case studies below.

Such an ethos reflects McKinseys' global strategy. There is increasing evidence that McKinsey has chosen to work for state actors with poor human-rights records, including China, Ukraine's ousted president Viktor Yanukovych and state-owned entities in Saudi Arabia.[104] Following the murder of *Washington Post* journalist Jamal Khashoggi in the Saudi Arabian consulate in Turkey, *The New York Times* revealed that McKinsey had provided the Saudi government with the names and details of dissidents, who were subsequently targeted by the government.[105] McKinsey acknowledges working in these countries but says that they obey the law in all markets in which they operate, and insist they make positive contributions to those countries.[106]

The increasingly prominent role of management consultants in decisions with massive public impact suggests a fundamental risk to democracy. *The New York Times* coverage of McKinsey's role in corruption in South Africa noted that the role of consultants in these spheres "underscores the risks that arise as governments increasingly turn over responsibilities to consultants who operate mostly in secret, with little or no public accountability." [107]

Established in the mid-twentieth century, Bain & Co and BCG (both based in Boston) have adopted the corporate culture and theories of corporate change developed by McKinsey. Much of what these firms actually do is ambiguous, despite the fact that they charge exceptionally high fees.[108] They are neither lawyers, accountants nor bankers. Instead, they draw expertise from various fields, including those of law, business and accounting, but often extending to unconventional fields for business, including poetry.[109] Management consultants describe themselves as cost-cutters and managerial experts ready to deliver efficiency and business reforms, but critics point out that these promises are often overstated, and that their actual impact is negligible, and often harmful. [110]

Another controversial aspect of management consulting is the secretive nature of this industry. The "Big Three" operate behind a veil of secrecy – Bain has long held a reputation as the "KGB of management consulting".[111] The firm is said to make their employees sign non-disclosure agreements and often gives its clients code-names to shield who they are working for.[112] This is at least partly because of the complex relationship between consultants and their clients:

If you're the CEO of a company and hire them, you don't want them running around saying we told them to make that acquisition, that was us. They take no credit and they take no blame. [113]

This kind of secrecy can result in impunity for management consultants. This is particularly worrying because these consultancy firms are increasingly contracted not only by corporations, but also government departments for public work. The movement of consultants into the public sphere can have deleterious effects on democracy. The lack of scrutiny of their activities erodes transparency and accountability.

Management consultants often work with their clients for such long periods that they become embedded, sometimes making it hard for the organisations to function without them.[114] In some instances, this has resulted in allegations of insider trading and other conflicts of interests.[115] The growing power of consultants is combined with exorbitant yet obscure fee structures, meaning that they often profit handsomely even when leaving destruction in their wake.

BAIN AND SARS

A recent example of the calamitous role of management consultants in the South African public sector is Bain & Co's contract for the South African Revenue Services (SARS). In 2015, Bain was contracted purportedly to review the organisational structure of SARS and improve it.[116] Instead, Bain were complicit in destroying SARS' capacity by knowingly creating a "flawed operating model" and sidelining key executives who would push back against this erosion of the institution. This was part of a concerted effort, led by Tom Moyane, to take control of the revenue service. [117]

In its final report, the Nugent Commission of Inquiry into SARS found that Bain's South African office was a central part of coming up with the "attack" in return for healthy fees. The report notes:

We think what occurred can fairly be described as a premeditated offensive against SARS, strategised by the local office of Bain & Company Inc, located in Boston, for Mr Moyane to seize SARS, each in pursuit of their own interests that were symbiotic, but not altogether the same. Mr Moyane's interest was to take control of SARS. Bain's interest was to make money. [118]

Bain was thus a knowing participant in the erosion of SARS in exchange for lucrative fees. In the ensuing fall-out, it has also emerged that Bain South Africa's then managing partner, Vittorio Massone, had met with President Jacob Zuma twelve times between 2012 and 2014, just before Bain received the contract.[119] Bain has since admitted that this meant that the procurement process for the contract was "irregular". [120]

South Africa subsequently witnessed a decline of approximately R100 billion in tax revenue.[121] An already stretched budget was further compromised, leading to inevitable squeezes on essential social spending. Bain has since admitted to their role and paid back the R217 million it earned from this contract. This payment is clearly inadequate, given the billions in lost tax revenue and the implications for the public. This is why SARS and the National Treasury are considering both civil and criminal cases against Bain for their role.[122]

The story of Bain and SARS is far from the only example of the role of management consultants in the state capture story in South Africa. In the case studies on Eskom and Transnet below, the long history of McKinsey's role in these state-owned enterprises is explored. It will be shown that in both cases, there is significant evidence that McKinsey – both through its own conduct and through its work with Eric Wood's Regiments Capital – was delinquent in its duties and, in so doing, both firms were essential enablers of gross corruption at both SOEs.

5

THE LAWYERS

While many brave lawyers battled the apartheid regime, countless others made a mint by codifying and enabling oppression. This included many lawyers around the world who assisted the regime's state-owned arms company Armscor as it purchased weapons in violation of the arms embargo.[1] Lawyers have played a similarly important role in the most recent phase of state capture, though their conduct remains one of the less-told stories of the enablers of these economic crimes.

Lawyers often play a central role in the illicit flow of money and the global offshore secrecy architecture; by among other things, helping set up front companies and bank accounts, thus co-creating an architecture for criminality along with cover-up camouflage. In some instances, corporate lawyers privilege loyalty to clients (from whom they profit) over their obligations in law. They provide order in a system of criminal consumption and exclusion by structuring the deals and finding the loopholes that enable the super-wealthy to evade the net of justice.

The shimmering glass towers housing lawyers in Sandton or downtown Cape Town provide well-heeled corporate criminals with legal advice on how to defend themselves against the reach of poorly resourced state institutions investigating complex economic crimes.

An indication of the lack of capacity by the state to track such economic crimes can be seen in the growth of in-house forensic investigation units within law firms. Many of these in-house investigation departments track white-collar criminals for corporations that no longer have faith in their country's criminal justice system. This privatisation of justice can lead to settlements between firms as opposed to matters being reported to the police, where there is no certainty about the outcomes.

The most unscrupulous lawyers assist their clients to navigate systems of financial dealings that could well see them imprisoned.

> **They assist with the establishment of front companies that hide the true beneficiaries of corrupt schemes – all of which is central to the process of international money-laundering. Not dissimilar to the tale of bankers and auditors above, it's a feeding frenzy for as long as this can last.**

MEGA-LAW FIRMS ON THE RISE

Walking through the streets of Sandton, Cape Town, London or New York City/ Manhattan, the evidence of law firms as corporate behemoths is everywhere.

Standing shoulder to shoulder between the glass high-rises of banks, auditors and consultants are the world's mega-law firms. In the past, it was more usually smaller law firms that offered bespoke services to economic criminals. While this is often still the case, law firms joined the process of rapid globalisation in the 1980s in lock-step with the politics of the Thatcher-Reagan era. In 2020, the world's top ten law firms employ over 31 000 people and produce a staggering annual revenue of over $24 billion (over R350 billion).[2] Of these firms, eight are headquartered in the USA and two in the UK. In spite of this Anglo-American location bias, they trade in multiple jurisdictions across the globe.[3] The advance of the mega-law firms is mirrored further down the profit ladder, with 29 law firms in the USA now employing over 1 000 lawyers each. [4]

This growth has largely been the result of mergers as law firms have advanced the trend of providing every legal service imaginable to their clients. The legal profession is, at its upper tier, now increasingly lead by vast corporations. As we see elsewhere in this report, it is precisely these corporate structures which have grown fat off licit and illicit profit and in turn accelerated the drift away from small law and mid-sized firms that once dominated the profession. Many have amalgamated into vast corporations whose fortunes are all too closely tied to a system of practice that favours a nefarious political and economic elite.

Another example of how the legal profession is changing is the increasing footprint of the "big four" auditing firms, which now themselves have an appetite for "big law". It is noteworthy that these auditors have intimate knowledge of law firms; one of example of this is the result of a survey which showed that a whopping 40% of the top fifty law firms in the United Kingdom, are audited by Deloitte. [5]

However, as shown in the previous section, the business interests of the large auditing firms are now also reaching directly into the legal profession. Following the deregulation of the legal services market in the United Kingdom in 2007, the "Big Four" auditing firms have over the past dozen years gone into law as part of their "integrated services model".[6] This neoliberal drift has seen non-lawyer ownership of law firms on a grand scale, – with the potential to devalue a profession and undermine ethical conduct. Unfettered by the past constraints of professional conduct, an army of lawyers now work in sprawling global corporations for whom legal services are merely a business unit.

This is not the first foray by the big accounting firms into legal work. Its first iteration in the 1990s culminated in the demise of accounting firm Arthur Andersen (then one of the Big Five) in 2002.[7] The firm provided legal services to the US electricity trader Enron, which eventually succumbed to the effects of its own massive corruption, taking Arthur Andersen down with it. The biggest corporate fraud in the United States at that point, Enron's crimes – facilitated by auditors and lawyers at Arthur Andersen – led to significant job losses as both Arthur Andersen and Enron collapsed. This is a prescient warning of what may come in the future. However, little seems to have been learnt from this seminal case of corporate corruption; by 2018, it was observed that of the Big Four auditing firms, "PwC employs 3,600 lawyers in 98 countries; EY has 2,200 lawyers in 81 countries; KPMG about 1,800 lawyers in 75 jurisdictions; and Deloitte has more than 2,400 lawyers on its books." [8]

In addition to the corporatisation of law and ownership by non-professionals, the globalised nature of mega-law firms means that many are well placed to enable financial crimes for unscrupulous clients.

> **Operating across jurisdictions and continents, with multi-million dollar pay cheques for top partners, the drive for profit has never been as intense.**

This is matched by the enormous opportunity to make at least some of this through illicit means –poisoned fruits of the ongoing rapid financialisation of the global economy. This concentration of wealth and power in corporate legal behemoths is an invitation to abuse. Furthermore, the growing overlap with the Big Four auditing firms, many of whom themselves are implicated in enabling global corruption, suggests that this is also a sector that may be "too big to jail".

FRONT COMPANIES AND SECRET OWNERS: "WE CREATED A MONSTER"

In 2016, a shockwave went through the global illicit economy as investigative journalists revealed the dirty dealings of Panamanian law firm Mossack Fonseca. The contents of the Panama Papers provided significant insights into how wealthy individuals, politicians and corporations dodged tax and hid the proceeds of crimes. Three years after the leak, over $1,2 billion has been clawed back by government agencies seeking payment of back taxes and fines as a direct result of the leak of the Panama Papers. [9]

The leak centred on prominent Panamanian law firm Mossack Fonseca, and illuminated a vast network of prominent beneficiaries of the global "offshore industry". Moreover, it brought the role of lawyers in enabling the illicit economy into sharp focus. For nearly twenty years, this Panamanian law firm managed the affairs of 300 000 firms, serviced by 600 lawyers in 42 countries, including the world's most prominent secrecy jurisdictions such as Luxembourg, Jersey and Switzerland.[10]

The company, operating under the slogan, "Wealth management as you deserve it", provided the world's rich and entitled with the bespoke services of front companies, accompanying bank accounts, and nominee directors – all of which served to mask the real owners and beneficiaries.[11] These and similar legal ruses embraced by criminal elites for much of the twentieth century are at the centre of global money-laundering activities, and activists have demanded a global registry of corporate ownership as a way to start addressing this. Senior partner Ramón Fonseca summed up the product of his business partnership with lawyer Jürgen Mossack in a 2008 interview with the fitting words: "Together we created a monster." [12] The clients who benefitted from this included global banks such as HSBC, for whom Mossack Fonseca created 2 000 off-shore companies, along with a further 300 for Barclays Bank. [13]

A South African who benefited from his relationship with lawyers at Mossack Fonseca was Marcus Jooste. The one-time kingpin of Frankfurt-listed firm Steinhoff was identified at being the centre of a massive fraud in 2017. Following this, over R160 billion of the value of Steinhoff was wiped off the stock exchanges, with disastrous economic consequences for investors who were effectively defrauded by the Stellenbosch University trained accountant and his business partners.[14]As an *amaBhungane* and *Financial Mail* investigation has shown, Jooste held secret stakes in companies that traded with Steinhoff for years to Jooste's covert benefit.[15] Similar to other conspiracies, Jooste ensured that the true beneficiaries were hidden from investors. Tracing back Jooste's dealings, we now know that his first likely bite at the rotten fruit of secretive offshore companies was in the late 1990s. With the assistance of lawyers at Mossack Fonseca, Jooste and his cronies bought a shelf company, Alvaglen, and used Steinhoff finances to bankroll an entity from which he stood to benefit.[16] This taste for secret profits, enabled by helpful lawyers, snowballed to the point that Jooste was one of the richest men in Africa by the time the true extent of his crimes was revealed to the public.

A year after the release of the Panama Papers, investigative journalists worked through over 13 million documents contained in the Paradise Leaks in 2017. At the centre of this off-shore network sat the award-winning Bermuda law firm Appleby, a giant in the off-shore business world.[17] Like Mossack Fonseca, Appleby's lawyers helped wealthy corporate clients and connected businesspeople to avoid paying tax. While such practice is not necessarily illegal, it is hugely damaging to the public pursue – effectively citizens are robbed of social services while large corporations grow fat from excessive, unethical profit-taking. Numerous South African entities made an appearance in Appleby's books, with some using Mauritius as a favoured bolthole for tax avoidance. [18]

Prominent South African-based corporations mentioned among Appleby's clients include mineral resources giant Glencore, headed by South African Ivan Glassenberg, which at one stage had a dedicated room in Appleby's offices. Why was Glencore, a global behemoth whose fortunes are legendary, so deeply embedded in its lawyers' practice? As the Panama leaks show, one reason is that Appleby helped hide the fact that Glencore and its fleet co-owned SwissMarine and its eight freighter ships, part of an operation valued at over $1 billion. [19]

South African banks also make a strong showing, including Investec and Standard Bank. As *amaBhungane* and the *Financial Mail* reported, Appleby bragged in a corporate brochure about its role in "advising Standard Bank of South Africa Limited on a US$70-million facility for the purpose of refinancing Zambia Sugar Plc, a subsidiary of Illovo Sugar Limited".[20] This deal enabled the JSE-listed firm of Illovo Sugar to pay an effective tax rate of 0.5% to the Zambian authorities at a time when the country's corporate tax rate was 35%. The impact of this was a total loss of millions of dollars in taxes by the Zambian government. [21]

The role of lawyers in the "off-shore" industry is symptomatic of unethical practice permeating the profession. Clients engaged in economic crime at best rely on lawyers to provide a veneer of legitimacy. At worst, as we have shown, they establish schemes designed to disguise beneficial ownership. Lawyers also often face lax regulations when it comes to anti-money-laundering requirements when compared to the relatively stringent requirements placed on banks, for example. A 2018 study by the Financial Action Task Force (FATF) notes that legal privilege is often used as a defence to conceal beneficial ownership.[22] This report further bemoans the low level of regulation of the legal profession, which enables complicity in such crimes by lawyers. What is evident is that the existing FATF requirement for lawyers to undertake due diligence and report suspicious transactions is woefully inadequate. The fact that the public relies on the work of investigative journalists to sift through leaks such as the Panama and Paradise Papers proves this point.

FROM STALINGRAD TO STATE CAPTURE

In President Jacob Zuma's fifteen-year-long struggle to avoid prosecution for his role in the corrupt 1999 arms deal, he has relied on the stick of politics and shield of the law – both of which have served his cause well.

Zuma's lawyers, sometimes engaging in a cynical game of lawfare for their client, have been crucial to ensuring that the former President does not see his "day in court", despite his much-vaunted pleas for him to be granted an opportunity to do so. When in court, Zuma usually appears to fight off the legal process that seeks to hold him to account, as opposed to the actual charges based on evidence of criminal conduct.

For many years, Zuma relied on his attorney Michael Hulley and Senior Counsel Advocate Kemp J. Kemp, who championed a "Stalingrad strategy" as a primary defence for their client. Kemp described his client's efforts to escape accountability "… [unlike] a battle where you send a champion out and have a little fight and that's it – this is more like Stalingrad." [23] To underscore this reference to the famous Soviet battle against fascists in World War II, he added, "We will fight them in every room, in every street, in every house." This legal strategy has served Zuma well. His lawyers' goal is not as much to prove the innocence of their client but rather to use legal means to effectively slow down any efforts to bring him to trial. Such activity is often used by wealthy clients and their lawyers to escape justice. This practice has both made Zuma's lawyers wealthier, and ensured their client's continuing freedom.

Were it not for the Stalingrad strategy, it is worth pausing to ask whether the beneficiaries of state capture and their enablers – many friendly to Zuma – would have been able to make criminal profits to the extent that they have. It is true that his lawyers take instructions from him, but given the massive negative impact of delaying and thereby denying justice in this matter, Zuma's lawyers need to be asked whether their strategy follows textbook ethical practice. If not, does such ruthless legal opportunism not impede instead of promote justice?

The question of professional ethics should be at the forefront of our mind when addressing the conduct of lawyers in the most recent period of state capture in South Africa. The evidence suggests that a number of law firms acted unethically, undermining the requirements of their profession. While not all such conduct has been illegal, why have lawyers and senior partners in these firms chosen to look the other way?

Take the Werksmans investigation into the multi-faceted corruption at the Prasa involving Lucky Montana, which is reported to have cost the fiscus nearly R300million for both forensic services.[24] While an investigation was necessary, the cost involved has been enormous and raises the question of whether such fees are ethical when the intention was to serve working-class train commuters affected by the conduct of the Prasa state-capture clique.

Similarly, the contracts for the locomotives at the centre of the Transnet corruption allegations were drafted and negotiated for Transnet with the help of law firm Webber Wentzel.[25] Their role must also be questioned by the Zondo Commission – simply put, were they unable to detect any of the corruption and if so, why?

We must also ask why they did not fear ostracisation by their fellow professionals, given the extent to which the legal profession relies on referrals and mutual support. The conduct of the profession was wanting at a key juncture and deserves special attention at the Zondo Commission

As lawyer and state capture critic Heinrich Böhmke notes in relation to state capture, "the actions of lawyers, without whom not a fraction of the damage could have been done, has gone unremarked." [26] The drive towards corporatisation of the profession may well have contributed to a lapse in professional ethics. Böhmke adds that

> ***"lawyers must avoid conflicts of interest and they mustn't overreach in setting fees or let their trust accounts be used as a conduit for schemes. Lawyers also shouldn't connive to substantiate witch-hunts or whitewashes, and they shouldn't facilitate crimes."*** [27]

The evidence to which we now turn suggests that the legal profession failed on many of these accounts. Yet they have not been held to account by their peers, or the institutions tasked with protecting the public interest. Without the aid of lawyers, very few of the machinations of state capture would have been possible.

STEIN SCOP: LAWYERS TO TRILLIAN

The Johannesburg based partners of Stein Scop Attorneys (Glenn Stein and Bradley Scop) promise prospective clients "…the quintessential 'big law firm' experience while being flexible enough to accommodate each client's particular sensitivities." [28]

One of the firm's most important clients in recent years, with sensitivities of its own, was the Gupta-linked investment company, Trillian Asset Management. Headed by Eric Wood, the company is currently deeply embroiled in allegations of state capture. In June 2019, it was ordered by the High Court to repay Eskom R595 million in fees – which Trillian claims it no longer has. While not the only lawyers acting for Trillian, Stein Scop was regarded as their law firm of choice and is reported to have received over R100 million from Trillian. Much of this was held in trust accounts – some of the reasons for this were not specified. [29]

OCCRP investigator Khadija Sharife, who has investigated Trillian and a massive leak of its internal records, maintains that "Stein Scop managed to become one of the biggest beneficiaries of Trillian's government work by charging the Gupta network hefty legal fees to the tune of millions of dollars. The firm spent months prosecuting Trillian whistle-blower Mosilo Mothepu, staving off investigations into Trillian, and otherwise defending the firm." [30]

Stein Scop did not respond to these allegations, claiming client confidentiality. [31] Defending Trillian is of course not an offence – but why would a firm of attorneys choose to assist a client whose ethical conduct is questionable?

The firm did withdraw its services from Trillian – but this came only in 2017. While it may only have caught the tail end of Trillian's business dealings, it benefitted handsomely. In the 2016/17 financial year, Gupta-linked firms were reported by the *Daily Maverick* as representing 50% of the firm's work.[32] While Stein Scop denies any wrongdoing in relation to state capture, it is evident that the affairs of this small law firm were, through its work for Trillian, deeply embedded in the Gupta network of companies.

Hogan Lovells and the decimation of SARS

The Anglo-American law firm Hogan Lovells is one of the ten largest in the world, with an eye-watering revenue of over $2 billion in 2017.[33] However, the Johannesburg office (which merged with local firm Routledge Modise in 2013), is tainted by allegations of profiteering as an enabler of state capture. This has led to radical restructuring at the firm and a parting of ways with Routledge Modise and the firm's former chairperson Lavery Modise.

A trenchant critic of Hogan Lovells' conduct has been South African-born British politician Peter Hain, who has accused the firm of enabling state capture, calling for a global boycott.[34] The allegations stem from the 2016 appointment of the firm by former SARS Commissioner Tom Moyane to investigate mysterious cash payments into the account of his second-in-command and ally at SARS, Jonas Makwakwa.[35] This was necessitated following evidence presented to SARS by the Financial Intelligence Centre. While the firm has denied any wrongdoing, it stands accused of rigging the investigation to ensure that Makwakwa was cleared of any illegality. [36]

These efforts strengthened the hand of Moyane, who together with consultancy company Bain, played a key role in weakening the effectiveness of SARS.[37] Those who benefitted from this include numerous tax dodgers, including those implicated in state capture. It is reported that at his disciplinary hearing, Makwakwa could only explain R2 200 in cash flowing through his account when he was under investigation for payments of R2,4million.[38] Did Hogan Lovells report all the evidence of wrongdoing it found? Even when Tom Moyane deliberately skewed the findings of their investigation to Parliament, the firm remained largely silent –citing confidentiality instead of acting as officers of the court.[39] Following a call by Hain for UK authorities to investigate the firm, regulators demurely declined on the grounds that all this had taken place in a foreign jurisdiction.

Hogan Lovells faced fresh allegations of enabling state capture in early 2019 when it was implicated in assisting Gavin Watson and his private prison company Bosasa in making corrupt payments to government officials. The testimony of Bosasa whistleblower Angelo Agrizzi implicated former Hogan Lovells partner Brian Biebuyck in criminal conduct. At the time, the firm was said to be "shocked" and "appalled" by these allegations.[40] All of this raises a serious question: how deep did the rot go at the firm, and why was this conduct never reported to authorities by partners at the law firm who must have seen billing information, and wondered what the scope of such services were?

MICHAEL HULLEY AND A BIG LITTLE LIE?

In September 2019, the Zondo Commission heard evidence that former President Jacob Zuma's long-time lawyer Michael Hulley had attempted to conspire in misleading the court. According to evidence presented at the Commission by former National Director of Public Prosecutions Mxolisi Nxasana, he was asked to lie to the court by Hulley.[41] At the time, the NGOs Corruption Watch and Freedom Under Law had approached the court to challenge the constitutionality of Zuma axing Nxasana from his job as head of the prosecutions service. A crucial defence was that Nxasana's departure was voluntary; which meant that the truth would require massaging.

According to Nxasana, Hulley "…suggested to me that I should work together with President Zuma and offered to pay for my legal costs, including the cost of senior legal counsel." [42] He added "I gathered that he wanted me to help President Zuma by saying that I made a request to vacate office. But

I made it clear in that meeting that I won't say that." However, to his surprise, he would read in Zuma's affidavit that he, Nxasana, had asked to step down. [43]

This case is an example of how lawyers have not only helped create the necessary mechanisms for state capture, but, as officers of the court, are accused of lying and cheating. In similar vein, the National Prosecutions Authority (NPA) suffered tremendous damage as a result of a compromised leadership that acted in the interest of Jacob Zuma's allies. In April 2019, the Mokgoro Inquiry, led by retired Constitutional Court Justice Yvonne Mokgoro, found that "…the suspended Deputy National Director of Public Prosecution (DNDPP), Nomgcobo Jiba, and the Special Director of Public Prosecution (SDPP), Lawrence Mrwebi, are not 'fit and proper' to hold office in the NPA." [44]

In relation to a decision to drop criminal charges against the head of Police Crime Intelligence, the notorious General Richard Mdluli, the Mokgoro Report notes that because Jiba failed to review the decision taken by Mrwebi to withdraw the charges against Mdluli, she "failed to display the required competence and capacity required to fulfil her duties" and her "conduct had the effect of seriously damaging public confidence in the NPA." [45] With the Constitutional Court affirming Mokgoro's findings, President Ramaphosa was able to sack both of the disgraced court officers. However, this only came after their conduct and that of some of their peers had inflicted massive institutional damage on the NPA and its integrity.

LESSONS FOR THE LEGAL PROFESSION

Lawyers have been key enablers of state capture: for every corrupt deal concluded, a lawyer drafted the documents that normalised such practice. However, like the auditors and bankers, their complicity in these crimes has up until now been treated as a side-show by the Zondo Commission and the public when discussing the issue of state capture. The evidence suggests that there are deeper systemic issues related to the legal profession that should urgently be addressed:

- **Who holds lawyers to account?** The public has in the past relied on self-regulating professional associations, such as the Law Society, to regulate the conduct of lawyers. However, they have proven inadequate given the levels of impunity involving lawyers linked to state capture. The decision to strike former senior NPA official Lawrence Mrwebi from the advocates' roll is an exception rather than the rule. This demands that we interrogate the various law societies, and whether they are indeed fit for purpose in policing the profession and ensuring that those in it are "fit and proper" to act as officers of the courts. A welcome relatively recent development is the establishment of a statutory regulatory authority in the Legal Practice Council with a code of conduct and regulations. However, its effectiveness in regulating powerful law firms is yet to be properly tested.
- **Prosecute corrupt lawyers:** The Zondo Commission would do well to identify a comprehensive list of lawyers and firms that benefitted from state capture so that it can, where appropriate, recommend their criminal prosecution by relevant authorities. The case studies identified in this section of the report speak to what is likely to be a larger trend.
- **Lawyers at the centre of the offshore world:** The practice of allowing the beneficial owners of companies to remain secret has had serious consequences across the globe. It enables economic crime and tax evasion on an industrial scale. Like accountants and bankers, lawyers play a central role in constructing secret offshore systems, to the detriment of billions of people.[46] Some moves have been made in South Africa to tackle this issue in recent years. However, this struggle is a global one, and requires the stringent regulation of lawyers who have helped enable this system of unjust and illegitimate profits.
- **Bigger is not better:** The global shift to mega law may seem appealing – but corporations in skyscrapers with internal due diligence departments are often more likely to engage in unethical practice, given the drive for ever bigger profits. The question of fees and the appropriate size of law firms should receive more attention if the legal profession is to contribute to upholding the justice system.

SANDTON: STATE CAPTURE MILE

Corporate power is heavily concentrated in a few blocks in Sandton. Many of the big banks, accounting and law firms that enable state capture and other forms of malfeasance are located here.

KEY

- TRANSNET
- ESKOM
- ESTINA

BAIN AND COMPANY

The consulting giant was a key player in strategising the offensive against SARS which undermined the capacity of the tax authority and led to reduced revenue collection. The Nugent Commission concluded that Bain's South African office was a knowing participant in the erosion of SARS in exchange for lucrative fees.

KPMG

KPMG was responsible for providing both auditing and tax advisory services to Linkway Trading, the South African firm that invoiced Dubai-based Accurate Investments a perfectly round R30 million for organising the extravagant Sun City wedding. This money originated from the Estina Dairy Project. KPMG also audited a range of other Gupta companies, including Oakbay Investments, and yet did not report suspicious activity.

STANDARD BANK

Estina's bank records show that, of the six payments that were made into Estina's Standard Bank account by the Free State government, most were immediately paid out, including to an offshore company registered in Dubai. These are both red flags for possible money laundering.

South African shelf company BEX, implicated in facilitating the CNR-Transnet deal and kickbacks related to that deal, held bank accounts at Standard Bank. It remains unknown whether Standard Bank identified and reported the suspicious activity.

FNB

FNB provided essential banking services to Estina at a time when the company received two significant deposits from the Free State Department of Agriculture totalling over R100 million. There were a number of obvious red flags that FNB should have identified in relation to its provision of banking services to Estina.

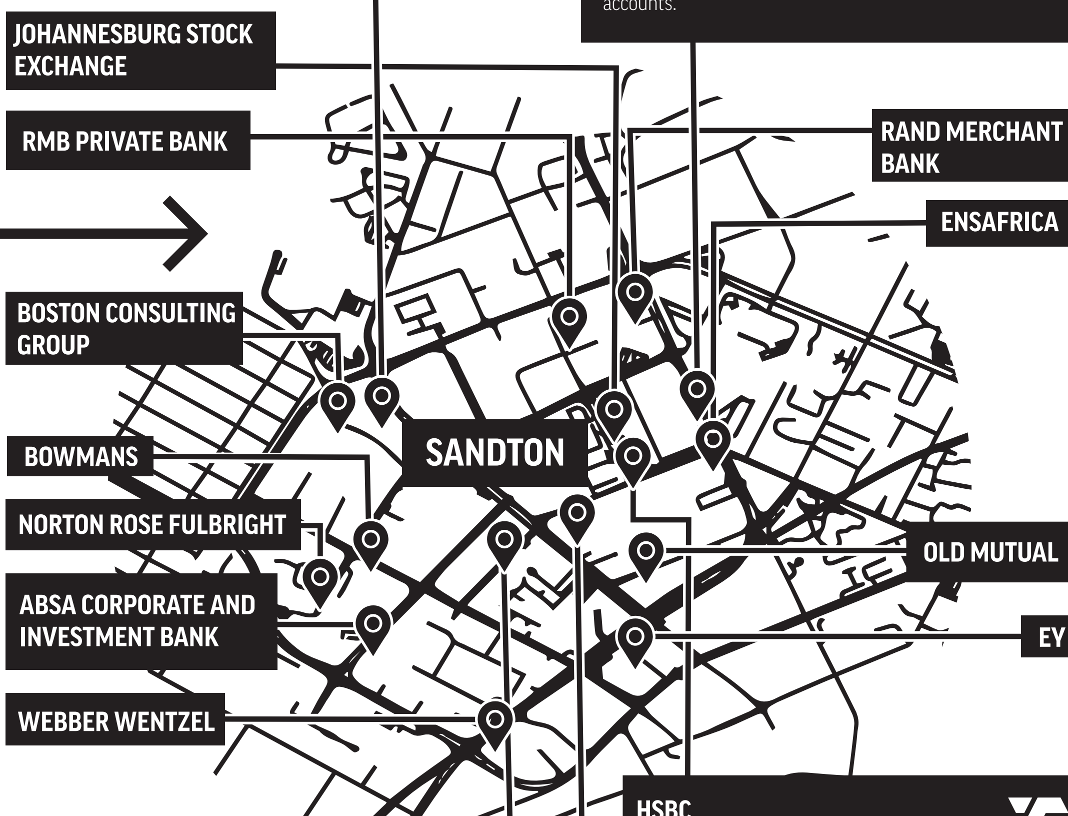
STANDARD CHARTERED

The majority of funds paid to Estina by the Free State Department of Agriculture were transferred out of Estina's banking facilities and into a network of offshore companies controlled by the Gupta enterprise. Standard Chartered and a range of other global banks facilitated these transfers. Standard Chartered closed Gupta linked accounts in 2014, arguably too late. Though this illustrates that monitoring and decisive action by the banks was possible

NEDBANK

Nedbank was party to dubious interest rate swaps organized for Transnet by Regiments. It was estimated in early 2019 that the swaps had cost Transnet over R780 million in additional interest payments to Nedbank.

As Baroda's correspondent bank, Nedbank allowed Baroda to use its infrastructure for all financial transactions. OCCRP has alleged that the nature of the relationship between Nedbank and Baroda enabled both banks to avoid responsibility for identifying and reporting suspicious transactions related to all of these accounts.



BANK OF BARODA

More than any other local bank, the Bank of Baroda was central to the money-laundering machinations of the Gupta enterprise. In addition to facilitating transactions in and out of Estina's current and fixed deposit accounts, the Bank of Baroda provided loan facilities that were used to create "fake loans" or "loan-backs" as part of the Estina money-laundering network.

Baroda accounts were used extensively to facilitate the purchase of Optimum Coal Mine (OCM) by Tegeta. A forensic investigation concluded that Baroda's conduct violated various legal duties including consistent failure to file suspicious activity reports with the FIC, as well as failure to identify where parties were related.

The Bank of Baroda, like HSBC, facilitated the flow of money between various Gupta front companies linked to the 1064 locomotive deal, allowing kickbacks linked to the deal to be laundered.

HSBC

HSBC was arguably the most important enabler of the looting of Transnet, having handled most of the transactions of the front companies CGT, JJT, Tequesta and Regiments Asia. It failed to act swiftly despite numerous obvious money laundering red flags.

McKINSEY AND COMPANY

McKinsey not only entered into an unlawful contract with Eskom, but also advised Eskom to pay Trillian R565 million, in the absence of any final contract, and with Eskom later admitting that Trillian had done no work for them.

McKinsey and Regiments Capital were transaction advisors on the 1064 locomotive deal. Regiments contributed to rewriting the business case at the last minute to facilitate the escalation of the price. McKinsey has since admitted it was suspicious of the relationship between Regiments Capital and the Gupta family in 2014 (two years after partnering), but did not cease working with them until February 2016.

6

CASE STUDIES:

ENABLERS IN ACTION

6A

TRANSNET

Transnet Freight Rail's (TFR) procurement of 1259 electric and diesel locomotives, the largest ever locomotive supply contract for TFR, is one of the most egregious examples of the looting of a state-owned enterprise. It exemplifies the manner in which the Gupta racketeering enterprise operated, and the way in which this enterprise relied on banks and front companies to enable them to move, obscure and then enjoy the proceeds of crime.

There were a number of key players involved in illicit activity linked to this procurement process. They include Chinese state-owned rail companies, Transnet executives, the extensive Gupta network of individuals and companies, and crucially, a global financial architecture, bolstered by banks, accountants and lawyers. After a brief overview of the Transnet procurement deals and the evidence of illicit activity therein, this section focuses on the role played by the enablers in these deals: the accountants, bankers, consultants and lawyers without whom the looting of Transnet would not have been possible.

BACKGROUND AND PROTAGONISTS

TFR's procurement of locomotives to update an ageing fleet involved three distinct deals – now best known as the 95, 100 and 1064 deals.[1] The latter 1064 deal is considered one of the most egregious examples of the way in which public procurement was repurposed for the enrichment of private individuals. Several witnesses, including senior Transnet employees, have already testified to the Commission about the financial consequences suffered by Transnet (and thus ultimately all South Africans) as a result of malfeasance in the deal.[2] This has been confirmed by several independent inquiries, including the Fundudzi forensic report commissioned by National Treasury.

Note: We note that the testimony to the Commission may yet be subject to cross-examination by implicated parties before the Commission is complete.

> **The 1064 deal and its related costs eventually totalled around R55 billion. This is not only R16 billion more than what was initially projected by Transnet; it is close to the nominal cost of the corrupt 1999 arms deal.** [3]

It is estimated that over a quarter of the state funds spent by Transnet on the 1064 deal enriched a few individuals and companies linked to the Gupta family, and was achieved through serious and repeated manipulations of the procurement process. [4]

Transnet's board of directors eventually (and after considerable public pressure) commissioned South African law firm Werksmans to undertake an investigation into the 1064 locomotive deal. In 2018, after complaining that Transnet had failed to co-operate with the investigation, Werksmans released their findings, which included a forensic investigation that considered the R16 billion escalation. Its findings were that the conduct had been inexplicable and wasteful, and the report recommended criminal investigation and civil proceedings to recover public funds lost pursuant to the unlawful contract. [5]

The Werksmans report rightfully identifies the Transnet board of directors as being potentially liable for gross negligence in the loss of these funds, in that they failed to apply their minds to the transaction, and failed to exercise objective judgement.[6] Yet at each stage of the suspicious activities, there were a range of private actors facilitating the illicit activity.

CSR AND CNR

China South Rail (CSR) and China North Rail (CNR) are Chinese state-owned rail companies that produce rolling stock (carriages, locomotives, wagons and other vehicles used on a railway). Both were major players in the bribery and kickbacks that characterised the capture of Transnet. They are also substantial industry players with a global reach.

For over a century, CRRC Corporation Limited was one company. In 2000, CRRC split and CSR and CNR, while still associated with CRRC, became distinct corporations.[7] As of June 2015, CSR and CNR re-merged to form CRRC Corporation Limited, which is currently the largest rolling-stock manufacturer in the world, and also one of the largest industrial firms in the world. [8]

In 2012, Workers International Vanguard League (an organisation based in Cape Town) requested that the Public Protector probe CSR's award of the contract for 95 locomotives for Transnet.[9] Their complaint was based on concerns that CSR had recently delivered 22 locomotives as part of a deal in Namibia, but upon delivery, these were so deficient that they were withdrawn from service only weeks later.[10] There were also early indications that CSR was not going to be able to meet the timelines it had promised.

CSR was awarded the 95 and 100 contracts in 2012, and then the contract to produce 359 of the 599 electric locomotives as part of the 1064 deal in 2014. [11]

THE 95 DEAL

The Forensic Report into Various Allegations at Transnet and Eskom, commonly referred to as the Fundudzi Report, was commissioned by the National Treasury. The report extensively details the serious irregularities in the awarding of the 95, 100 and 1064 tender to CSR. [12]

From its outset, the R2.7 billion 95-locomotive deal began with deviations from legal requirements and apparently preferential treatment for CSR. This began with Transnet employee Lindiwe Mdletshe collecting tender documents on behalf of CSR, despite CSR having not paid the requisite R20 000 fee.[13] Furthermore, emails between a senior director at CSR, Wang Pan, and then Transnet CEO, Brian Molefe, indicated a close relationship that presented a serious conflict of interest, one that should have been disclosed. According to the Fundudzi Report, the emails raised the suspicion that CSR knew that they would be awarded the tender before any formal decision had been made. [14]

CSR did not have a South African entity as a partner at the time of the bidding process, and thus did not have an adequate B-BBEE score.[15] In fact, an initial assessment rated them at 0.[16] This should have immediately disqualified CSR. However, Thamsanqa Jiyane (group executive for manufacturing) and Siyabonga Gama (chair of Transnet's Capital Investment Committee – CAPIC), argued that this requirement should only be considered at a later stage, on the basis that it unfairly disadvantaged foreign businesses. This was despite the fact that other local businesses were disqualified for not meeting B-BBEE standards. [17]

On 22 October 2012, a formal signing ceremony was concluded, and CSR E-Loco was formally contracted to supply 95 new Class 20E locomotives in a Locomotive Supply Agreement (LSA).[18] In a pattern that would repeat itself, CSR failed to meet their delivery deadline. By the February 2015 deadline, only ten locomotives had been completed; the remaining 85 were delivered in June 2015. [19]

Moreover, the late penalties that were supposed to be incurred by CSR were never issued. In a pattern that would also repeat itself, this contract with CSR cost R100 million more than was initially budgeted (R2.6 billion).[20] Without submitting them for board approval, as required by law, Brian Molefe approved the higher payments. [21]

Many of the payments from Transnet to CSR were quickly paid on by CSR to Gupta fronts. At least 20% of the payments to CSR were paid to a UAE registered company – Century General Trading (CGT) – for what was described as commissioned "consulting". No consulting services were provided. Rather CGT, described as a trader of scrap metal, rice, beans and other commodities, and registered in the UAE Free Zone,[22] was merely a front for the Gupta family, managed by their associate Ram Ratan Jagati. [23]

Jagati, who was born in India but resides in the UAE, has been described in media reports as a middleman or factotum for Gupta-associate, Piyoosh Goyal and the Gupta family (these characters will be examined later in this section).[24] CSR's contract with CGT would later be succeeded by an "advisory" commission from Tequesta at 21% of CSR's fee for the deal. These payments were little more than kickbacks.

The 95-deal is in many ways a model for the other dealings between Transnet, CSR and later CNR. This process was riddled with concerns, including:

THE 95-DEAL:

A process riddled with problems.

- **The manipulation of procurement and bid specifications;**
- **Suggestions of conflicts of interest due to the nature of the relationships between CSR/CNR employees and Transnet employees;**
- **Escalating budgets without board approval;**
- **The failure to enforce penalties for malfunctioning products or late delivery;**
- **The nefarious involvement of several Gupta associates;**
- **The payment of "consultancy fees" to Gupta-linked companies with little evidence of actual work done.**

THE 100 DEAL

Due to delays in the procurement of locomotives for Transnet's general freight business, the 100 deal, unlike the 95 deal, was not an open-bid tender. Rather, the tender was awarded through "confinement", without a competitive tender process. [25]

The 100-locomotive contract was for heavy-haul electric locomotives, and was initiated by Siyabonga Gama, then the CEO of Transnet.[26] The initial motivation for confinement suggested that the contract should be given to the Japanese corporate Mitsui. However, this was immediately disputed by Chair of the Board Acquisitions and Disposals Committee (BADC), Iqbal Sharma, who wrote to the Department of Public Enterprises to advise against awarding the contract without tender to Mitsui.

There was evidence early on that Iqbal Sharma was as a key Gupta associate. This is why in June 2011, Sharma's appointment as Chairperson of Transnet by then Minister of Public Enterprises, Malusi Gigaba, was blocked by Cabinet.[27] Gigaba, implicated in numerous instances of furthering the Gupta's interests, subsequently created the BADC, purportedly to oversee the procurement of locomotives for Transnet.[28] Sharma was appointed chairperson.[29] Partly due to multiple allegations of corruption related to these Transnet procurement deals, the BADC was eventually disbanded in May 2018.[30]

According to emails obtained by Fundudzi and Werksmans, Sharma attempted to persuade Director General of the Department of Public Enterprises, Tshediso Matona, to refuse to grant the confinement of the contract to Mitsui.[31] Mitsui was initially selected as it had previously delivered similar locomotives for Transnet, and thus had the capacity to deliver within the emergency framework and timelines required.[32] In his email to Matona, Sharma copied in an email address belonging to Tony Gupta. However, Matona suggested that the matter be resolved internally at Transnet.[33] After this, a letter was fabricated as being from Matona, discouraging the confinement.[34] Fundudzi investigators were able to show that the letter came from an email address allegedly belonging to Sharma. Sharma told investigators that this email had been hacked.[35]

Following Sharma's deceptive attempts to deny Mitsui the contract, several Transnet managers, including Brian Molefe and Anoj Singh (Transnet CFO at the time), joined in opposing the Mitsui contract. They claimed their opposition to issuing the contract to Mitsui was because of allegations that a previous confinement to Mitsui, in 2010, had led to Kgalema Motlanthe receiving undue benefits.[36] No charges were brought against Motlanthe, and no substantial investigation appears to have been conducted to establish the veracity of the allegations.

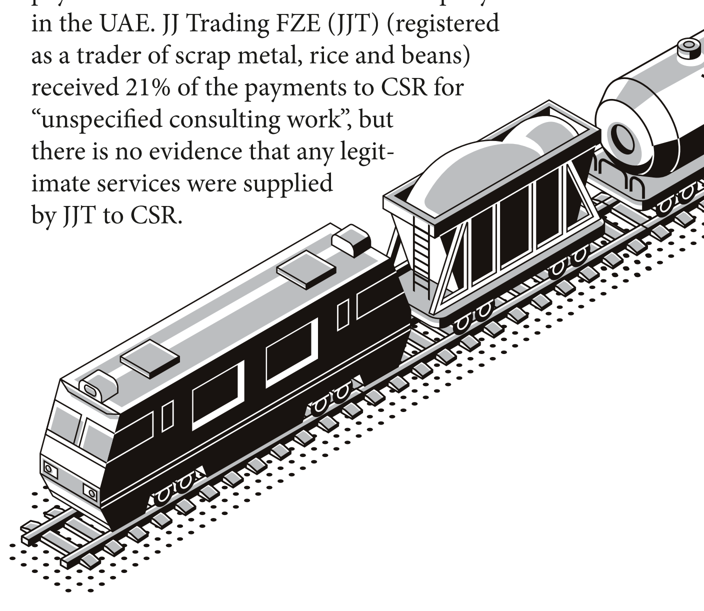
Singh's involvement in this decision must be noted, as Singh's role as CFO at Transnet and then Eskom, along with his ties to the Guptas, has raised credible questions about his role in the capture of these institutions.[37] Singh is said to have lied to investigators from Fundudzi several times, and was unable to substantiate the sources of his income in his personal FNB account.[38]

Sharma, Molefe and Singh pushed to reallocate the confinement for the 100 locomotives to CSR. This deal was accelerated and received board approval without CSR having produced a proposal for the deal.[39] Moreover, while Mitsui was able to produce the 19E heavy tonne locomotive suitable for Transnet's coal transport network, CSR was not able to.

While this should have raised alarm bells, Brian Molefe simply requested an adjustment of the contract, twice, and Transnet eventually settled on a 21E class locomotive, which CSR was actually able to produce.[40] The suspect nature of this contract was further amplified by the fact that Molefe sent CSR a Request for Proposal (RFP) – an essential part of any procurement process – only after the contract had already been awarded to CSR.[41]

The 100 deal with CSR would end up costing Transnet R4.8 billion – R969 million more than the original board-approved budget.[42] The Fundudzi report notes that the increase in budget is dubious, given that the initial proposal from Transnet was for 112 locomotives, but that Singh and Molefe had misled the board about this, too.[43] With the order being decreased, the budget should also have decreased.

As was the case in the 95-loco deal, CSR paid on a significant amount of the total payment from Transnet to a front company in the UAE. JJ Trading FZE (JJT) (registered as a trader of scrap metal, rice and beans) received 21% of the payments to CSR for "unspecified consulting work", but there is no evidence that any legitimate services were supplied by JJT to CSR.



1064: CASHING IN ON COMMISSIONS

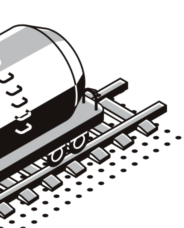
The 1064 contract involved the purchase of 599 electric locomotives and 465 diesel locomotives. The four suppliers for the 1064 contract were: [44]

1. CNR – 232 diesel locomotives;
2. General Electric –233 diesel locomotives;
3. CSR – 359 electric locomotives;
4. Bombardier – 240 electric locomotives.

CSR

Like the 95 deal before it, the bidding process for the 599 locomotives was delayed to accommodate CSR. Lindiwe Mdletshe, senior manager for strategic sourcing for Transnet, and who had played a key role in the favouring of CSR for the 95 contract, would again assist CSR.[45] This was achieved by claiming that several bidders had asked for an extension for the bidding for the 599 locomotives, when only CSR had actually asked for this extension. [46]

CSR also failed to submit both the "Imported Content Declaration C" and "Local Content Declaration" forms, which were both mandatory documents for the bidding process.[47] This should have resulted in the exclusion of CSR from the process. Yet, the Fundudzi investigation found that there was a last-minute change to the requirements that reclassified the missing documents as "essential", rather than "mandatory" documents. This was done a day before the closing date on 29 April 2013.[48] The reclassification from "mandatory" to "essential" saved CSR from disqualification.



The technical evaluation for the bidders may also have been distorted to favour CSR. CSR initially scored 94.5% in the technical evaluation, putting them behind other bidders, Bombardier and Mitsui. Yet in the space of two days, 23–25 October 2013, CSR's score was increased to 96.5%. This rescoring put CSR in first place.[49] Although the other bidders' scores were also altered, CSR's change was more significant and resulted in CSR being awarded the bulk of the project. This change allowed for Molefe and Singh to make a more convincing case for CSR to be awarded the project. The Fundudzi investigators concluded that there was "no set evaluation criteria" that informed the changing of the score. [50]

There were a series of other irregularities in the 1064 contract. For one, the request for proposals in terms of the tender was put out to market before the required Public Finance Management Act (PFMA) consent had been obtained.[51] When consent was given by Finance Minister Pravin Gordhan in 2013, it was subject to conditions that included notice of any increase in capital expenditure on the contract. The Fundudzi report found that while the cost of the project rose from R38.6 billion to R54.6 billion, no such notice was given, and that Transnet failed to meet the other Treasury conditions. [52]

> **Moreover, the R16 billion escalation in cost itself was highly suspicious, and arguably designed solely facilitate the payment of kickbacks by CSR to Gupta-linked front companies, as is explained in the following section.**

The original business case indicated that the R38 billion cost was an "all-inclusive" estimate – meaning that all possible costs were included in this amount. This has been confirmed by the Werksmans investigation, which concluded that it was the only reasonable reading of the original business case.[53] Yet this business case was deliberately altered in early 2013 (allegedly on the verbal instruction of Anoj Singh) to misrepresent the R38 billion as excluding "the potential effects from forex hedging, forex escalation and other price escalations". [54]

While this was clearly not the case, combined with other adjustments to the contract, it provided the space to increase the cost of the project dramatically. By May 2014, Brian Molefe and Anoj Singh sought the Transnet board's approval for an increase in the cost of the contract to R54.5 billion. The Fundudzi report concluded that:

> **Molefe and Singh therefore misled the BADC into believing that the ETC of R38.6 billion excluded the relevant costs when it was Singh who instructed Mohamed to change the Business Case to**

reflect that the relevant costs were excluded. The misrepresentation by Molefe and Singh contributed to the increase in ETC by at least R6.7 billion.[55]

Various investigations have strongly suggested that the favouritism shown to CSR was due to the payment of lucrative kickbacks. These kickbacks were generally paid to front companies in secrecy jurisdictions, with banks arguably turning a blind eye to red flags, given how long it took for them to take any action.

JJT (the UAE front company) was one such company paid lucrative kick-backs disguised as "consulting fees". According to a "Business Service Agreement" between Tequesta and CSR, JJT was to be paid 21% of the payment due to CSR, although there is no evidence of any legitimate work done by JJT that could explain this payment.[56] JJT would later be replaced by Tequesta, when the latter was brought in to provide "advisory services" in 2014.[57] JJT had been paid R706 770 480 when they were replaced by Tequesta (this is 3.9% of the 21% advisory fee of R3.8 billion).[58]

The precise values of all of these payments are known to us because of an Excel spreadsheet titled *FinalCSR2015working* attached to an email that formed part of the "Guptaleaks". The spreadsheet, found attached to an email from Richard Seleke (who served on the Trasnent BADC) to Gupta associate Ashu Chawla, set out clearly and unequivocally the size of the "commissions" – kickbacks, properly understood – that had been paid, and were still to be paid by CSR, to various Gupta-linked entities as part of the Transnet locomotive deal.

Remarkably, despite being a recently registered Hong Kong company, Tequesta was billed as being able to "play [an] active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the country" [59] due to their supposed "familiarity with the regulatory, social, cultural and political framework" in South Africa.[60] In total, CSR were paid R18 billion on this particular deal, of which 17% of the remaining 21% (R3.098 billion) of advisory fees would be transferred to Tequesta. Oddly, according to OCCRP,[61] Tequesta received payments three months before the signing of the deal's contract.[62] The Business Service Agreement further indicated that each time the company [CSR] receives payments from the client [Transnet], as a percentage of the total contract value, some portion of the advisory fee will be paid to Tequesta. [63]

Tequesta's CEO was Salim Essa, a man widely referred to as a "Gupta lieutenant".[64] Essa also co-founded Regiments Asia, which also received payment from CSR for a range of "services" for which there has never been any evidence. Regiments Asia is alleged to have been co-founded by Eric Wood, who, alongside Essa, is implicated in allegations of corruption at Eskom.[65] This is dealt with in the next case study.

According to banking data obtained by an OCCRP investigation, Regiments Asia received US$65 million from CSR.[66] Woods' involvement is also notable, as his company Regiments Capital, would be recommended by the global consultancy firm McKinsey, discussed above, to advise Transnet on the procurement of the 1064 locomotives.[67] This arguably amounts to collusion, given that Woods would have had insider knowledge of the tender criteria for the 1064 procurement.

When the 1064 deal came under public scrutiny because of the alleged Gupta influence, Transnet hired the auditing firm, Price Waterhouse Coopers (PWC), to investigate. PWC found that Iqbal Sharma "might [sic] have conflicts" with regards to this deal because of Sharma's association with Gupta-linked companies.[68] In particular, Ajay Gupta's son Kamal Shingala was the director of VR Laser, a company both Salim Essa and Sharma had shares in. VR Laser was also financially linked to the Gupta empire in that it had received a multi-million US-dollar loan from Tequesta.[69] VR Laser was further alleged to be involved in the capture of Denel and associated dubious contracts in India.

In early 2018, Transnet's chairperson, Popo Molefe, sent a letter to staff informing them that the Board Acquisition and Disposal Committee (BADC) would be disbanded after various allegations of corruption:

Transnet has, for the past three years, been faced with a number or serious allegations of corruption, maladministration and mismanagement of procurement processes. The seriousness of these allegations cannot and must not be ignored. [70]

Mncedisi Ndlovu & Sedumedi (MNS) Attorneys report (commonly referred to as the

MNS report)[71] recommended that Transnet press charges against Sharma and report him as a "delinquent director" under the Companies Act, due to his failure to declare his business relationships with Essa, and, by extension, the Guptas.[72] Sharma was not alone. MNS also found that Molefe, Singh, Mdletshe, Gama and Jiyane, along with the Transnet board in general, had committed various breaches of the law, and recommended disciplinary action. [73]

Like the 95 and 100 deal, CSR's delivery of the 359 locomotives has been beset with delays. In 2017, two of the locomotives arrived, but were found to be defective and unusable. Transnet claimed that these were merely prototypes.[74] But by April 2018, CSR had only delivered 174 of the 218 locomotives initially scheduled for that date.

According to the Fundudzi investigators, CSR should have been levied with penalties to the tune of R53 839 461.67. However, Transnet has not made any effort to collect these penalties.[75] CSR was scheduled to deliver the last of the locomotives in July 2019. At the time of writing this publication, these have not been delivered.

CNR

As mentioned above, the portion of the 1064 deal that went to China North Rail (CNR) was for 232 diesel locomotives. It was worth R10 billion.[76] The original terms of the deal stipulated that the 232 locomotives would be partly built at Transnet's Koedoespoort site, in Pretoria.[77] Yet, just before the contract was signed, CNR (along with another supplier – Bombardier) were informed by Transnet that they had to relocate the building to Bayhead in Durban. While the purported reason was to "stimulate development in other parts of South Africa", [78] it has been noted in subsequent investigations that the decision was unmotivated and risky in that it became a rough and ready excuse for non-delivery. [79]

Apart from the relocation to Durban seeming to have no reasonable motivation, it also appears that it was part of the deal manipulated to enable the extraction of rents from Transnet. When CNR was first asked to relocate, according to their own calculations, the estimated cost was R9.7 million.[80] The Commission has heard from a minority partner on the deal, businessman Roberto Gonsalves, on 23–24 May 2019. In that testimony, Gonsalves testified that this initial estimate was made in March 2014. Yet by July 2016, Transnet and CNR had agreed to a staggering R647 million for the relocation. [81]

This extraordinary increase was brought about by a 2015 agreement between CNR and a small company called Business Expansion Structured Products (commonly referred to as BEX). The agreement stated that BEX would provide "business development services" to the Chinese supplier. [82]

CNR's contract with BEX was highly contentious, even internally. CNR's minority directors were reportedly so unhappy [83] with the decision to contract with BEX, an unknown company with virtually no record of having delivered the same service, some of them refused to sign off CNR South Africa's financial statements. However, CNR used its majority to push the contract through, as confirmed by Mr Gonsalves to the Commission.[84]

Despite CNR initially costing the relocation at R9 million, CNR gave BEX a benchmark of R280 million[85] – meaning that whatever Transnet agreed to pay CNR over and above the R280 million for the relocation, would go to BEX as what was described as an "agency commission".[86] Gonsalves had previously told AmaBhungane that this commission was "hugely excessive for a company that had never [previously] traded". [87]

The initial jump in price was from R9 million to R280 million, but by July 2015, BEX quoted a cost of R719 million. This included the offer of a 10% "discount". [88] In an email from Bex found as part of the #Guptaleaks (also forwarded to Salim Essa), BEX suggested that "on this price CNR are prepared to offer a 10% settlement discount…. This results in a revised project relocation cost of R647,181,494." [89]

Additionally, BEX wanted 50% (R323 million) to be paid out within a fortnight of the deal being signed. According to the Werksmans Report, it did not seem that Transnet investigated any of the figures used as a basis for the deal.[90] On 23 July 2015, Transnet's acting Chief Executive Officer, Siyabonga Gama, signed off on this deal.

The BEX proposal – and the company itself – were suspicious. As already put to the Commission by other witnesses, the company had no discernible history or ability related to this kind of work. In addition, the sole director of the company was a person by the name of Taufique Hasware, a general trader with no relevant experience, but who was a director of three other companies – *Homix, Forsure Consultants* and *Hastauf* – all of which appear to be front companies for Salim Essa and the Gupta racketeering enterprise. These companies were primarily purposed with facilitating kickbacks from Transnet contracts. [91]

As will be discussed at length below, there were other conspicuous red flags that should have alerted diligent executives or auditors to the transaction. Werksmans' investigation into the 1064 locomotive contract contained a forensic audit report.[92] It found that BEX's contract with Transnet was almost identical to the China South Rail-Tequesta contract, which was used to set up kickbacks from the CSR deal:

> **Notably, the layout, style and format of the Tequesta contract is the same ... the cover pages appear to be identical (just different names inserted).**[93]

Investigative journalists at AmaBhungane have subsequently confirmed the link between BEX and Salim Essa. BEX forwarded their email confirming the new total of R647 million for the relocation to Essa, merely stating "FYI".[94] This email was forwarded on 13 July 2015, a few hours after BEX had sent the original email to CNR. On 15 July 2015, Essa forwarded the same email to Eric Wood.

Ultimately, BEX earned a R66 million "commission" from this deal – just over 10% of the massively inflated total charged for the relocation from Pretoria to Durban.[95] CNR's South African partners have put it to the Commission that "there was absolutely no justification for Transnet to agree to pay China North Rail SA (CNR SA), contracted to supply 232 diesel locomotives, close to R700-million for moving a yet-to-be operational plant." [96]

After the testimony to the Commission in May 2019, the Chairperson of the Commission instructed the Commission's legal team to contact the Directorate for Priority Crimes Investigation (the Hawks) to find out why no criminal investigation or action has followed such strong evidence of unlawfulness in relation to this deal. [97]

The concern of the Chair of the Commission is reflected by the public. In 17 January, Transnet chairperson, Popo Molefe, announced that CNR and CSR had returned R618 million, which represented 10% of the advance payment paid by Transnet to the companies.[98] Further, the minority shareholders of CNR also laid a charge with the police with regards to this deal, in terms of the Prevention and Combatting of Corrupt Activities Act.[99] Gonsalves told the Commission in May 2019 that they considered the R66 million payment to BEX as a bribe, and had submitted this complaint to the Hawks. [100] Yet, as in so many cases, the criminal justice system stalled. Following Gonsalves's testimony, Judge Zondo instructed the Commission's staff to contact the Hawks urgently to find out why there had been no movement on such a serious allegation of corruption. [101]

While appropriate action must be urgently taken against any Transnet executive who intentionally or negligently facilitated this looting of public funds, it is equally essential that the Commission turns its focus to the private actors who facilitate these kinds of transactions. We turn now to the enablers.

THE ENABLERS

THE CONSULTANTS: REGIMENTS AND MCKINSEY

As described above, in order to make space for the extensive kickbacks that defined the corruption of the Transnet locomotive contracts, it was necessary for those involved to significantly inflate the costs of those contracts. It was these increases in costs that created the buffer of profit that could be dispersed as kickbacks dressed up as "commissions". Private consultants Regiments Capital and McKinsey played a central role in this process.

McKinsey had worked with Transnet since 2005. As per the Supplier Development Programme (SDP), certain service providers to SOEs are required to partner with a Broad-Based Black Economic Empowerment (B-BBEE) compliant business partner and ensure they receive a 30% stake in the profits of that contract.[102] This is intended, among other things, to increase the skills of local companies by partnering them with experienced multinational corporations.[103] Ideally, this would benefit smaller businesses who would otherwise not have the capacity to partake in SOE tenders.

McKinsey as a multinational company was thus required to partner with a B-BBEE business partner. Transnet CFO Anoj Singh suggested Regiments Capital to McKinsey.[104] Within weeks, Regiments Capital was a McKinsey partner on the 1064 deal.[105] McKinsey agreed to a R 35.2 million contract in August 2012. [106]

McKinsey's advisory services contract contained four commitments:

1. **Developing and augmenting the business case** for the approval of the locomotives by the Transnet Board of Directors and Department of Public Enterprises"; [107]

2. **Calculating** the impact of wagons, locomotives infrastructure, optimisation, profitability of each sector and clear capital volume link; [108]

3. **Procurement and legal work**, which included "Supplier Development and Localisation strategy"; [109]

4. McKinsey was contracted to **oversee technical and operations** aspects of the 1064 business case.[110]

In practice, McKinsey, Trillian and Regiments have been accused of agreeing to consulting contracts at massively inflated prices, earning a total of R1.5bn between 2012 and 2016 for contracts awarded on consignment.[111] Regiments and McKinsey in particular were transaction advisors on the 1064 deal. While this role should have included fair and unbiased advice, the Fundudzi report has confirmed that Regiments assisted Transnet in rewriting the business case to justify a R16 billion escalation in cost. [112]

Rewriting the business case at the last minute was an essential step that allowed Brian Molefe and others at Transnet to provide the necessary leeway to inflate the total cost of the 1064 transactions beyond R50 billion, thus allowing for the payment of commissions and bribes worth 21% of the total contract value.

McKinsey was tasked with validating the "business case" for the 1064 locomotive contract in 2013. They did so, and confirmed that the total estimated cost was R38.6 billion, inclusive of all costs (with the single exception of borrowing costs).[113] Asked by Fundudzi investigators, McKinsey insisted that Regiments were part of the consortium of consultants that had undertaken these calculations, and thus were "adamant that Regiments were aware that the ETC of R38.6 billion included all the related costs and excluded only the contingencies." [114]

However, as discussed above, the business case was deliberately altered at the last minute to misrepresent the R38 billion as excluding "the potential effects from forex hedging, forex escalation and other price escalations." [115] This was approved by Transnet's board, providing the space for Molefe and Singh to present an adjusted contract cost of R54.5 billion to the board in May 2014.

The Fundudzi report concluded that not only had Molefe and Singh misled the board, but that the escalation had been "overstated by R9.2 billion".[116] It turns out that Regiments was key in assisting these Transnet executives in calculating this massively overstated increase in cost. Some of these projected cost increases were attributed to costs for "hedging" and were justified through the use of forward forex calculations drawn up and checked by Regiments. The Fundudzi investigation concluded that not only was Regiments crucial in calculating the increased costs, but that it "did so knowing that the costs were already included in the ETC of R38.6 billion." [117]

Another way in which the contract cost was increased was to split the 1064 contract between four suppliers instead of two. This decision was ostensibly done to "accelerate" the delivery of the contract, which Transnet believed would take too long to fulfil if both the electric and diesel contracts were given to one supplier. This decision was based almost entirely on the work of Regiments Capital, presented to Transnet in 2014.

The figures used by Regiments attempted to prove that an accelerated schedule would save Transnet money even though the opposite was true. These arguments were lacerated in Professor Wainer's report, which formed part of the Werksman's report on corruption at Transnet. He commented that

> *"it would not be an overstatement to describe the Regiments calculations as absurd, obviously wrong and grossly misleading."* [118]

McKinsey's global leader of Public and Social Sector Practices, David Fine, testified to Parliament's Portfolio Committee on Public Enterprises in 2017. Fine confirmed that although McKinsey became suspicious of the relationship between Regiments Capital and the Gupta family in 2014 (two years after partnering), they did not cease working with them until February 2016.[119] This was despite concerns about their beneficial ownership, rate of transformation, performance and allegations of impropriety in the media.[120] Instead of terminating the relationship, McKinsey sent a directive to Regiments Capital to change the make-up of the team working with them.[121] It was at this point that Eric Wood began heading the Regiments Capital team working with McKinsey. [122]

Regiments Capital has been implicated in money laundering for other parts of the Gupta enterprise.[123] This includes an alleged R17 million funnelled through fictitious invoices from Regiments Capital to former Gupta-owned news company, The New Age (TNA).[124] Some of this money, R10 million, was allegedly used for an award ceremony in which TNA named Nkosazana Dlamini-Zuma as 2015's "South African of the Year". [125]

Beyond their work on the 1064 business case, Regiments Capital was also contracted to act as manager of R9 billion in assets of the Transnet Second Defined Benefit Fund (TSDBF).[126] As noted above, Regiments Capital entered into interest rate swaps with the fund as a counter-party, to profit at the expense of the fund and its members. Following two years of litigation by TSDBF against Regiments Capital, Regiments Capital has agreed to pay a R500 million settlement for:

> **allegedly making the TSDBF buy government bonds from its subsidiary, Regiments Securities. Then it would, on the same day, make the fund sell them back to Regiments Securities at a lower price. Regiments allegedly pocketed the difference as profit and the pension fund suffered a loss.** [127]

Regiments Capital also profited from inside knowledge obtained by Eric Wood, who knew about Finance Minister Nhlanhla Nene's dismissal in 2015.[128] On the exact day Nene was fired (9 December 2015), Regiments Capital, acting on Wood's information, invested billions on a bet that the future value of bonds would drop.[129] Yet, acting in its role as TSDBF manager, it set up the fund to bet that the value of bonds would rise. When bond prices inevitably fell, the pension fund lost around R133 million, to the detriment of pensioners at Transnet.[130] Not only did the fund lose out, it had to pay Regiments R220 million in management fees.

Regiments Capital and Transnet's TSDBF only severed ties in 2018. Considering the consistent failure on the part of McKinsey and Regiments to save Transnet money – indeed, the obverse – it is remarkable that Transnet and TSDBF continued to work with McKinsey and Regiments for such a long period. This is most likely the result of how McKinsey had, between 2005 and 2015, successfully embedded itself within Transnet. Indeed, one board member "wondered how the agency could ever oust consultants should the need arise." [131] Clearly there is an urgent need for SOEs to end their reliance on private-sector actors whose ultimate aim is profit, rather than safeguarding the interests of South African taxpayers.

We submit that McKinsey and Regiments were delinquent in their duties. This delinquency facilitated gross corruption. It is imperative that McKinsey and Regiments, and their directors, appear before the Commission to explain their conduct.

FRONT COMPANIES AND COMPANY FORMATION AGENTS

A "SHELF COMPANY" FOR SALE: LEGAL FRONTIERS AND BEX

A search of CIPC records shows that Business Expansion Structured Products (BEX) was first registered in 2009, to an address in the affluent Melrose Arch in Johannesburg.[132]

It indicates that the company is in the process of deregistration but still shows that it has two "active principals": Taufique Hasware and Legal Frontiers (Corporate Services) CC.[133] Company records also show that an auditor, Mark Shaw, was a former director of BEX. [134]

Firms like Legal Frontiers (Corporate Services) provide a range of "business support services" to individuals and corporates alike. One of those services is the provision of a "shell companies" – special-purpose companies set up to facilitate transactions and hold assets, often for the purpose of distancing these from the actual beneficiaries.[135] BEX is a perfect example. When the investigators at AmaBhungane first started trying to unravel the story of BEX, they asked Mark Shaw about it. According to the journalists, Shaw first feigned ignorance, saying that "it was strange that he was registered as a director of the company – that was not normally the case with the shelf companies [136] that Legal Frontiers sells." [137]

When the Werksmans report was released, the documents in the Annexures showed Shaw's answers to be misleading. Not only had the contract between CNR and BEX had been signed by Shaw, but he was the signatory on the Standard Bank account into which BEX was paid the R67 million "commission" (kickback) by CNR.[138] When confronted with this, Shaw conceded that he was the signatory, but claimed to be representing a client whose identity he could not disclose. [139]

The subsequent AmaBhungane investigation reveals many entrenched problems related to the ease with which companies can be set up and operate in South Africa with little or no scrutiny as to their purpose or ultimate beneficial owners. As is evident from the story of BEX, this system is supported by private service providers, from lawyers to auditors.

Another player in the CNR-BEX contract was Integrated Capital Management (ICM), which at the time of the BEX contract was controlled by three directors: Stanley Shane, Clive Angel and Marc Chipkin. These three men have previously been linked to Salim Essa via their alleged role in the establishment of Trillian, the consultancy controlled by Essa and Eric Wood, which booked massive fees from other SOEs, including Eskom and Transnet. [140]

According to Mark Shaw's lawyer at the time,[141] Billy Gundelfinger, in a written answer to AmaBhungane's questions, Shaw became involved (and ultimately the signatory on the CNR deal) because Salim Essa had asked ICM to help with the registration of BEX. In turn, ICM made the introductions to Legal Frontiers, who "procured a shelf company with a VAT number and Standard Bank account". However, it was Essa (according to Gundelfinger's narrative) who provided the FICA documents to set up BEX.[142] Further, the lawyer argued that all instructions for the company came from Essa, and they never met the other listed director (Hasware), but that this was not in any way unusual.

According to this account, Shaw had been asked to be a nominee director to sign off on transactions because Essa and Hasware were outside the country so often – and this is how Shaw had become signatory to all of BEX's bank accounts, as well as the now infamous deal between CNR and BEX. [143]

A final complicating factor in this story is that BEX's registered address, as provided by Essa, was that of Alan Norman, a senior banker with strong ANC connections. Norman told *AmaBhungane* that he had no idea how his details had become connected to BEX. [144]

As noted earlier in this submission, it is a major money-laundering red flag when large unexplained deposits are immediately paid out to other shell companies.[145] This was the case with BEX. After receiving the R66 million "commission" for the CNR relocation, it immediately paid out that money in four instalments to other shell companies. Again, according to Gundelfinger, Shaw signed off on these transactions.[146]

Despite all of the above, Mark Shaw's second lawyer, Russell Kantor, maintained that Shaw's conduct had been above board, and insisted that his client had had no dealings with Essa, nor had any knowledge of the why the R646 million CNR-BEX contract was suspicious. [147]

One of the central methods to launder illicit proceeds (whether from corruption or other crimes) is the "misuse of corporate vehicles or legal structures, aimed at hiding the true identities of those who actually own, control and benefit from these structures." [148]

Kantor's defence of Legal Frontiers set out that:

> **As part of its stock-in-trade, Legal Frontiers maintains a number of shelf-companies, which it makes available to clients at request and on short notice. The process involves Legal Frontiers –(i) registering and incorporating new private companies with CIPC; (ii) appointing its representative as director and shareholder for each such shelf-company; and (iii) attending to the annual filing of the necessary statutory returns. Bank accounts are established prior to the company being disposed of and where at that time the signatory is a representative of Legal Frontiers. The primary purpose of establishing a bank account at that stage is to facilitate the procuring of a VAT registration. There is nothing irregular in the process as set out as foregoing, which is common in any number of company secretarial firms in the Republic.** [149]

This description of the work of Legal Frontiers illustrates the remarkable ease with which unscrupulous individuals can procure shelf companies to facilitate illicit transactions. In fact, there appears to be an entire private industry of legal and other advisors whose purpose is to ensure that such corporate vehicles can be supplied at short notice.

Such structures operate with little scrutiny, and the professionals that facilitate them seem to ask very few questions, even when they are signing contracts and facilitating transactions that are deeply suspicious. In this case, the relocation contract was hugely inflated to over R600 million, and had very little if any supporting documentation. Yet, as amaBhungane's investigation notes, a registered auditor (Shaw) in capacity as a nominee director for BEX signed off on the transaction. [150]

CGT AND JJT IN THE SWITZERLAND OF THE MIDDLE EAST

As described previously, significant portions of the money paid to CSR were paid on to two companies based in the UAE; JJ Trading FZE (JJT) and Century General Trading (CGT). According to the Gupta Leaks, JJ Trading and CGT kept 15% of the CSR payments for themselves, and paid the rest (6%) onwards as "expenditures".[151] The value for each of the three Transnet contracts was: R2.7 billion, R4.4 billion and R18.1 billion, and the "fees" CSR paid the front companies were: R537 million, R924 million and R3.8 billion respectively. [152]

A whistleblower with knowledge of the deal told amaBhungane that JJ Trading was essentially a front for the Guptas; it signed the original agreements with CSR, but remitted proceeds to Gupta-linked companies. [153]

CGT and JJT are registered in the UAE Free Zone. According to information acquired by amaBhungane and Scorpio, CGT and JJT were registered in the UAE by Ram Ratan Jagati. In 2017, journalists flew to Dubai to find JJT's offices. In Dubai's Hamriyah Free Zone, they asked a guard in the industrial complex which supposedly housed JJT where its offices were. The guard indicated that he did not know the company and no such company existed in the complex.[154] This is a common occurrence with front companies. While often receiving and paying on large sums of money, they often have no actual offices, activities or employees. Likely, the same would apply for CGT, which was also registered by Jagati.

The UAE's Free Zones provide a range of incentives to attract businesses. These incentives also make the jurisdiction attractive to those seeking to move, obscure and stash illicit money. In addition to providing for total foreign ownership and exempting companies from any import and export duties, Free Zones in the UAE allow "100% repatriation of capital and profits [and] 100% corporate and personal income tax exemption" as well. [155]

> **Until November 2018, this tax haven status made it possible for companies not to disclose beneficial ownership.[156] It is for this reason that the Corporate Tax**

Haven Index, compiled by the Tax Justice Network, named the UAE as one of the most corrosive corporate tax havens in terms of its impact on African countries. [157]

This issue is exacerbated by double taxation agreements that the UAE has with many African countries. Though countries like Kenya have taken steps to counter this, South Africa still has a double taxation agreement in place with the UAE. This allows for persons and corporations in the UAE to avoid being taxed in South Africa, and vice versa.[158] This encourages many to secrete away profits of nefarious dealings to registered shell companies in the UAE, where in addition to sheltering under a cloak of secrecy, they will not be required to pay any tax.

Dubai has been described as the "Middle East's Switzerland" and as an entrepôt has continually profited from conflicts in neighbouring countries. TJN argues that Dubai is one of the key beneficiaries of the Arab Spring, as wealthy elites spirited away money and the proceeds of decades of corruption in the face of impending change. [159]

In 2018, the Financial Secrecy Index named Dubai as the ninth most secretive jurisdiction in the world. According to TJN, Dubai's lax tax and company laws have allowed it to become a favourite of money launderers around the world: aiding the movement of money for dictators, terrorists, diamond smugglers in the Congo, and Europe's most wealthy.

Organised crime expert Misha Glenny states: "*Dubai had become so useful for terrorists, the super-rich, the United States, dictators, Russian oligarchs, celebrities, Europe, and gangsters that if it did not exist, the global élites would have to invent it*". [160]

It is thus unsurprising that six of the front companies exposed by the Gupta Leaks would be found to be registered in Dubai.[161]

Though Dubai requires that ultimate beneficial ownership of corporations be disclosed, the enforcement of this is lacklustre, and as in South Africa, there is no public registry of ownership of companies.[162] TJN describes Dubai as unco-operative with regards to providing information to other jurisdictions. This can present challenges for investigative authorities in foreign countries which might require mutual legal assistance from the Emirati government.

CGT and JJT in turn took instructions from Worlds Window, an Indian scrap-metal dealer that is linked to various money laundering-schemes associated with the Gupta enterprise. The precise role of World's Window in the Transnet case has been hard to trace because money moved between so many front companies and were linked to multiple different deals for Transnet. What is clear is that JJT made R867 million from the 359 and 100 contracts combined, while CGT made just over R80 million. [163]

The remainder of the moneys (listed as expenditures), were transferred from JJT and CGT to Gupta-controlled front companies. Shadow World Investigations has traced a large number of transactions between Gupta associates or front companies and JJT. These include: Global Corporation LLC, Ses Technologies, Tegeta Exploration, Anil Gupta, Achla Gupta, Westdawn, Sahara Computers, Oakbay Investments, Islandsite and Arctos SA. [164]

Much remains unknown about the ways in which money moved between CSR, Worlds Window, CGT and JJT, because of the complex relationships and money flows between these companies and Gupta associates. However, there is ample evidence to suggest that the flows from CGT and JJT were the first stages of the capture of Transnet and the misappropriation of funds for the 95, 100 and 1064 deal through another Gupta front, Tequesta.

TEQUESTA AND REGIMENTS ASIA

Sometime in late 2014 or early 2015, the Worlds Window system was discarded. CSR stopped making payments to JJT and CGT. Instead, this commission fee would be transferred to Tequesta, with whom CSR entered into a Business Support Agreement in May 2015.[165] The reasons behind this are not certain. However, amaBhungane have speculated that this might be due to Piyoosh Goyal, the chair of Worlds Window, being investigated in India for bribery. This may have made the World's Window system untenable. [166]

Salim Essa registered Tequesta in Hong Kong in June 2014 and signed the contract with CSR in May 2015, according to which the 21% "fee" for the 359 locomotives became due to Tequesta.[167] The agreement also noted that a prior agreement with JJT had been cancelled, and made provision for how to handle disputes between the Tequesta and JJT.

Hong Kong is rated as the fourth most secretive jurisdiction in the world, according to the Financial Secrecy Index. It offers a wide range of "offshore services" that facilitate both tax avoidance and other illicit activity. These services include the provision of opaque companies that can be used for these purposes. There is no public knowledge of beneficial ownership in Hong Kong. [168]

Hong Kong has a long history of secrecy. It has been used as an entrepôt between the East and the West since 1842, when the Chinese government ceded control of Hong Kong to Britain in the Treaty of Nanking, after the British had killed 20 000 people in the first Opium War.[169] The two Opium Wars, between 1839–1842 and 1856–1860 respectively, were a consequence of Britain's imperial ambitions and efforts to force China to accept opium imports from British-controlled India, regardless of the damage the narcotics wreaked on China.[170] After the first Opium War, Britain would go on to turn Hong Kong into the commercial gateway to Asia.

Central to this commercial expansion was the role of the Hong Kong and Shanghai Banking Corporation, now known as HSBC. The interests of colonial states and their corporations have often gone hand in hand. Both HSBC's founder, Thomas Sutherland, and one of the first board's chairmen, Thomas Dent, were both major players in the trade of opium, with interests in both the freight industry and opium production. [171]

According to the Financial Secrecy index, HSBC and its first board were central to setting Hong Kong up as a deregulated free market in the aftermath of the first Opium War.[172] HSBC's recent involvement in money laundering in Mexico has had many drawing linkages to its colonial past, with journalists referring to it as the "world's oldest drug cartel". [173]

HSBC is also important in the Transnet narrative as it became the most important bank that facilitated suspicious transactions between CGT/JJT, Tequesta, Regiments Asia and other Gupta shell companies. We will turn to this later in this section, showing how the bank failed to exercise rigorous due diligence and other controls in relation to these transactions.

The laissez-faire approach to financial regulation in Hong Kong has attracted many foreign businesses, and according to the Tax Justice Network, it is the "turntable" for "round-tripping" money for mainland Chinese investors.[174] In 2016, the Panama Papers revealed that Hong Kong was Mossack Fonseca's (the legal firm from which the Panama Papers were leaked) most active centre in the world for the creation of shell companies.[175] Lax and secretive laws for trusts have also led to trusts in Hong Kong being abused for money-laundering purposes. It is for these reasons that Hong Kong has been on FATF's radar for years as a hot-spot for illicit money flows. [176]

To improve its international compliance with AML/CTF standards, the government of Hong Kong implemented the Companies (Amendment) Ordinance on 1 March 2018, which requires keeping the records of the significant controllers' registers.[177] This applies to companies, but still does not apply to trusts.

Tequesta was required to "play [an] active role in providing advisory services in respect of the Project, Business development and BEE structuring and management in the country." [178] In return for providing these services, Tequesta would be entitled to an Advisory Fee of 21% of the 359 project, 3.9% of which had already been paid to JJT, as discussed earlier in this section. [179]

Tequesta was a Hong Kong-based shell company registered by Gupta associate, Salim Essa. Essa is also the only signatory of the Business Services Agreement between CSR and Tequesta. Tequesta was established on 20 June 2014, the very same day as Regiments Asia.[180] Both companies were registered at the same Hong Kong address.

According to an OCCRP report,
181 **90% of the credits in Tequesta's HSBC account came from this deal, causing speculation that the company was specially formed for the purposes of profiting from this deal. As Regiments Asia was created on the same day, also used HSBC accounts, and would go on to play a similar "advisory" role, it can be extrapolated that it too was created to benefit specifically from the Transnet-CSR deals. These red flags were not acted upon by HSBC, as explained more fully later on.**

According to banking data obtained by journalists at the OCCRP, R5.3 billion was paid by CSR into two accounts: the first was Tequesta's HSBC account, which received R651 million between June and October 2015.[182] The other payment was made to the HSBC account of Regiments Asia. [183]

CSR's payments to Tequesta and Regiments Asia accounted for 90% of the credits to these accounts.[184] Yet these funds did not remain in these two companies' bank accounts for long. More than US$100 million was transferred from Regiments Asia to two dozen companies, mostly via HSBC, with other banks in Johannesburg, Dubai, and the US playing a part in the movement of money. [185]

Noting the very narrow period of activity in these bank accounts, and the tendency for large sums to be deposited and immediately moved on, the OCCRP concluded that these companies were shell corporations.[186] These payments by Regiments Asia were all made between late 2014 and February 2017 – the bulk of these transfers occurring in February 2017.[187] The same shell companies also received payments from Tequesta. [188]

STEPHEN MS LAI: COMPANY FORMATION AGENT

Tequesta and Regiments Asia were only the first step in the money-laundering architecture. Deposits into their accounts were swiftly dispersed to a series of other shelf companies. We have reviewed some of the banking and company documentation related to these transfers. They reveal that, between 2014 and 2016, the funds transferred to Tequesta and Regiments Asia by CSR or related entities were transferred onwards to a total of 181 different entities.

One recipient that stood out was Stephen MS Lai (or, alternatively, S M S L & C C L). Lai received a total of US$11 600 in a total of five payments between May 2015 and June 2016. Our research has revealed that Stephen MS Lai is a chartered accountant who runs an office in Hong Kong at the address Rm A, 15/F, Hillier Comm Bldg, 65–67 Bonham Strand, East Sheung Wan, H.K. He has also registered a UK company called Stephen M.S. Lai & Co. CPA Limited.[189] The company was registered on 18 September 2015 at Temple Court, High Street, Woking, England, GU21 6BH. UK Companies House records for this company suggest that Lai is resident in the UK. [190]

Lai's company website provides an overview of the services that it offers.[191] A cursory reading of the website shows that Lai specialises in providing company creation services in a number of offshore jurisdictions. In addition to the United Kingdom, these include Anguilla, Belize, British Virgin Islands, Caymans, Delaware, Luxembourg, Mauritius and others.[192] These jurisdictions are notorious tax and secrecy havens used by, among others, criminals to hide and protect their assets.

The role of secrecy jurisdictions and company formation agents in facilitating everything from tax evasion to global organised crime is discussed in detail in the first section of this report. Lai's website reveals this system in action. Among the advantages it lists of "going offshore" are the possibility of reducing tax to "zero", the possibility of never submitting reports, and the ability to hide one's identity from "public search". [193]

SHELF COMPANIES FOR SALE

The website, however, places specific emphasis on the creation of companies and bank accounts in Hong Kong. Lai's company offers three "schemes". Scheme A, which is "best suited for overseas businessmen without bank accounts arrangements" and for which Lai charges USD$530, is described as offering the following as part of the package deal:

- Registered Office Address
- Corporate Secretary
- Registration at Companies Registry (CR)
- Receive electronic copies of following corporate documents over the E-mail:
- Original Formation documents
- Electronic copy of the Certificate of Incorporation
- Electronic copy of the Business Certificate
- Note our packages include the following:
- Compliance officer, and Data Information Officer as per the Hong Kong law
- Business office address: (We receive your mail and send it to you quarterly without any further charges. In case it is urgent, please inform us over the email and we will send it via express courier without delay)
- Public phone line (we receive your calls, tell your clients you are away, note down their contact details and email the information to you)
- Public fax line: (We receive your fax online. We also directly forward the e-fax back to you if it is from you)
- Receive Mail and Mail forwarding
- Keeping significance controllers' registers as requested by Law of Hong Kong.[194]

Scheme B, which the website states is "best suited for overseas businessmen with bank accounts arrangements in Hong Kong", and for which Lai charges USD$600, is substantially the same as "Scheme A", but includes the opening of a bank account in Hong Kong. On this subject, Lai's website notes:

> *For Scheme B), We only arrange the bank account opening process for Hong Kong corporate formation. We cannot guarantee the opening of the account for sure. To see the criteria of eligibility for opening a bank account opening please visit the website of relevant banks for details. Also, US$250 will also BE CHARGED for proceeding the certification processing for Hong Kong holding company formation documents, passport and address proofs that are certified by CPA. Also for issuing referral letter required by banks, especially by HSBC.* [195]

Scheme C, which is "best suited for overseas businessmen with guarantee bank accounts opening" and for which Lai charges USD$530, is substantially the same as Scheme A, but appears to include a guarantee that the applicant will definitely be able open a bank account in Hong Kong.

> **It is notable that at the end of the description of Scheme B, the website says "especially by HSBC". Elsewhere on the website, Lai suggests that he works with a large number of banks in Hong Kong, but emphasis is placed on HSBC as a regular part of his services.**

One example of this is that the website notes "we are a QI license (issued under the name of Chui, Lai & Co, previous name of Stephen M.S. Lai & Co CPA) holder from HSBC."[196] We have been unable to confirm precisely what a "QI license holder" is, although the context indicates that this license allows Lai's companies to open HSBC accounts with greater ease.

Under a section of the website labelled "special types of businesses", Lai's company offers to sell companies with prior trading history, and to have the new owner's registration backdated to the date of the company's original formation. This, remarkably, is an overt offer to ensure that Hong Kong government records fundamentally misrepresent the details of the company. This would allow an unscrupulous businessperson to buy a seemingly legitimate front company with the appearance of having been involved in that company for years. This may help to evade or counter the scrutiny of legal authorities or other investigators trying to uncover economic crime. The website notes the following with regard to backdating the registration:

> *These are the companies with prior history of business operations and holds [sic] the complete formation records, renewal records and the tax records of the company. If our*

clients choose to opt for such companies then we can proceed with the change of company name as well as changing the company's nature. Not only this, we can also manage to arrange the date of appointment of director, shareholder or other management staff of the company back to the start of company trade date. In this way, government records would show that; directors were appointed on the date, company was started and not from the day our client bought the company. We will be pleased to help you form this company. It will require only a couples [sic] of days to form such company with the active bank account within or out of Hong Kong or running business within or out of Hong Kong.

When read together, Lai's business amounts to creating off-the-shelf or bespoke corporate entities, securing them bank accounts, and offering these companies the accoutrements expected of functioning and legitimate companies. Apart from the offer of backdating one's association with the company, the offer of newly created companies that are accompanied by a fax and telephone number and office address can be used to create the impression that the company is staffed and active in Hong Kong.

The company formation documents for Regiments Asia and Tequesta Group Limited make it clear that both companies were formed by Lai's business. We have already indicated that both companies were registered on the same day – 20 June 2014 – and had Salim Essa listed as a director. In addition, the company secretary for both companies is listed as PAMM Corporate Secretary Limited. The email address provided for PAMM Corporate Secretary Limited was abbylai@onlinecompanyregister.com. The email address server is self-evidently the same as the address of Stephen MS Lai's website. Moreover, the physical address provided for PAMM is identical to the Hong Kong physical address listed on Lai's website.

At the beginning of this section, we indicated that both Tequesta and Regiments Asia made hundreds of payments to around 181 different entities. This was a way of breaking up the trail of kickbacks that originated from Transnet – and thus South Africa's public purse. The majority of these 181 companies were also registered in Hong Kong.

Just like Tequesta and Regiments, the filing documents for these companies indicate that they were formed by specialist offshore company formation agents, or purchased as off-the-shelf companies from other professional service providers selling secrecy.

Just one example of this is the company Glory Rich Technologies, which received eight payments between 10 September 2015 and 23 December 2015. Company formation documents show that Glory Rich Technologies was formed in Hong Kong in December 2014. The company was established by an entity called GRL14 Limited. GRL14's address was given as "OMC Chambers, Wickhams Cay1, Road Town Tortola, British Virgin Islands". All indications are that GRL14 acts as a company formation agent in the British Virgin Islands, and that part of its business is to form shell companies for sale. It appears that Glory Rich Technologies was formed by GRL14 Limited specifically as a shell company to be sold to a future buyer.

The British Virgin Islands (BVI) is a notorious tax haven and secrecy jurisdiction. The Financial Secrecy Index ranks BVI sixteenth, but holds that this understates its importance in the offshore world.[197] It is notorious for having a "lax, flexible, ask-no-questions, see-no-evil company incorporation regime, which allows owners of companies to hide behind 'nominees' to achieve strong secrecy".[198] As a result, the BVI is now the "world's leading centre for company incorporation" – with GRL14 just one company in an industry that by 2017 had helped register 417 000 active companies – 18 for each person living on the collection of islands that make up BVI.[199]

Glory Rich was thus formed by a company formation agent based in one tax haven (British Virgin Islands), which chose to form a company in another secrecy jurisdiction known for lax financial governance (Hong Kong). In February 2015, GRL14 resigned as the company secretary to Glory Rich. It was replaced by a Hong Kong-based company formation and management agent, Joy Enterprise Secretary Services Limited. At the same time, the official address of Glory Rich was changed to that occupied by Joy Enterprise, namely, "Rm 19C, Lockhart Ctr, 301–307 Lockhart Road, Wan Chai, Hong Kong."

All of this strongly suggests that whoever truly controlled Glory Rich, the beneficial owner behind the company, had made use of a company formation agent to purchase an off-the-shelf company registered in Hong Kong, which itself was originally formed by a company formation company based in the secrecy jurisdiction of the British Virgin Islands.

In sum, the receipt and then the onward payment of funds to Tequesta and Regiments Asia was made possible by a series of company formation agents. These companies make use of notorious secrecy jurisdictions and tax havens, which in turn provide accountability-free zones that allow global organised crime to flourish.

> **These companies are selling secrecy and escape from the rule of law, and help to make it difficult for law enforcement to follow the money in order to prosecute economic crimes and recover stolen money. In this case, Stephen Lai and others helped to construct an architecture that spirited away the gains of corrupt deals at Transnet. Yet as is clear from Lai's website, he does not need to hide. His offers to sell secrecy, anonymity, altered records and bespoke corporate entities to whomever wants them is open to all. After all, what he offers is now the norm in the world of offshore finance.**

THE BANKS: STATE CAPTURE CARTELS

A shelf company, as shown above, is usually sold as a package that comes with a bank account. Banks have legal responsibilities to ascertain the identity of their clients and whether transactions going through their accounts are suspicious. When it comes to the front companies used to launder kickbacks linked to the Transnet locomotive deal, there is ample evidence that a number of banks failed to fulfil these duties.

STANDARD BANK

As explained previously, the South African shelf company BEX, implicated in facilitating the CNR-Transnet deal, held bank accounts at Standard Bank. Ensuring that the company had a bank account was a central part of Legal Frontiers' role as the company formation agent. Standard Bank also held accounts for other Gupta front companies. These include Homix, which has been implicated in laundering kickbacks related to several corrupt SOE contracts, and Regiments capital.[200]

> **In his evidence to the Commission on 10 June 2019, South African Reserve Bank official Mr Shiwa Mazibuko explained that the Homix transactions raised almost every single known red flag for money laundering – and that it was inexplicable that Standard Bank did not pick up on these, or if they did, that they did not act on the warning signs.[201]**

These red flags included that the bank accounts were dormant for extended periods, following which they were subject to a massive spike in deposits. These deposits were immediately transferred out of the accounts, another obvious sign of money laundering.

Did Standard Bank consider the ultimate client behind companies like BEX and Homix, and consider why such large deposits were received and immediately paid out? As Mazibuko explained to the Commission, Standard Bank "would know trends in particular accounts and notice spikes or unusual activities, and should detect suspicious transactions quicker." [202] The failure to identify or halt these transactions sooner are questions that must be urgently put to Standard Bank by the Commission.

Standard Bank is not alone, however. As is shown throughout this submission, all South Africa's banks, and several international banks, consistently failed to stop suspicious transactions. This raises a central flaw in the oversight mechanism that requires only financial institutions to interrogate beneficial ownership, and which trusts those institutions to act on the information to which they have access.

HSBC

HSBC is arguably the most important enabler of the looting of Transnet, having handled most of the transactions of the front companies CGT, JJT, Tequesta and Regiments Asia. As described above, OCCRP obtained documents and banking data which showed that around R1.3 billion was paid by CSR in over 40 transactions to accounts held by Tequesta and Regiments Asia. [203]

HSBC is the largest bank in Europe and the fifth largest bank in the world.[204] According to HSBC's annual report, its total assets are worth R39 trillion.[205] The bank has 200 000 shareholders in 130 countries and territories, approximately 39 million customers and employs around 235 000 people around the world.[206] The bank is also made up of 821 different legal entities in 71 countries. [207]

HSBC has been implicated in many contemporary scandals. In 2008, whistleblower and HSBC's former computer specialist Herve Falciani leaked documents from HSBC's Swiss private banking arm. He provided the data to French authorities and eventually Le Monde and the International Consortium of Investigative Journalists (ICIJ).[208] The secret files cover accounts up to 2007 associated with more than 100 000 individuals suspected of dodging taxes, and legal entities from more than 200 nations. [209]

Some of the accounts uncovered in the Swiss leaks were owned by Africans, in particular Fana Hlongwane, who was implicated as an arms-deal middleman in the 1999 arms deal contract between South Africa and British Aerospace (BAE).[210] Hlongwane became an HSBC client in 2001, and is linked to over 20 other bank accounts that held as much as US$12.7-million in 2006/ 2007. [211]

HSBC IGNORED RED FLAGS

With regard to the laundering of Transnet funds throught CGT and JJT in the UAE, HSBC did in fact flag suspicious transactions that had flowed between CGT and JJT and other shell companies, but three years too late. By then, CSR had already paid JJT and CGT R1.6bn of the intended R5.3bn – and the Gupta Leaks show substantial evidence of this flowing into the Guptas' offshore accounts. [212]

HSBC has denied culpability for its poor money-laundering checks on CGT and JJT, and stated: "To the best of our knowledge, HSBC previously exited, is in the process of exiting, or never had a banking relationship with JJ Trading [or] Century General Trading." [213] (See infobox on the following page)

Considering all of the factors described in the infobox, it seems clear that by the time HSBC Hong Kong was providing banking facilities to Tequesta and Regiments Asia, it was widely known that Salim Essa was closely linked to, and alleged to be a frontman for, the Gupta brothers. It is thus inexplicable that no attempt was made to shut these accounts, or, at the very least, investigate and establish what connections the Tequesta and Regiments Asia accounts had with the Gupta family or other South African corruption scandals.

HSBC's response to these investigations has been to deny any knowledge of the scheme and play down their role. Responding to the OCCRP, their response read: "HSBC simply has no desire to do any Gupta-related business. To the best of our knowledge, HSBC previously exited, is in the process of exiting, or never had a banking relationship with Tequesta, Regiments, ... [and persons such as] Mr. Salim Essa ... or other members of the Gupta family, and other Gupta-related entities we have become aware of through the media or otherwise." [214]

HSBC MAY HAVE IGNORED INTERNAL WARNINGS

In November 2017, Lord Peter Hain raised the conduct of HSBC in relation to the Gupta enterprise in the British House of Lords. Hain requested that UK authorities, and the Financial Conduct Authority in particular, conduct an investigation into whether HSBC had failed in its duties to prevent or report financial crime related to the HSBC accounts owned by Tequesta and Regiments Asia.

Hain also addressed his concerns to Chancellor Phillip Hammond. In so doing, Hain made the following written allegation:

> **An important part of this is that HSBC SA staff had visibility of the Hong Kong accounts and warned London this was theft and money laundering. However London HSBC ignored that warning, presumably deliberately, and so no action was taken to prevent this illegal banking activity.** [216]

HSBC FAILS TO ACT ON RED FLAGS

All of the evidence in the public domain and in our possession suggests that HSBC should have swiftly identified that the Tequesta and Regiments Asia accounts required monitoring, investigation and, ultimately, suspension. This would have ensured they were complying with their KYC and AML obligations.

The following factors, discussed in more detail above, provide evidence of this:

- Tequesta and Regiments Asia were registered in Hong Kong and set up their accounts with HSBC in 2014. At the time, they had no discernible infrastructure or capacity to provide services. Yet, within months of their formation, they were receiving millions of dollars in payments, purportedly for "advisory services".
- The companies were registered in the name of Salim Essa. By mid-2015, Essa was already being written about in the South African media in relation to his dubious activities at Eskom; by mid-2016, he had been clearly linked to the Gupta network and the Transnet corruption. Essa was the person who registered both companies and set up the bank accounts.
- The payments into the accounts were clearly labelled as emanating from CSR or its sister companies, all owned by the Chinese state. These were the only sources of income for these accounts. A sceptical enquirer, as banks should be, would want to know what sort of legitimate business, newly formed without any infrastructure, received such large payments from four related state entities, without receiving any income from any other parties.
- Although the exact web of dispersals still needs to be mapped, it is clear that the moneys deposited by CNR, CSR, CRRC or Da Lian were dissipated almost immediately after they were paid, leaving no operating capital. It is common knowledge that the receipt of large deposits that are immediately dispersed is a red flag for money laundering.
- A large number of the payments made from the Tequesta and Regiments Asia accounts were made into accounts owned by shelf companies in Hong Kong that, our investigation shows, had been formed in 2014 or 2015. This is exactly the same time that Tequesta and Regiments Asia were registered. [215]
- A large number of the onward payments were made to garment, textile and furniture manufacturers based in mainland China. Neither Tequesta nor Regiments Asia had the infrastructure or business intent to trade in wholesale merchandise. Certainly, they recorded no incoming earnings from such trades. These industries, however, are often used in money-laundering schemes, as they have significant turnover and an export focus.
- Finally, it is noteworthy that HSBC had, previously, acted in relation to Gupta-linked accounts on the basis of what it deemed suspicious activity. According to a statement released by the HSBC in November 2017, it felt compelled to close a number of front companies linked to the Guptas in 2014.

We have not been able to independently verify this claim. Nevertheless, the seriousness of the claim, and the credibility of the source, leads us to lend it serious weight. We thus recommend that the Commission investigate and establish, to the best of its abilities, whether or not HSBC's London office were made aware of the warnings of theft and money laundering in relation to the Tequesta and Regiments Asia accounts, and, if so, what was done to ameliorate or otherwise prevent these crimes.

MERCANTILE BANK – AML IN ACTION

The 1064 locomotive contract was not the only corrupt deal pushed through Transnet in this period. In 2014, telecommunications firm Neotel was granted a series of multi-million-rand contracts with Transnet.[217] Similar to the modus operandi above, Neotel paid a Gupta front, in this case South African company Homix, a kickback (usually around 10%) for helping them "land the contracts" with Transnet.[218] Neotel eventually ordered an investigation into the payments to Homix that led to the resignation of their chief executive and chief financial officers in 2015.[219]

As was the case in the money-laundering system for the locomotive contracts, Homix immediately dispersed the funds it received from Neotel to other fronts, many based in Hong Kong.[220] For example, on 27 May 2015, Homix actioned two money transfers to Morningstar International, another Gupta-controlled firm in Hong Kong. Morningstar International then moved similar amounts to shell companies named Gallenade and Billion Lucky. The same pattern of financial flows occurred the following day. According to the OCCRP, Homix sent a total of R96 million to Morningstar International.[221]

The Homix transactions were so large and unusual that its bank, Mercantile Bank, noted the activity as suspicious within four days of these transactions and reported them to the South African Reserve Bank (SARB). SARB instructed Mercantile Bank to close the account within a week. [222]

It thus took just 11 days to shut down these accounts for suspicious activities. However, other shell companies took the place of Homix as the chief conduit of these funds soon afterwards. Despite this, the closure of these accounts by Mercantile is an example of how quickly banks can identify and act on suspicious transactions.

It is in this context that the other banks' conduct, including HSBC's, should be scrutinised. We submit that the Commission should interrogate to the best of its abilities why the banks implicated in this report went on facilitating transactions for these entities for years.

Many more banks should be questioned about their conduct. All in all, the OCCRP reports that US$160 million was moved by Tequesta and Regiments Asia between international banks: "…more than 20 banks sent or received money from Regiments Asia, Tequesta, or the shell companies. Led by HSBC, these banks also included National Westminster in the United Kingdom, Wells Fargo in the US, India's state-owned Bank of Baroda, Habib Bank, Standard Chartered Bank, and a dozen Chinese banks like Bank of China and China Citibank. Often, the transfers were listed as "commissions". [223]

NEDBANK AND THE INTEREST-RATE SWAPS

Another bank implicated in the looting and capture of Transnet was Nedbank. Transnet is one of the country's largest borrowers. Manipulating these loan facilities is potentially lucrative. The 1064 locomotive deal was no different. Once the contracts had been corruptly set up, Transnet needed to access billions in loans to pay for them. This was another opportunity for the Gupta enterprise, and Regiments Capital in particular, to extract profit from the deal.

Regiments Capital became consultants to Transnet in 2012 in strange circumstances. While Transnet said that they were recommended by McKinsey, the latter denied this.[224] As will be shown below, McKinsey's similar denials (that they had contracted Trillian as sub-contractors at Eskom) were shown by the Budlender investigation to be false.[225] Regardless, between 2012 and 2015, Regiments' role with Transnet grew, along with their fees. An investigation by Treasury confirmed that Regiments and McKinsey were paid millions in fees and "reimbursements" by Transnet without any proper documentation.[226] The role of these consultants is discussed in more detail in the next section.

One of Regiments Capital's biggest payoffs was secured with the assistance of Nedbank. For the purposes of the 1064 locomotive deal, Regiments facilitated and arranged a R12 billion syndicated loan from a consortium of banks.[227] Nedbank was one of the banks party to the loan – it contributed R3 billion. Negotiations with the banks started in August 2014, and the contract was signed on 1 December 2015 with an agreement to pay floating (market-based) exchange rates.

Just two days later, on 3 December, the head of Transnet's Treasury, Phetolo Ramosebudi (also the brother of a trader at Regiments Capital), recommended that the interest rate be swapped to a fixed rate.[228] This was a deviation from usual Transnet procedure. It was also inexplicable that a decision was made to revise the terms of a loan, with the accompanying costs, only days after signing the original 1 December 2015 agreement.[229]

Regiments Capital was quick to take advantage. The very next day – 4 December 2015 – Regiments stepped in and executed an "interest-rate swap" [230] for R4,5 billion of the R12 billion loan. In March 2016, Regiments conducted a second interest rate swap for the remaining R7,5 billion.[231] On both occasions, the bank that agreed to the interest rate swap was Nedbank. For the first swap in December 2015, instead of paying the (then) floating rate of 9,1%, Transnet was required to pay an interest rate of 11.15%. The total rate paid went up to 11.83% because Regiments' fees were included or "folded in" to the deal. The rate for the second swap on 1 March 2016 was even higher at 12,27%. [232]

The deal generated significant profits for Nedbank and Regiments. In the first swap, Nedbank made R28.2 million as a cut of the fees, and in the second more than R46 million.[233] Regiments earned R162 and R335 million from these deals respectively. [234]

By February 2019, it was estimated that the swaps had cost Transnet over R780 million in additional interest payments to Nedbank – for these two swaps alone.[235] Nedbank have since defended their participation in the swaps as standard business practice, claiming that there was "nothing untoward" about the deal.

However, there are a range of factors that cast serious doubt on this denial. First, a whistleblower who spoke to OCCRP investigative journalists indicated that Nedbank was the only bank willing to undertake the swap. This was because other banks found the sudden shift from Treasury's internal treasury department (which always handled such matters and had all the required experience) to an unknown external consultant inexplicable. [236] Not only was the sudden role of Regiments a surprise, but those familiar with these financial markets described the proposed rates and fees as "excessive", "a rip-off", "laughable", "unimaginable" and "an end game to extract ludicrous fees". [237] Others have questioned the conflict of interest in Nedbank being part of the loan consortium and executing the interest-rate swaps – in effect being both "referee and player". [238]

The other concerns are laid out in an affidavit to the Zondo Commission in May 2019 by Transnet's acting chief financial officer, Mohammed Mahomedy. For one, he notes that the second swap in March 2015 was undertaken at rates significantly higher than the market rate because of the need to fold in Regiments' fees and the fact that the deal was done without a competitive bidding process.[239] Moreover, Nedbank's compliance department wrote to Phetolo Ramosebudi in mid-March 2016 to request that Transnet confirm that they were satisfied with the value and pricing of the swap even though it was priced significantly higher than the mid-market rate at the time.[240] This request seemed to be an effort to obtain consent for transactions that had taken place months before.

After the first two swaps, Regiments went a step further and abandoned Nedbank in order to use the Transnet Second Defined Pension Fund (TSDPF) as the counter-party for the swap. This cost the fund hundreds of millions of rand. As a result, the fund sued Regiments. The civil litigation is ongoing.[241]

Mncedisi Ndlovu & Sedumedi (MNS) Attorneys is the law firm advising Transnet on its efforts to clean up the SOE and recover the billions looted from its coffers in the course of the deals discussed above. As part of its recommendations, the firm has suggested that Transnet sue Nedbank to recover some of the money lost as part of these deals. This recommendation is made on the basis of their conclusion that Nedbank and Regiments "apparently colluded" to "defraud" Transnet.[242]

While Nedbank has told the Commission that it may seek to cross-examine Mahomedy about his testimony implicating them,[243] this has not occurred at the time of writing. We suggest that, regardless of Nedbank's stated intentions, the Zondo Commission should subpoena the bank's executives to appear and explain their role in these dubious transactions.

As is shown throughout this submission, all South Africa's banks, and several international banks, consistently failed to stop suspicious transactions. This raises a central flaw in the oversight mechanism that requires only financial institutions to interrogate beneficial ownership, and which trusts those institutions to act on the information to which they have access.

6B

ESKOM

The disastrous economic consequences of Eskom's mismanagement affect all South Africans.

Eskom lost nearly R20 billion in irregular expenditure between 2012 and 2018.[1] During the same period, the utility's debt burden exploded. Speaking to Parliament in September 2019, interim CEO Jabu Mabuza explained that with total debt reaching more than R450 billion (the equivalent of the national budget for healthcare and primary education combined), Eskom is borrowing money simply to service the interest on the existing debt.[2]

Given that Eskom's complete failure would be calamitous for South Africa's economy, the state has repeatedly stepped in to bail it out, dedicating huge resources to keeping it afloat. In the context of a stagnant economy and static tax revenues, this means that money for essential social spending is diverted to pay for decades of greed and mismanagement at the electricity utility. Eskom's failures have serious and severe human consequences.

Public actors implicated in the mismanagement and looting of Eskom have been probed by investigative journalists, Parliamentary committees, investigative reports, the *State of Capture Report*, and in numerous testimonies at the Zondo Commission. We focus, however, on the often underplayed but extensive role that private sector actors have played in the looting of this state-owned enterprise.

This report chooses two case studies to explore the role of private sector actors in enabling the most egregious instances of corruption. The first examines the role of global consulting giant McKinsey, in concert with Trillian, in extracting generous fees from Eskom apparently unrelated to any work done. The second is the now infamous sale of Optimum Coal Holdings to Gupta firm Tegeta, and the banks that facilitated the transactions.

MCKINSEY AND TRILLIAN

MCKINSEY

At the end of 2015, McKinsey entered into a contract with Eskom with the purported goal of developing internal project management and engineering capacity.[3] The contract was not subject to a bid procedure, contrary to basic public procurement requirements.[4] The contract had the potential to earn McKinsey US$700 miilion (R9 billion) by its conclusion, and was the firm's biggest ever contract in Africa. Despite objections by some at the firm, the contract was supported by several of McKinsey's senior partners globally, including Yermolai Solzhenitsyn and Thomas Vahlenkamp. According to a *New York Times* investigation, the two senior partners had "oversight in energy and power". [5]

At McKinsey's South African office, the project was led by Vikas Sagar with assistance by Alexander Weiss. Sagar has been described as a popular McKinsey partner.[6] McKinsey has denied that Sagar was involved in any wrongdoing, and he subsequently left the firm with his full benefits in place.[7] However, there is evidence that Sagar may have had a conflict of interests due to his friendship with Gupta associate Salim Essa.[8] Sagar and Essa had attempted to partner on several projects before McKinsey's deal with Eskom. In 2014, Sagar asked a McKinsey expert for an opinion on the viability of a uranium and gold mine in South Africa. Sagar subsequently forwarded this opinion to Essa.[9]

Apart from the lack of competitive bidding, the Eskom-McKinsey contract should have immediately raised concerns for Eskom management. One troubling aspect was that McKinsey proposed a "no fee, at risk contract", in which they agreed to forgo payment if they failed to deliver the project's benefits. On the flip side, if they did deliver these strategies, they stood to receive a massive cut of their client's profits. While in theory this could look like McKinsey was accepting the project risk, "in practice, it allows consultancies [like McKinsey] to earn billions in fees as a cut of savings that may never be realised." [10]

This is because the consultant also calculates the saving they have achieved, often using dubious baseline estimates to calculate their own achievements. In the case of McKinsey and Eskom, a review by fellow consultants Oliver Wyman and risk-management firm Marsh found that McKinsey and Trillian had used highly questionable ways of calculating Eskom's "savings", including "charging double the market rate for coal contract negotiations" and using "baselines … that could exaggerate effects achieved". [11] When asked about this, McKinsey's global head admitted that they had overcharged Eskom and needed to implement stricter controls which would include "real recognition that there has to be clarity on what performance means." [12]

This type of at-risk contract also required special permission from Treasury. Treasury requires SOE consultants to be paid fixed hourly rates. Eskom's compliance department and legal counsel informed Edwin Mabelane (Eskom's head of procurement) that the expenditure would be irregular should the requisite permissions not be sought.[13] Eskom's management ignored the warnings. Treasury was informed of the contract after the fact.

The Parliamentary Portfolio Committee on Public Enterprises that heard evidence on the deal made an important observation: it should have been obvious to McKinsey that the deal was deficient and unlawful. Their decision to proceed needs to be critically examined. The committee concluded that "it is highly improbable that a company as sophisticated as McKinsey could, in good faith, have acted on the assumption that a contract based on a sole sourcing arrangement and on the applicable remuneration structure was lawful." [14]

THE CONTRACT THAT NEVER WAS: ESKOM, MCKINSEY AND TRILLIAN

It was not only McKinsey that was set to profit from the Eskom deal, though: Trillian Capital also benefitted to the tune of nearly R700 million. Trillian was paid R700 million by Eskom on the recommendation of McKinsey, even though Trillian had no contact with Eskom.

McKinsey chose Trillian to be its B-BBEEE partner, just as it had partnered with Regiments Capital for their work at Transnet. In 2016, Eric Wood, a director of Regiments Capital, had a falling out with fellow directors Litha Nyhonya and Niven Pillay. They had objected to Wood's attempts to sell a 50% stake of Regiments Capital to the Guptas and disputed the terms of his move to Trillian.[15] Wood subsequently became a director of Trillian on 29 February 2016. Salim Essa, who, as shown above, has been widely described as a front-man for the Gupta enterprise, was a the majority (60%) shareholder of Trillian at the time that Eskom contracted with McKinsey and Eskom's decision to pay Trillian. [16]

The agreement envisaged McKinsey paying Trillian 30% of its R1 billion a year contract with Eskom.[17] However, although a contract between McKinsey and Trillian had been prepared and then edited, it was never actually signed, and no contract was concluded. Despite this, on 9 February 2016, McKinsey partner Vikas Sagar sent a letter to Eskom indicating that McKinsey had sub-contracted Trillian, and authorising Eskom to pay Trillian directly.[18] This resulted in Eskom paying Trillian R565 million, in the absence of any contract, and with Eskom later admitting that Trillian had done no work for them.[19] The lack of a contract rendered these payments unlawful.

Testifying before the Portfolio Committee on Public Enterprises, Former Trillian Financial Advisory CEO, Mosilo Mothepu, suggested that this kind of conduct had been perfected by Eric Wood. She argued that Wood "established the precedent of invoicing public sector entities without proper agreements being in place and for work not undertaken. This pattern was established while Dr Wood was still at Regiments, in the company's dealings with Transnet." [20]

THE FALLOUT: THE BUDLENDER REPORT

Due to allegations of impropriety, then Trillian chairperson Tokyo Sexwale initiated an investigation led by Advocate Geoff Budlender into the nature of the contract or agreements between Eskom, McKinsey and Trillian.[21] Both Trillian and McKinsey declined to co-operate fully with Budlender's investigation. Moreover, McKinsey's first response was to issue denials of them ever having had a relationship with Trillian, despite considerable evidence to the contrary.[22] This evidence included a letter written by Sagar instructing Eskom to pay Trillian as a sub-contractor. The whistleblower Bianca Goodson also provided documentary proof that, during the three months that she was the CEO of Trillian Management Consulting (TMC), she engaged extensively with McKinsey on the Eskom and Trillian contract. [23]

Advocate Budlender identified the cynical nature of McKinsey's initial denials about working with Trillian. He notes:

> ***I have to say that I find this inexplicable, particularly having regard to the fact that McKinsey presents itself as an international leader in management consulting, and given the widespread public interest in this matter. It is difficult to avoid the conclusion that the ultimate McKinsey response was an attempt to avoid dealing with a situation which appears to be embarrassing to the company. In my opinion, a refusal to provide the truth ought to be even more embarrassing.*** [24]

The day before Budlender was to release his report on 29 July 2017, Trillian director Eric Wood invited him to a meeting, after having previously refused to engage with Budlender's investigation. Budlender believed this to be a stalling tactic. As Tokyo Sexwale would be voted out as chairperson of Trillian on the 29th, no report could be published after this date.[25] Budlender declined the meeting and published the report.

In the face of Budlender's damning public findings, McKinsey began divulging the extent of their dealings with Trillian, by which time Sagar had left the company. McKinsey now claimed that they had mistakenly entered into a contract with Trillian before they had completed the requisite "due diligence" checks. These checks involved investigating the beneficial ownership of Trillian before entering any contract with the company. [26] Despite this, "work" between these two companies commenced and continued until March 2016. By this time, Trillian had already been paid more than half a billion rand for work they had not performed. The nature of this "work" or consultancy, and why McKinsey was also paid a R1 billion fee (including over R90 million in interest), is unclear.

Following a Gauteng High Court judgement, McKinsey has since agreed to return R902 million to Eskom.[27] The repayment did not include interest on this significant sum, which would been considerable. McKinsey's new senior partner, Kevin Sneader, has since apologised for its relationship with Trillian, saying McKinsey was "not careful enough about who we associated with". He added that "we are embarrassed by these failings, and we apologise to the people of South Africa, our clients, our colleagues and our alumni, who rightly expect more of our firm." [28]

Such apologies ring hollow in the absence of hard accountability. McKinsey has been reported to US federal investigators for possibly breaching their foreign bribery laws. However, the company has not yet faced any other punitive measures. Neither Sagar nor any other McKinsey partner has been faced proper accountability for their role in the calamities at Eskom and Transnet. While Sagar left the firm with his full benefits in place, Weiss was allegedly sanctioned, though McKinsey declined to say what this sanction was. [29]

TEGETA AND OPTIMUM COAL

The *State of Capture Report* by the Public Protector dedicates substantial space to explaining how Eskom's role in the sale of Optimum Coal Holdings to a firm called Tegeta Exploration and Resources was inexplicable and likely unlawful on a number of grounds. Briefly, commodities giant Glencore (a corporation with a deeply chequered past of its own on the continent) was pressured into selling Optimum Coal Holdings. The pressure was applied by the newly appointed mining minister Mosebenzi Zwane and Eskom's freshly appointed board. Zwane had previously served as the MEC for Agriculture in the Free State; it was under his watch that Estina was awarded the contract to implement the Vrede Integrated Dairy Project. Zwane and Eskom's board further ensured that Gupta-linked firm Tegeta would be given preferential treatment to buy Optimum, despite not having the capital available. This included Eskom using public funds to prepay a staggering R600 million to the company to aid them in securing the deal. [30]

Partly as a result of the Public Protector's report, the story of Tegeta's coal heist has been explored in many forums since, including a thorough investigation by the Portfolio Committee on Public Enterprises in Parliament.[31] The Committee concluded that, instead of fulfilling its public and developmental function, Eskom's resources had been increasingly utilised to benefit private individuals and corporations. Regarding the Tegeta deal, the Committee concluded that "Eskom's relationship with Tegeta was questionable and that various related contracts and payments were unauthorised, irregular, and/or were otherwise unlawful." [32]

BACKGROUND TO OPTIMUM HOLDINGS

Securing the purchase of Optimum Holdings was a long-term goal of the Gupta enterprise, and was part of a broader plan to milk profits from the coal business in South Africa. The industry was an obviously attractive target. Coal power stations provide the vast majority of South Africa's energy needs, and despite the mining and burning of coal having catastrophic environmental impacts, contracts to supply coal to Eskom have always been lucrative for those who can secure them.[33] Coal is Eskom's largest procurement line item, worth more than R50 billion annually. [34]

In 2011, the *Sunday Times* reported that Idwala Coal, controlled by the Gupta enterprise, was operating a mine near a wetland without the requisite licenses in Mpumalanga.[35] Despite these reports, Idwala continued to operate, wreaking environmental devastation on the local wetland. In 2014, it was also reported that Tegeta had been mining coal illegally at its Brakfontein Colliery in Mpumalanga, and that it was polluting a nearby river and related water sources.[36] Both Idwala and Tegeta are corporations held by the Gupta's Oakbay Investments, and were established to pursue coal deals as early as 2006. [37]

It has since emerged that Eskom's deal with Tegeta's Brakfontein mine, which was worth R4 billion to Tegeta, was beset with irregularities. Laboratory tests dating to 2011 repeatedly showed that the quality of the coal from the mine did not meet baseline standards for use. Yet in 2015 Eskom sent the coal for an unprecedented fifth test and approved the contract despite the fact that the coal was only "marginally within specification". [38] Within months of supplying the coal to Majuba power station, Eskom had to suspend the contract due to poor quality coal.

Investigations have since shown that then Eskom executive Matshela Koko personally intervened to lift the suspension after just five days, and Eskom soon suspended the laboratory services they had been using. [39]

In August 2019, Minister of Public Enterprises Pravin Gordhan confirmed that the Special Investigating Unit (SIU) had lodged a court application on behalf of Eskom to set aside the Tegeta Brakfontein coal supply agreement, in an attempt to recoup up to R2.7 billion. [40]

Purchasing Optimum Coal Holdings was crucial to the Gupta enterprise. The Optimum Coal Mine (OCM), also based in Mpumalanga, was owned by global mining conglomerate BHP Billiton. In 1993, BHP Billiton entered into a contract to supply Eskom's Hendrina power station with coal for 25 years at a fixed price of R150 per tonne.[41] In 2008, BHP sold Optimum mine. It included, as part of the sale, the very lucrative right to export coal from Richards Bay Coal Terminal. The group making the purchase formed Optimum Coal Holdings to hold Optimum mine, the Richards Bay coal export right, and later the Koornfontein coal mine as well. In 2012, Optimum Coal Holdings was then sold to Glencore, which owned the Group when Tegeta came knocking. [42]

Glencore owned Optimum from 2012, and is thus often presented as the victim bullied out of Optimum Coal with the help of Eskom. As shown below, there is lots of evidence to back this up. Yet it is worth mentioning that Glencore itself is no stranger to controversial dealings. Led by South African-born Ivan Glasenberg, Glencore is the world's largest commodities trader and has been linked to a range of scandals for the conduct of its mining operations and financial strategies. Currently, Glencore is under investigation for dodging taxes in Australia after revelations from the Paradise Papers revealed the company's secret architecture to move money out of the country.[43] It is also the subject of a US federal investigation for paying hundreds of millions of dollars to Dan Gertler, a personal friend of the DRC's former president Laurent Kabila, to secure favourable mining licenses in the war-torn country. [44]

When Glencore bought Optimum Coal Holdings, they inherited a 1993 contract to provide coal from the Optimum mine to Eskom's Hendrina power station. Glencore immediately invoked the contract's "hardship clause", claiming that the low fixed price stipulated by the contract would cause massive annual losses (nearly R1 billion). Glencore also claimed that the excessive penalties for providing low-quality coal were unfair.[45] Negotiations between Eskom and Glencore led to the two parties reaching a "Co-operation Agreement" in 2014 that set out a process to rework the contract. [46]

POLITICAL INTERFERENCE TO FORCE THE SALE OF OPTIMUM COAL HOLDINGS TO TEGETA

This new agreement never materialised, most likely because of significant shifts in the political leadership at Eskom and in national government at the time. In December 2014, then President Zuma announced wholesale changes to the Eskom board, and appointed nine new board members, four of which had business or family links either to the Gupta family or crucial middleman Salim Essa.[47] Essa owned more than 20% of Tegeta through a company called Elgasolve, of which he was the sole director.[48] Apart from Elgasolve, Tegeta's other major shareholders were the Guptas' Oakbay and Mabengela Investments, the latter owned by Duduzane Zuma, son of Jacob Zuma. [49]

In April 2015, Brian Molefe was transferred from Transnet to Eskom as acting CEO. Molefe's central role in the unlawful looting of Transnet has been described above. He played a similarly important role at Eskom.

Between the new board and Brian Molefe, Eskom acted quickly to undo the possibility that Glencore could renegotiate the Optimum process. By June 2015, Molefe had ensured that the settlement process between Eskom and Optimum had been terminated.[50]

A few weeks later, on 1 July 2015, KPMG wrote a letter to Glencore with an offer from one of their clients to purchase Optimum for R2 billion. It later emerged that KPMG's client was the Gupta-owned Oakbay Investments. Then, just two weeks later on 16 July, Eskom invoked the penalty clause in their contract with OCM, levying a R2,1 billion fine related to supplying low-quality coal between 2012 and 2015.[51] The Portfolio Committee concluded that the fine was "unusually high" and "out of line with the applicable mechanism in the agreement". [52] In 2016, the Eskom team that had come up with the R2.1 billion total, including members of the finance department, coal supply department, and legal team, gave the explanation that an "error in their spreadsheet" had caused the problem. The fine should actually only have been a little over R700 million. [53]

The fine resulted in OCM's board placing the business under voluntary business rescue on 31 July 2015, and ensured that Glencore was now willing to sell OCM. However, the Gupta enterprise needed to ensure two further things. The first was to pressure Glencore to sell Optimum Coal Holdings in its entirety, including the lucrative Richards Bay export contract and Koornfontein mine.[54] The other was to ensure the sale would be made to Tegeta.

OCM's business rescue practitioners told Parliament that negotiations with Eskom were acrimonious. Eskom showed no willingness to negotiate the sale of OCM to any of the other business (other than Oakbay Investments) that expressed interest.[55] In the same month that OCM was placed into voluntary liquidation, Brian Molefe and Eskom board chairperson board Ben Ngubane attempted to persuade Ngaoko Ramatlhodi, the Minister of Mineral Resources, to cancel Glencore's mining rights. At the same time Matshela Koko, who had intervened to assist Tegeta obtain the Brakfontein mine contract, threatened to review all of Glencore's coal contracts with Eskom.[56] He also insisted that Glencore sell OCH in its entirety, while leaking confidential Eskom data to the Guptas.[57]

On 22 September 2015, Jacob Zuma made another important change at a Cabinet level. In his eighth cabinet (he would go on to oversee eleven, with a reshuffle occurring on average every nine months), Mosebenzi Zwane was appointed as Minister of Mineral Resources, replacing Ramatlhodi. [58]

The decision to appoint the relatively unknown member of the Free State government to a Cabinet position reportedly surprised senior ANC officials. However, as discussed below, Zwane had recently played a central role in the Estina Dairy project described below, and he would play a central role in this story as well. Emails from the #Guptaleaks show that Zwane's CV was forwarded to Tony Gupta by Frans Oupa Mokoena, a Free State businessman with close links to Ace Magashule. Tony Gupta forwarded the CV to Duduzane Zuma on the following day, 1 August 2015 – just under two months before he was appointed to his new Ministerial post.

In late November, Zwane issued several "stoppage notices" [59] to a series of mines owned by Glencore. Two days later, on 24 November 2015, Eskom stated that it would only support a sale deal if Oakbay procured Optimum Coal Holdings (OCH) and not just Optimum Coal Mine (OCM), adding that it would not waive the R2 billion penalty against OCM.[60] Days later, Tegeta made a R1 billion offer to purchase OCH.

When Glencore rejected this lowball offer, Zwane flew to Zurich for a meeting with Glencore's CEO Ivan Glasenberg. They were joined at the meeting by Salim Essa and [61] Rajesh "Tony" Gupta. This intervention by the Minister must have worked, because by 10 December, Glencore, OCH, Oakbay and Tegeta had reached an agreement to sell all OCH shares to Tegeta for [62] R2,1 billion. The Parliamentary inquiry found that multiple Eskom board members had various conflicts of interest when they signed off on the deal. [63]

TEGETA IS PRE-PAID

An important obstacle still stood in the way of the Gupta enterprise completing the purchase of OCH. Tegeta did not actually have the money to meet the purchase price. In one of the more extraordinary parts of this story, Eskom resolved this issue by making a series of irregular and suspicious payments to Tegeta to enable them to make the purchase. On 10 December, the same day that the Sales Agreement was reached, Eskom gave Tegeta a "highly irregular guarantee in the amount of R1,68 billion to Tegeta for an 'in principle' agreement to supply coal". [64]

By March 2016, Tegeta obtained full approval from the Department of Mineral Resources for the purchase of OCH. This was given three months after the sales agreement; this process usually takes between one and three years.[65] By April, Eskom had paid Tegeta over R1 billion in "highly irregular payments", but Tegeta were nevertheless still R600 million short of the purchase price. [66] Tegeta attempted to secure bridging finance on 11 April to fill this gap, but were unsuccessful.

On the same day as this unsuccessful attempt, Eskom's board called an urgent late-night tender committee meeting. At that meeting, the board approved a R600 million pre-payment to Tegeta for a future supply of coal to Arnot power station. The *State of Capture Report* and the subsequent Parliamentary inquiry both concluded that Eskom's Board knowingly agreed to this "solely for the purposes of funding Tegeta and enabling Tegeta to purchase all shares in OCH." [67] While Brian Molefe and Anoj Singh claimed that the pre-payment was made to assist production capacity at Arnot for the sake of the coal supply, the financial analysis undertaken by the Public Protector showed that the prepayment was solely used for Tegeta's purchase of OCH. [68]

Three days later, on 14 April, Tegeta paid the full purchase price of R2.1 billion and acquired OCH.[69] Soon afterwards, Eskom withdrew the R2 billion fine they had originally levied against OCM.

Testifying to Parliament, Mxolisi Mgojo, the CEO of Exxaro, which owns several coal mines in South Africa that supply Eskom, said that such prepayment was unheard of: "as far as Exxaro is aware, Eskom does not make prepayments to any other major miners in the industry. The so-called prepayment to Tegeta for coal, of which Exxaro learned through the media, is the only instance to our knowledge where such so-called prepayment was made." [70]

THE ENABLERS

There is little doubt that the conduct of the Eskom executives and political principals discussed above constituted serious violations of both the Public Finance Management Act (PFMA) and Constitutional prescriptions for state officials.[71] Their conduct was irregular, irrational and unlawful.

There is another important aspect to the story of the sale of OCH to Tegeta. As outlined above, Eskom made several large and highly irregular transfers to Tegeta over a short period of time in early 2016. These were not the only suspicious deposits received by Tegeta. A series of shell companies in the Gupta enterprise, in several different jurisdictions, also made deposits into Tegeta accounts. This included nearly R1 billion in three transactions from Gupta-owned or linked firms Centaur, Trillian Capital and Trillian Advisory.[72] These are discussed in more detail below.

The banks that facilitated these transfers must answer questions as to why they allowed this to transpire. By early 2016, after facilitating years of suspicious transactions related to the Gupta enterprise, other South African banks were beginning to close Gupta-linked accounts. This meant that the South African branch of the Bank of Baroda was the central facilitator of transactions linked to the sale of OCM to Tegeta.

BANK OF BARODA

The Bank of Baroda was central to much of the money laundering for the Gupta criminal enterprise. The section on the Estina project below reveals emails from the Gupta Leaks showing how employees at the bank received personal benefits from the Gupta enterprise. The bank's role in money laundering should be viewed in this context.

The Bank of Baroda is a state-owned Indian bank. It operated a Johannesburg branch offering various banking services in South Africa until 2018. Founded in 1908 by the Maharajah of Gujarat (the Western-most state in India, where it is still headquartered), the bank has been owned by the Government of India since 1969 and is designated as a "profit making public sector undertaking". [73] The bank has an extensive global reach, with branches in 14 countries (their list still includes Johannesburg, which is no longer accurate), subsidiaries in eight, and "joint ventures" in another two.[74] Early expansion was partly motivated by a desire to provide banking for the Indian diaspora, and the bank's website still has the phrase "building bridges for the Indian diaspora" on the page dedicated to its global network. [75]

According to its most recent annual report, the bank employs 85 000 people, and in 2018 earned US$7 billion in revenue and had total assets over US$100 billion, making it the third-largest bank in India.[76] Its origins of being tied to the political elite continue today. By way of example, current non-executive Chairman Dr Hasmukh Adhia (appointed in March 2019) was India's Revenue Secretary and Finance Secretary from 2015 to 2018, and as a result sat on several important boards, including those of the Indian Reserve Bank and State Bank of India. He has been described in some Indian media as being part of Prime Minister Narendra Modi's "inner circle". [77]

The South African market appears to have been of limited importance to Baroda. When Baroda exited South Africa in 2018, following huge pressure for their role in laundering money for Gupta-linked entities and an R11 million fine by the FIC (described further below), the bank's legal representative suggested that the bank was leaving as it made no commercial sense to continue, given that activities in South Africa comprised "less than one quarter of one per cent" of the bank's business. [78]

The scandals in South Africa are not mentioned in the bank's most recent annual report in any depth – and the decision to exit the country is simply described as the result of the outcome of a strategic review to "rationalise" the bank's international footprint.[79] There is one other mention of the fine imposed by the FIC. It is listed under "disclosure of penalties imposed by overseas regulators" and is explained as the result of a "failure to comply with the cash threshold reporting, implement adequate processes and detect and report suspicious and unusual transactions." [80] No other details are given.

BARODA AND THE GUPTA ENTERPRISE

While evidence is still emerging regarding the full extent of Baroda's complicity in the state capture project, and the motivations for their conduct, it was clearly involved in multiple suspicious transactions that even the bank's employees flagged as questionable, according to sources quoted by the Organised Crime and Corruption Reporting Project (OCCRP).

According to journalists at OCCRP, between 2007 and 2017, about R4.5 billion moved between more than 20 Gupta-linked front companies that held accounts at Baroda's[81] South African branch. These transactions dominated the operations of its small Johannesburg branch, and were linked to various deals tainted by corruption.

Accounts at the Bank of Baroda accounts were used often in what appeared to be cases of "round-tripping", in which large sums of money would be transferred between companies owned by the Guptas or their associated companies. This was often done through inter-company loans – usually with no clear commercial or legal purpose (and often even in the absence of a loan agreement), and thus apparently done to obscure the origin of funds and the real purpose of the transaction. [82]

OCCRP identified a total of 231 transactions between companies owned or controlled by the Guptas where "inter-company loan" was stated as the reason for the transfer – these transactions amounted to R4.5 billion.[83] The most common parties to these transactions were Oakbay Investments and Tegeta Exploration and Resources, the parties that benefitted from the coerced sale of OCH described above.[84] Another example was Trillian Management Consulting, which loaned R160 million from its Baroda account (via Trillian Financial Advisory) to another Gupta-linked company, Centaur Mining, even though no loan documentation could be found by OCCRP investigators. [85]

Crucially, evidence gathered in a joint investigation by journalists at OCCRP and *The Hindu* suggest that junior officials at the Bank of Baroda did indeed flag many of the suspicious transactions linked to these and other transactions. Documents cited in their investigation showed that suspicious activity reports required by FICA were generated on a daily basis. Yet senior executives at the bank reportedly stepped in to quash them, ensuring that the suspicious transactions were at least partly hidden from regulators.[86] This suggests a premeditated intention to help cover up suspicious transactions, rather than a mere failure to enact and enforce compliance systems.

BARODA AND TEGETA'S PURCHASE OF OCH

Most South African banks were in the process of closing Gupta accounts at the time Tegeta's purchase of Optimum was completed. Some accounts, including Tegeta's account with FNB, remained open. However, the closures were important because they meant that Gupta-linked firms became increasingly dependent on Baroda for facilitating transactions. [87]

In fact, in the week following the agreement to sell OCH to Tegeta in December 2015, Sanjiv Gupta,[88] the head of the Bank of Baroda in South Africa at that time, issued a letter of assurance that Tegeta was able to pay the full amount for the purchase of OCH.[89] It is not clear that this was within Sanjiv Gupta's powers. It was also false; Tegeta was R600 million short of being able to make the required payment. This was when Eskom stepped in to ensure the sale would be finalised with the prepayment discussed above.

When Eskom made the last-minute decision to prepay Tegeta over R600 million on 11 April 2016, apparently to help them bridge the shortfall, the money was paid into Tegeta's FNB bank account the next day. One day later, on 13 April, R883 million was transferred from the same FNB account into Tegeta's account at Baroda. [90]

This account at Baroda also received large deposits totaling nearly R2.5 billion in 2016 from other Gupta-linked accounts. Before the Eskom transfer, this included nearly R1 billion in three transactions from Gupta-owned or linked firms Centaur (over R800 million), Trillian Capital (R65 million) and Trillian Advisory (47 million).[91] On 14 April, there was a final deposit of R10 million from one-person company Albatime, itself implicated in a series of other money-laundering scandals linked to the Gupta enterprise, including the illicit looting of Transnet's Second Defined Benefits Fund (TSDBF). [92]

By 14 April, with all deposits received, Baroda placed the money in fixed deposit account and allowed Tegeta to use the deposits as collateral for a R953 million loan. A Moneyweb investigation noted that all of this activity, as well as the final payment to purchase OCH, occurred over just two days. [93]

It was on the basis of these transactions – and their inclusion in the Public Protector's *State of Capture Report* – that the Reserve Bank appointed Deloitte to investigate the transactions. They focused on the significant deposits that were made by Centaur, Trillian Capital and Trillian Advisory into fixed deposit accounts, and how these funds were then used to bankroll the purchase of Optimum Coal by Tegeta. [94]

The report concluded that Baroda's conduct violated various legal duties, including several required by FICA. These violations included a consistent failure to file suspicious activity reports with the FIC. In addition, Baroda had failed to identify where parties were related, to verify the source of funds being received, and to identify each party to a transaction. They also failed to identify other risk factors.[95] One such risk was that Salim Essa was a shareholder in nearly all of the companies involved in the transactions.

It was these serious violations of FICA and the know-your-client rules that led the FIC to impose an R11 million fine on Baroda.[96] The small fine is indicative of a systemic problem in the regulation of banks, namely, low fines that are disproportionate to the legal transgressions in question. In the case of Eskom, Baroda played a central role in facilitating the plundering of billions in public assets. The R11 million fine is not proportionate to the impact of their conduct. As such, it is unlikely to act as any kind of deterrent to prevent similar conduct in the future.

Baroda played a further important role in the Tegeta and Optimum saga. Apart from lucrative coal contracts, Tegeta's purchase of OCH also provided it access to a R1.7 billion "rehabilitation fund" linked to the coal mine. These are funds set aside to address environmental issues after a mine has closed. Although it is illegal to use funds of this type for any other purposes, they were deposited into Baroda accounts, where the Guptas were illegally permitted by the bank use the funds as collateral with which to borrow money. [97]

It is likely that Baroda executives were keenly aware of the identities behind the parties to these transactions. Years earlier, Baroda was at the centre of a convoluted scheme to enable the Guptas to pay for a house in Waterkloof for Bongekile Ngema-Zuma, Jacob Zuma's fourth wife. Officially, Baroda did not provide retail banking services (including mortgages) in South Africa. However, in 2010, the bank agreed to provide a mortgage of R3.84 million to an entity called the Sinqumo Trust for the purposes of buying the property (at the time, Ngema-Zuma was engaged to Jacob Zuma).[98] The mortgage was paid by moving money between three different Gupta front companies, before transferring some to Mabengela Investments (a trust controlled by Tony Gupta and Duduzane Zuma). This in turn paid Sinqumo Trust, which made the mortgage repayment; recall that Mabengela Investments was a major shareholder in Tegeta.

The bank had listed Sinqumo as a "Gupta-affiliated entity" in 2010, but only designated them a Politically Exposed Entity in 2015 (along with 35 other Gupta company accounts) – five years after the loan was made.[99] In addition, the loan was guaranteed by JIC Mining Services – the name under which Westdawn Investments traded. Westdawn was in turn owned by Oakbay Investments, the Gupta's "private investment vehicle" and the entity behind Tegeta's purchase of OCH. [100]

NEDBANK

The Bank of Baroda, as a foreign bank, required a South African sponsor bank in order to operate. Baroda could not clear transactions on its own; rather Nedbank cleared those transactions and relied on "clearing accounts" to do so. This is typical of correspondent banking. [101]

One of the "Big Four" South African Banks, Nedbank controls over R1 trillion in assets and has a market capitaliszation of R136 billion. In 2018, their headline earnings were nearly R14 billion.[102] Nedbank employs 31 000 staff, who serve nearly 8 million clients at 702 staffed outlets across the continent. [103]

Nedbank highlights its wealth management business in its internal documents. It boasts of being the third largest offshore unit trust manager in South Africa and of having a presence in "key global financial centres to provide international financial services for SA- and Africa-based multinational and high-net-worth clients [around 18 200 clients] in Guernsey, Isle of Man, Jersey and London, and we have a representative office in Dubai." [104] All of these are notorious secrecy jurisdictions/tax havens. Business media note that wealth and asset management remain the central pillars and strengths of the bank. [105]

Nedbank's Chief Executive Mike Brown appeared at the Zondo Commission along with other bank executives in 2018 to bemoan political pressure placed on the banks by Cabinet to keep Gupta accounts open. Brown has sat in executive positions at the bank for 15 years, first as Chief Financial Officer (CFO) from 2004 to 2009, and then as CEO from 2009 to today.[106] His background is in accounting (his first degree was from UKZN) but he later studied business at Harvard.[107] Brown regularly enjoys annual pay packages in the tens of millions. In 2018, his total package was R53 million (amounting to over R145 000 per day). [108]

FACILITATING THE FACILITATORS

As Baroda's correspondent bank, Nedbank allowed Baroda to use its infrastructure for all financial transactions. OCCRP has alleged that the nature of the relationship between Nedbank and Baroda enabled both banks to avoid responsibility for identifying and reporting suspicious transactions related to all of these accounts. [109]

According to OCCRP, the Baroda-Nedbank system worked in such a way that neither bank had access to all the information they may have needed to exercise the due diligence demanded by FICA. Nedbank did not have sufficient information to conduct due diligence on transactions that occurred between Bank of Baroda accounts, as they did not have full access to the details of these transactions. At the same time, Baroda did not have access to information about the origin of money transfers to Baroda accounts that came from external banks. [110]

Tegeta's purchase of Optimum coal is a good example. The transaction involved Eskom prepaying Tegeta for coal. Nearly R600 million was paid for this purpose into a Tegeta account with FNB. From there, a total of R800 million was transferred to a Tegeta account with Baroda the next day.[111] Baroda could thus claim that they did not have full access to information about the accounts held at FNB, while Nedbank could claim that they had insufficient knowledge about how the money was transferred between different Baroda accounts once there, or how the money was used for collateral or inter-company loans for the purpose of laundering money.

Nedbank's conduct with regard to their relationship with Baroda should be scrutinised for an additional reason. Along with the other big South African banks, Nedbank closed its own Gupta-linked accounts in 2016, citing corruption and money-laundering concerns. CEO Mike Brown has claimed that as a result, the bank came under pressure from senior ANC officials, including Mosebenzi Zwane and other Cabinet Ministers. [112]

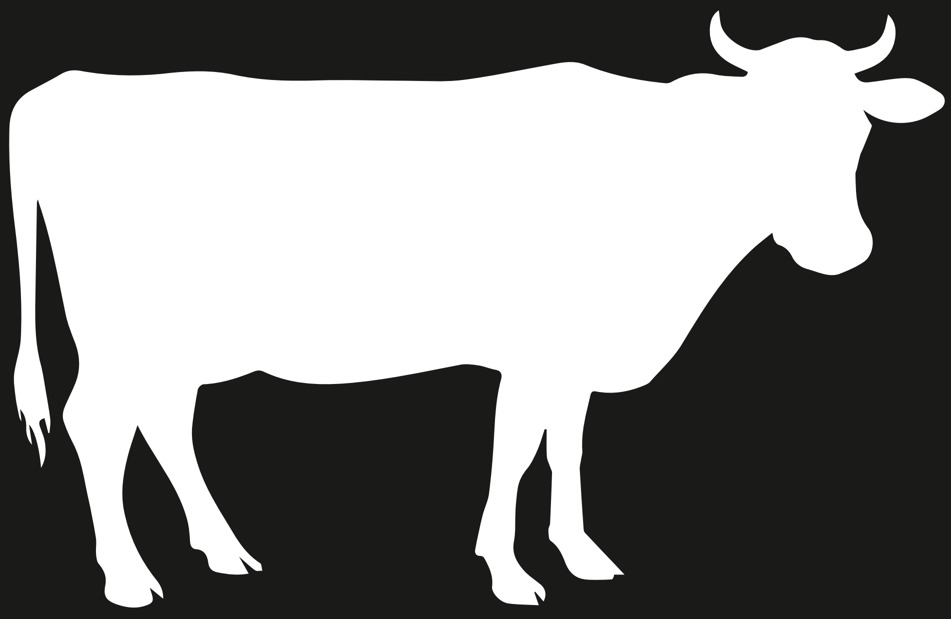
In the circumstances, it is curious, even inexplicable, that Nedbank decided to continue acting as Baroda's correspondent bank. Nedbank only terminated this relationship in 2018,[113] long after widespread reporting had indicated that Baroda's South African business was dominated by Gupta companies. OCCRP claims that a source close to Nedbank told them that the decision to stick with Baroda – the third largest bank in India – was based on the fear that severing ties would have been "politically costly". [114]

> **It is worth noting that Nedbank's response to questions by OCCRP during the latter's investigations was standard and generic:**
>
> ***In respect of all of our clients, including Bank of Baroda's SA branch, Nedbank has a responsibility to apply anti-money laundering regulations, "know-your-client" procedures and report all suspicious transactions to the Financial Intelligence Centre. Nedbank has a robust system to comply with its know-your-client and suspicious transaction reporting obligations, and applies these rigorously to all our clients.***

The hypocrisy of the bank's position is perhaps best captured by CEO Mike Brown's public statements and letter to Cyril Ramaphosa following the latter's election to the ANC Presidency in December 2017. At that time, Brown bemoaned the governance failures at SOEs, rising debt, and poor financial management in state institutions.[115] Yet at this point, Nedbank was still facilitating all transactions for accounts held at the Bank of Baroda. By then, the role of the banking system (including through transactions cleared by Nedbank) in facilitating looting of the state was common knowledge.

When Brown testified before the Zondo Commission about political pressure placed on the bank after it closed Gupta-linked accounts in late 2018, the Commission did not press him on the bank's role as a clearing bank, or its decisions concerning its relationship with Baroda. While the evidence leader probed Brown about the manner in which decisions were made to close accounts associated with Gupta-related entities such as Oakbay Investments, there were no difficult questions about the length of time it took to do so, or whether the bank had at all times complied with the requirements of FICA.

We recommend that Nedbank and other implicated banks should be summoned to the Commission urgently to face these and other important questions regarding their complicity in these scandals.



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ESTINA / VREDE INTEGRATED DAIRY PROJECT

In February 2013, Ace Magashule, then Free State Premier and now ANC Secretary General, used his State of the Province address to make a major announcement: the Free State government would be setting up a "state-of-the-art" dairy farm in the town of Vrede that could process up to 100kl of milk per day.[1] In addition, the Vrede "mega-project" would be used to empower the local community, eventually being ceded to local dairy farmers trained to use the sophisticated facilities.[2]

Two months later, Gupta family and friends, along with South Africa's political, economic and media elite, gathered at Sun City to celebrate the wedding of Vega Gupta and Aakash Jahajgarhia. The lavish nuptials, photos of which were splashed as a lifestyle feature on Channel 24,[3] had prompted one of the first big Gupta-linked scandals when it emerged that the guests had been allowed to land at Waterkloof airport, a military installation. Little did South Africans know that the wedding involved an even bigger scandal: funds from Magashule's vaunted dairy project, instead of benefiting local Vrede farmers, were laundered into the pockets of Gupta companies to meet the costs of the Sun City wedding.

By early 2014, investigative journalists began piecing together how the project was intimately tied to the Gupta enterprise, which catalysed the National Treasury to initiate their own investigation, followed by the Public Protector. The picture that emerged was of a project conceived and executed without due process by Free State officials and in violation of, at least, the PFMA.

New information emanating from the #Guptaleaks and court proceedings has deepened the scandal. It is now incontrovertible that the Estina/Vrede Dairy Project was, from start to finish, a Gupta-driven project, established to benefit the Gupta enterprise and loot Free State government funds. Indeed, an analysis of banking records and other documentation by Shadow World Investigations has revealed that the vast majority of the R280.2 million paid to Estina by the Free State government was transferred into accounts owned or controlled by the Gupta enterprise.

The outright looting of the Estina/Vrede Diary project relied extensively on the banking facilities of banks in South Africa and abroad, which we term the "local" and "offshore" laundries. The roles of the Bank of Baroda, Standard Bank, First National Bank and Standard Chartered Bank are particularly notable. Equally implicated is KPMG, which was centrally involved in assisting the Gupta enterprise to launder stolen Estina funds via the books of the Gupta company Linkway, using the costs of the Sun City wedding to do so. [4]

THE OUTRAGEOUS DAIRY PROJECT: THE START

On 7 June 2012, Peter Thabethe, the Head of Department for the Free State Department of Agriculture, signed a partnership agreement between Estina (Pty) Ltd and the Free State government. The partnership agreement envisaged that Estina would deliver an integrated dairy project in the district of Vrede. Local beneficiaries, to be identified by the Free State government, were supposed to receive 51% of the shares in the project through a Special Purpose Vehicle called Zayna Investments, trading as Mohuma Mobung Dairy Project. The Free State government would provide R342 million to fund the project, while Estina would inject R220 million of its own funding; a total of R570 million that, judiciously spent, would nurture a fledgling dairy industry in one of the neediest districts of the Free State.

Sadly for the citizens of Vrede and South Africa, the sordid origins and conduct of the Estina/Vrede Dairy Project would belie this grand vision. The problems with the project were legion, and too detailed to describe in full here.[5] A summary of misconduct and favouritism will have to suffice.

First, the dairy project, conceived and approved within a period of roughly three months, was approved on the basis of a business plan and proposal that was profoundly lacking in multiple respects. The proposal, for example, provided almost no detail as to the long-term feasibility of the project, or, indeed, a proper accounting of the costs involved.[6] In December 2013, as part of a National Treasury investigation into the project, an external independent consultant, Dawie Maree, was asked to review the proposal. Maree criticised its lack of financial rigour and described the feasibility study as "very academic in nature, with no clear findings and recommendations." More fundamentally, Maree came to the conclusion, based on market data and the proposal itself, that the entire project was misconceived:

> **Given the current trends and realities in the South African dairy sector, the most appropriate investment in the dairy industry would be in the coastal areas, where the conditions for production are more favourable. An investment of this magnitude in the Free State provice is considered too risky and not sustainable.... In conclusion, it is not recommended to continue with the project in its current state since government will not receive value for money. The costs are not reasonable or market related.** [7]

Second, the entire project was problematically predicated on the plan that Estina would deliver the project in partnership with a much larger dairy producer, Paras Dairy, from India. In his testimony before the Commission, Thabethe reiterated that the partnership with Paras Dairy, which he claimed to have found through desktop research and vetted during a trip to India, was fundamental to the project's success.[8] Indeed, Thabethe argued that Estina's involvement was secondary to that of Paras: "what we wanted was with Paras." [9]

Paras's relationship with Estina was codified by a Memorandum of Understanding signed by the CEO of Paras Dairy, Gajinder

Kumar, and Estina on 11 April 2012. The MoU, however, explicitly noted that "the parties hereby agree and acknowledge that they are independent contractors. No partnership, joint venture or employment is created or implied by this MoU." [10] In simple terms, while Estina was appointed as an agent of Paras to find opportunities for dairy projects in South Africa, Estina and Paras were not joint partners in any project. Thus, when the Free State government contracted with Estina, based in part on their partnership with Paras, there was in fact no legal partnership between Estina and Paras.

The failure to secure Paras's involvement was potentially devastating for one key reason: Estina had no prior agricultural experience or agricultural infrastructure. Indeed, as we discuss in more detail below, the sole director of Estina at the time was one Kamal Vasram. Vasram had no prior farming experience: the #Guptaleaks show that Vasram worked as an IT salesperson; then, for much of the life of the Estina Project, he worked full-time as a salesperson at Toshiba. The only thing that appears to have counted in Vasram's favour was his connection to the Gupta enterprise,[11] which we discuss in more detail below.

Third, the project was approved without any competitive bidding process, in clear violation of the PFMA. The PFMA requires provincial departments to implement proper procurement systems through effective supply chain management policies. The Free State Department of Agriculture's supply chain management policies stipulate clearly that competitive bids had to be sought for all procurements above R500 000. These supply chain policies could be waived only in exceptional circumstances,[12] none of which applied to the Estina/Vrede Dairy Project.

When Thabethe was first questioned during National Treasury's investigation, he "confirmed that no procurement process was followed in appointing Estina" and that "he did not procure the services of Estina through a competitive bidding process." [13] Thabethe claimed that he had decided to waive the procurement process as he believed, based on an agricultural roadshow, that there were no other South African suppliers who could perform Estina's duties. Considering that Estina had no previous farming experience or farming infrastructure of its own, Thabethe's explanation makes no sense.

It was not, however, only Thabethe who was responsible for the approval of the dairy project. The audit trail already presented before the Commission shows that the Vrede Dairy Project was approved by the Free State provincial Exco on 12 June 2012. The Exco included Ace Magashule and Provincial MECs, including Mosebenzi Zwane, then Free State MEC for Agriculture. While those involved in the Exco did not violate PFMA by approving the project (due to the PFMA's emphasis on Head of Departments as accounting officers), they bear political responsibility for approving a project displaying such manifest flaws, and which was awarded without a competitive bidding process.

Magashule, Zwane and Thabethe were, however, more intimately involved in a second decision that materially benefited Estina. On 12 September 2012, Magashule signed a Declaration of Authority in favour of Zwane. The Declaration gave Zwane the authority to enter into contractual arrangements between the Department of Agriculture and Phumelela Municipality, which owned the land on which the Vrede Dairy Farm was to be established. Zwane duly signed a further declaration, delegating this authority to Thabethe. [14]

Shortly thereafter, the Free State government signed a lease agreement between the Free State Department of Agriculture and Estina. The lease agreement, which ran for 99 years, provided Estina with use of 4 439 hectares of agricultural land. Estina was handed the lease for free, and was not required to pay rent.[15] It has subsequently emerged that Estina was granted the lease only after existing agricultural tenants had been told to vacate the land by Phumelela Municipality in October 2012. The net result was to terminate existing economically viable agricultural projects in anticipation of the Estina project, which was both unproven and ultimately unsuccessful.

The fourth problem in the award of the contract to Estina related to the timing of various decisions and contractual agreements. The contract between Estina and the Free State Department was signed on 7 June 2012, committing the Department to paying Estina R342 million over the life of the project, but the project had not received the requisite Cabinet or Exco approval. Indeed, this was only sought a week later, and it was approved by Exco on 13 June 2012.

The contract between Estina and the Department further stipulated that the Department immediately release R30 million to Estina to kick-start the project, which was intended to be the first of a number of payments totaling R114 million in the first year. The first R30 million was approved for transfer (and the payment made) on 11 June 2012. This was two days before the project received any formal approval, and prior to the payment being approved by the Provincial Accountant General.[16] It was also a day before the Provincial Treasury granted approval to transfer funds to the Department of Agriculture on 12 June 2012.

The final problem related to the contracts themselves. On 15 June, Thabethe contacted the Free State MEC for Finance, asking that a second R30 million payment to Estina be approved. The MEC asked the Provincial Accountant General, Ms Fourie, to assist with the payment. Fourie refused to approve the payment, citing her concerns about potential procurement irregularities.[17] The Provincial Treasury, most notably, did not have the requisite money to fund the payment. To resolve the matter, Fourie forwarded the contract and her concerns to the State Attorney, Advocate Ditira. Advocate Ditira's review found that the 7 June contract "may be invalid due to a number of reasons."

Although the exact sequence of events is unclear, what is known is that the original 7 June 2012 contract between Estina and the Department was abandoned. It was replaced by a second agreement signed on 5 July 2013, which was more legally rigorous than the first version. This was approved shortly thereafter by the Provincial Exco. And while the second agreement was an improvement on the first, National Treasury's investigation concluded that the second agreement was also full of flaws:

> **ENS noted that the second agreement concluded between the FSDA and Estina was more comprehensive in regulating the legal relationship between the department and Estina but the contract contains very little with regard to project specifications and deliverables. The contract does not provide details on precisely what Estina would deliver in return for R342 million.**

> **Mr Thabethe was questioned about the lack of clarity in the agreement and that it is unclear regarding the project deliverables. Mr Thabethe's response was that he signed the agreement in its current state on the advice of the State Attorney's Office.**[18]

The above suggests that the Free State government had entered into legally binding contracts that exposed it to massive financial risk. Moreover, the Free State government had already paid R30 million on the basis of a contract that was so profoundly flawed that it had to be scrapped a month later. Such conduct hardly speaks to responsible stewardship of public funds.

THE OUTRAGEOUS DAIRY PROJECT: THE MIDDLE

In February 2014, National Treasury completed an investigation into the Estina/Vrede Dairy Project. We have noted some of its findings regarding the origin of the contract above. The findings, which were distributed to the Premier Ace Magashule and MEC Mosebenzi Zwane, found that in addition to PFMA violations, there were serious concerns about the Department's oversight of the project, and its long-term viability. National Treasury thus recommended that "no further funds [be] invested in the project until all of the risk factors set out in this report are addressed." [19]

The findings of National Treasury were reiterated In November 2014, when the erstwhile Public Protector, Advocate Thuli Madonsela, completed a provisional report setting out her investigation into the Estina/Vrede Dairy Project. She had had initiated the investigation following complaints to her office by the Democratic Alliance. [20]

The first key finding of the Public Protector's report was to reiterate the findings of the Treasury Investigation, that the Estina/Vrede Dairy Project was initiated in violation of the PFMA. The second was that, subsequent to the contract being awarded, the Department of Agriculture had conducted virtually no oversight of the project, despite repeated payments being made to Estina.

> ***The report concluded that the conduct amounted by "gross negligence, maladministration and ultimately Irregular expenditure in terms of Treasury prescripts."*** [21]

In November 2014, the Public Protector distributed the provisional report for discussion and response to interested parties, including Ace Magashule (as Premier), the Free State MEC for Agriculture (Mamiki Qabathe, who had replaced Mosebenzi Zwane by this point) and Peter Thabethe (as Head of Department). The report was clear in its recommendations, and reiterated that payments should be stopped on the project. It also repeated Treasury's recommendation that disciplinary action be taken against Peter Thabethe for his role in formalising the contract with Estina, and Seipate Dhlmamini, the CFO in Thabethe's Department who had approved payments to Estina.

None of the recommendations of the Treasury and the Public Protector were ever acted on. On 21 July 2014, four months after Treasury had distributed its findings, the Free State Department of Agriculture made its sixth payment of another R30 million to Estina. Needless to say, none of the implicated officials were ever subject to the recommended disciplinary proceedings.

While none of these reports were legally binding, this does not mean that it is acceptable that they were ignored. We believe that the seriousness of the problems, and the clarity of the recommendations to halt the project, meant that implementing these findings was both politically and ethically imperative.

The failure to implement the recommendations of the Treasury and Public Protector reports was additionally inexcusable, as the Estina/Vrede Dairy Project had been extensively rubbished by the National Department of Agriculture the year prior to these adverse findings. This brings us to the final and perhaps most telling problem with how the project was initially conceived and run.

The National Department of Agriculture became involved in the Estina/Vrede Dairy Project by virtue of how the project was funded in the 2013/2014 financial year. Of the R114 million that was budgeted to be paid to Estina, R53 million was to be sourced from the Conditional Agriculture Support Program (CASP). CASP grants are administered by the National Department of Agriculture, Forestry and Fisheries (DAFF). Elder Mtshiza from DAFF ultimately recommended that the funds allocated by CASP to the project be withheld and "distributed to incomplete projects in the province and to smallholder farmers" because the project lacked a proper and acceptable feasibility study, business plan, biological impact study or attention to water rights. [22]

But arguably the most damning finding was that the province was entirely delinquent in identifying the intended 100 beneficiaries of the project, about which nothing had been done. It was only when Mtshiza's August findings threatened the project that the Department made any moves to identify potential beneficiaries. Even this was done in a haphazard manner: potential beneficiaries were asked to sign up after being called to a meeting-hall by loudhailer. In total, 80 individuals supplied their ID numbers and names, and committed to the project. [23]

> **It was only on 11 October 2013 that a new AgriBEE entity, intended to house the shares of beneficiaries in the project, was formed. The new entity, Mohoma Mobung Diary [sic] Project Pty Ltd, was incorporated with a sole director: Estina's Kamal Vasram. At no stage were any of the supposed intended beneficiaries given shares in the company or brought onto its board. The Commission's evidence leaders have argued that as a result, the intended beneficiaries have no legal recourse, despite being promised work with and through the dairy farm – on the basis of which, many slated beneficiaries had made life-altering economic decisions.** [24]

THE OUTRAGEOUS DAIRY PROJECT: THE END

By April 2014, details of the Estina/Vrede Dairy Project and its links to the Gupta family had started to emerge into the public domain through detailed investigative reporting. As these stories were unfolding, it appears that the provincial government was making moves towards shuttering the project. According to correspondence and documents reviewed by Advocate Thuli Madonsela, the Free State's Provincial Exco decided, on 16 April 2014, that the project would be transferred to the Free State Development Corporation (FSDC). On 24 April 2014, the Free State Department of Agriculture sent a letter to Estina that sought to cancel the contract between Estina and the Department. The handover to the FSDC was approved by the FSDC board the following month, on 27 May 2014.

This, one would expect, would have terminated Estina's role in the project – and ended further payments to Estina.

Not so.

On 25 April 2014, Estina sent a letter of demand to the Free State Department of Agriculture. Estina claimed that the agreement between the Free State government and Estina included a clause that required Estina to be paid for all services delivered up until that point. Estina claimed that this entitled it to a full and final payment of a further R136 252 652. As we show below, this claim was ludicrous – Estina had spent almost none of its own money on the project, neither had it delivered substantial services of any kind. Instead, the money had been almost instantly diverted into the accounts of the Gupta enterprise.

The letter of demand was successful on two counts. First, for whatever reason, it delayed the termination of Estina's contract with the Department until 13 August 2014. One major consequence of this was that, despite the findings of Accountant General and the Public Protector, the Free State Department of Agriculture could make one final payment under the terms of the still extant contract – the R30 million payment that was made on 21 July 2014.

Second, the Department, for reasons unknown but almost certainly unjustified, agreed with Estina's letter of demand, and continued to pay Estina beyond the date of the contract's termination. Two further payments were thus made to Estina. The first, worth R60 million, was transferred to an Estina account at First National Bank on 8 May 2015. The second, worth R46 252 652, was paid to the same account on 5 May 2016. These payments, when added to the R30 million paid on 21 July 2014, equaled R136 252 652 – the exact amount that Estina had claimed it was due to be paid in its 25 April 2014 letter of demand.

Thus, Estina was paid R106 million between May 2015 and May 2016, despite the contract having been cancelled. This was in addition to being paid R30 million in July 2014 *after* the FSDC had already taken over the contract, Estina had been informed that the Department was seeking to cancel the contract, and the Accountant General had recommended that all payments to Estina be halted.

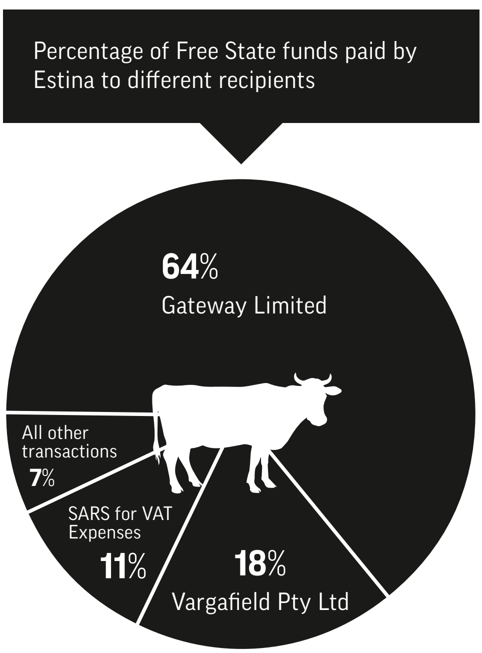
ESTINA, BROUGHT TO YOU BY THE GUPTA ENTERPRISE

Taken together, the degree of preferential treatment shown towards Estina in awarding it the Vrede Dairy contract, and the scale of government maladministration, is astonishing. As Shadow World Investigations have noted in their separate submission to the Commission:

> *The ineluctable impression created is that at every stage of the contract, from its approval to its "termination", the Free State Department of Agriculture, and the Free State government as a whole, sought to pay Estina funds to which it was not entitled, for which it failed to ever meaningfully account, and for which it appears to have delivered marginal if any returns to the community of Vrede.*

We believe that the only reasonable explanation for this behaviour is that the Estina/Vrede Dairy Project was, from beginning to end, a project developed by the Gupta enterprise, and for the benefit of the Gupta enterprise. The #Guptaleaks have borne this out in a number of ways.

First, and perhaps most importantly, it is incontrovertible, based on banking documentation filed in South African courts, and from internal Gupta documents, that the vast majority of the money paid by the Free State government to Estina was transferred into accounts held by the Gupta enterprise. Shadow World Investigations' submission shows calculations drawn up with an independent forensic specialist proving that of the R280.2 million paid to Estina by the Free State government, R59 million was paid to a company called Vargafield, controlled by a key Gupta lieutenant; R34 million was paid to SARS for various VAT-related expenses; and R229 million was paid to Gateway Limited, a Gupta-controlled company based in Dubai. The remaining R21 million was paid to a range of other recipients for expenses such as salaries and, shockingly, a handful of agricultural supply firms.



In simpler terms, 64% of all the money paid by the Free State government to Estina was transferred to the Gupta's Dubai vehicle, 18% to their local vehicle, and 11% to SARS for VAT costs. A paltry 7% of all Free State funds were spent on other expenses.

Second, the #Guptaleaks reveals that the Gupta enterprise was intimately involved in the earliest stages of the project. One example of this is the figure of Kamal Vasram. As noted above, Kamal Vasram was the sole director of Estina during its involvement with the Vrede Dairy Project. He was also the sole director of the AgriBEE entity that was supposed to house the shares of local beneficiaries. The #Guptaleaks emails show that during this same period, Vasram was working full-time for Toshiba as a salesperson, managing Toshiba's sales relationship with Sahara.

More importantly, the emails show that Vasram's relationship with the Gupta enterprise existed long before the Vrede Dairy Project was started. Correspondence from 2009 and 2010 shows that Vasram, then working at Intel, was in contact with Sahara Computers regarding Intel products. He must have made an impression as, in October 2010, he was invited, along with his partner, to attend a Diwali celebration at the Gupta's Saxonwold compound. This friendly relationship soon turned into a monetary one: from March 2011 until mid-2012, Vasram sent a monthly invoice to Linkway Trading, a Gupta enterprise company. Vasram invoiced Linkway R11 000 per month for undefined "services rendered".

In June 2011, as he was receiving monthly payments from Linkway, Vasram formed an IT sales company called Sunbay Trading. A detailed investigation by Pieter-Louis Myburgh has shown that Sunbay was contracted to supply laptops to the Free State Office of the Premier in 2012 and 2014.[25] Sunbay was alleged to be a front for Sahara Computers: soon after the first laptop deal, Sunbay paid R28m to Sahara Computers in multiple payments between 7 and 22 September 2012.[26] In the second laptop deal, Sunbay was paid R4.5 million by the Free State government. Sunbay, which had sourced the laptops from Sahara, paid Sahara R4.2 million for the contract.[27] Calculations by Shadow World Investigations show that Sahara and Sunbay massively overcharged the Free State government for the laptops, selling them for just over double the price Sahara charged other customers.

Another example of the Gupta enterprise's connection to Estina is the figure of one Sanjeev Gautam. At the earliest stages of the Estina project, Gautam was central to it, at least on paper. On Estina's behalf, Gautam signed all the key legal documents that established the project, including the April 2012 MoU between Estina and Paras. He also signed both the 5 June 2012 and 5 July 2012 contracts between Estina and the Free State Department of Agriculture. His role was listed as "managing director".

Gautam was an Indian national with a long association with the Gupta enterprise. The #Guptaleaks shows that in 2011, Gautam secured a visa to visit South Africa with the assistance of Sahara Computers; later that same year, Sahara Computers assisted in getting a visa for Gautam's father, Kaushul Gautam. The supporting documentation stated that Kaushul Gautam "will be coming to South Africa to make a personal visit to see Mr Ajay Gupta." The #Guptaleaks also show that in May 2012, Sanjeev Gautam joined Tony Gupta and his partner Arti on a trip to Dehradun, the Gupta's hometown.

The #Guptaleaks also shows that Gautam, since at least 31 March 2011, held 49% of the shares in an Indian-registered company called Gateway Infrastructure. The other 51% of the shares were held by Anil Gupta, brother-in-law to Tony, Ajay and Atul Gupta. Arti Gupta, Tony's Gupta's wife, was a director in the same company. The #Guptaleaks also show that, on 28 June 2012, the same month Estina signed its contract with the Free State government, Ashu Chawla, Sahara's Chief of Operations and a key player in the Gupta enterprise, ordered that 190 242 Indian rupees (equivalent to just under R30 000 at the time) be paid into Gautam's personal account with the State Bank of India.

In simpler terms, 64% of all the money paid by the Free State government to Estina was transferred to the Gupta's Dubai vehicle, 18% to their local vehicle, and 11% to SARS for VAT costs. A paltry 7% of all Free State funds were spent on other expenses.

The correspondence between Gautam and various Gupta enterprise employees reveals another key detail: Gautam was arranging visas for trips to South Africa for various Paras Dairy employees and using Sahara Computers to do so. In late March 2012, emails between Ashu Chawla and Gautam show that they were organising invitations and visas for one Gajinder Kumar. Gajinder Kumar was a Paras employee who signed the April 2014 MoU between Paras and Estina on behalf of Paras Dairy. Kumar thus signed this vital document, on which the entire Estina/Vrede Dairy Project hung, during a trip to South Africa that was substantially organised by the Gupta enterprise.

The Gupta enterprise was also involved in the day-to-day running of the Estina, often in the most prosaic terms. The #Guptaleaks show that:

- Estina shared an address in Sandton with other Gupta enterprise companies, including Mabengela Investments, which was co-owned by Duduzane Zuma.
- Sahara Computers was involved in securing the working visas for three Indian nationals who worked on the Vrede Dairy Project.
- Estina's financial records and controls were hosted on Sahara's "Fincon" server.
- Ashu Chawla was involved in approving day-to-day payments from Estina, including a R750 payment to Estina's accountants.
- The one time that Estina used Free State government funds to import dairy equipment from India, they bought the equipment from a supplier (Star Engineers) whose CEO had already met with Ajay Gupta in India. Employees of Sahara were also involved in arranging the shipment of the dairy equipment to South Africa.

Together, these examples act as a window into the heart of the Estina/Vrede Dairy Project: a heart that beat to the rhythm and benefit of the Gupta enterprise.

CORRUPTION AND CONNECTIONS: THE GUPTA ENTERPRISE AND FREE STATE OFFICIALS

The fact that Estina was a Gupta enterprise entity provides only a partial explanation of why key Free State officials bent over backwards for Estina's benefit. For that, we need to look at the direct connections between the Gupta enterprise and the three central Free State officials involved: Peter Thabethe, Mosebenzi Zwane and Ace Magashule.

Thabethe's connections to the Gupta enterprise were multiple. First, it must be recalled that in 2012, Thabethe conducted research into international dairy companies that might undertake the project, and landed on Paras Dairy. Between 29 February and 4 March 2012, Thabethe travelled to India to meet with Paras. He was accompanied on the trip by Ashok Narayan.[28] Narayan was a key lieutenant in the Gupta enterprise. He had worked as a director for Sahara Computers and was a director of Linkway Trading, the Gupta entity that paid for the Sun City wedding. He features prominently in a range of Gupta-linked scandals, including as director of Homix, the entity that earned undue commissions on deals with Neotel. He was also a director in an entity called Siyabuselela Trading, vacating that position when he was replaced by Estina's lone director, Kamal Vasram.

Narayan's trip to India with Thabethe was approved by Ace Magashule, who had appointed Narayan as a specialist ICT advisor on 1 March 2012 (in the middle of Narayan and Thabethe's trip to India). In testimony before the Commission, Thabethe claimed that he was told by Mosebenzi Zwane to include Narayan on the trip.[29] However, in the same testimony, Thabethe failed to explain why Narayan, an ICT specialist, was added to his trip to India to review an agricultural project. Thabethe indicated that he did not question Narayan's inclusion or why he was chosen, selecting instead to accept the instruction: "Chair, I should have questioned…. But I didn't question." [30]

The #Guptaleaks gives some indication as to why Thabethe didn't ask questions – because he knew who Narayan was all along. The #Guptaleaks emails show that Ashok Narayn sent an email to Peter Thabethe's personal email address (pthabethe@hotmail.com) on 5 January 2011. Narayan had sent the email from his Sahara Computers email address, and copied in Sahara Computer's Joleen Roux, who was responsible for Sahara and Gupta enterprise logistics. The email attached an invite to a *New Age* "Friendship Celebration" that was to honour "150 years of friendship between India and South Africa in the company of H.E. MR. JACOB ZUMA." A second attachment set out the details of the public *New Age* celebration to take place during an International Pro20 cricket match between South Africa and India in Durban. The body of the email strongly suggests that Narayan and Thabethe had already discussed the invitation:

> Dear Peter,
>
> As discussed, please find enclosed the invitation to the two events in Durban over this weekend.
>
> Unfortunately, we are unable to offer accommodation since all hotel rooms have already been allocated.
>
> You may reach me on my cell on 076 792 8332 when you reach Durban.
>
> I look forward to meeting with you there.
>
> Best Regards,
> Ashok Narayan

During Thabethe's testimony before the Commission, the evidence leader and the Chair indicated a degree of incredulity at how quickly Thabethe was able to arrange his trip to India. The #Guptaleaks, however, shows that Thabethe's visa was partially arranged by the Gupta enterprise. On 25 February 2012, Ashu Chawla sent an email to a Sahara employee attaching a letter addressed to the "Visa Counsellor: High Commission of India, Johannesburg, South Africa." The letter was written on the letterhead of SES Technologies, an Indian company controlled by the Gupta enterprise, and signed by Ashu Chawla. The letter noted that Thabethe was to travel to India "for business opportunities" and that "SES Technologies Ltd will assist with all their requirements while they stay in India." Thabethe's much-discussed "research trip" to India to meet with Paras Dairy was thus partially arranged by the Gupta enterprise; and it included Ashok Narayan, one of the Gupta enterprises' most important players, as the trip chaperone.

Mosebenzi Zwane's long-running connections to the Gupta enterprise have been exhaustively documented,[31] so we will not rehash them here. However, two revelations are worth noting in relation to Estina. First, the #Guptaleaks emails show that in October 2012, the Gupta enterprise began arranging for Zwane's choir to take an all-expenses-paid trip to India. The Gupta enterprise was responsible for arranging visas for all the choir members – and also Mosebenzi Zwane himself. It also paid for the flights and hotels, and arranged a touring itinerary, including tickets for the Taj Mahal. The choir group travelled to India between 15 and 23 October 2012. Ashok Narayan joined the trip, acting as contact person and facilitator. Narayan and Zwane took two days from their schedule to travel from Delhi to Dehradun, the Gupta's hometown, where they were joined by Tony Gupta.

Thus, four months after Zwane had approved the Estina contracts as a member of the Provincial Exco, and a month after he had delegated authority to Thabethe to lease the Vrede land to Estina for free for 99 years, Zwane and his associates travelled, all expenses paid by the Gupta enterprise, on an indulgent tour of India. This alone should trigger an investigation into Zwane's conduct in terms of the Prevention and Combatting of Corruption Act (PRECCA).

The second revelation is that Zwane made numerous visits to the Gupta compound in Saxonwold, at least once in the company of Peter Thabethe. Calendar entries in the #Guptaleaks show that Thabethe (described as "Peter HOD Agric") was scheduled to meet Tony Gupta on 2 November 2012, 31 January 2013 and 18 July 2013. The last meeting was also attended by Zwane (the meeting was described as "Zwane and Peter"). Zwane (described variously as "MEC Agric" or "Zwane") was scheduled to meet with Tony Gupta in Saxonwold on 16 September 2012, 5 January 2013, 1 February 2013, 18 July 2013, 17 January 2014 and 31 January 2014. Peter-Louis Myburgh has pointed out that the meetings with Zwane and Thabethe at the Saxonwold compound took place at various "crunch" moments in the Estina/Vrede project. The meetings in January 2013, for example, took place around the time the Free State Department of Agriculture was seeking to receive its CASP grant. [32]

Ace Magashule, too, had close and abiding connections to the Gupta enterprise. One of these was the appointment of Ashok Narayan as his ICT advisory. Then there were the two laptop deals done by the Office of the Premier of the Free State in facilitation of a plan to hand out laptops to needy learners in 2012 and 2014. As noted above, both of these contracts were signed with Sunbay. Estina and Sunbay shared the same sole director, Kamal Vasram. Sunbay made payments totalling approximately R34 million to Sahara, which had supplied Sunbay with the laptops sold to the Office of the Premier. Like Zwane and Thabethe, Magashule was recorded visiting the Gupta's Saxonwold compound at least once in October 2012.

Magashule's family received direct benefits from the Gupta enterprise during the life of the Estina project. Magashule's son, Tshepiso Gift Magashule, was employed as a consultant by the Guptas from at least November 2010 onwards. A spreadsheet from the #Guptaleaks shows that Tshepiso worked for Mabengela Investments, a Gupta-controlled company that was partially owned by Duduzane Zuma. Tshepiso and his brother Thato also benefited from Gupta largesse when they travelled to Dubai in 2015, where they stayed at the luxury Oberoi Hotel. Sahara covered the cost of their "bed and breakfast" on the trip. On another trip, Tshepiso joined Ajay, Tony and Atul Gupta and their families on a three-week holiday to New York and Venice.

The #Guptaleaks show that Tshepiso lived for a period at a house at 18 Avonwold Road, Saxonwold, very close to the Gupta's Saxonwold compound. Property records show that the property was owned by Confident Concepts, a Gupta-controlled company. According to Peter-Louis Myburgh, Ace Magashule used the Avonwold property to meet with the Gupta brothers.

The links between the Gupta enterprise and the three most important officials involved in the Estina project place the scandal in a new and important context. We submit that the most reasonable interpretation is also the simplest: Thabethe, Zwane and Magashule colluded with the Gupta enterprise to create the Estina/Vrede Dairy Project with the primary aim of siphoning nearly R300 million in Free State funds into the pockets of the Gupta enterprise. Setting up a dairy farm that benefitted local farmers was, at most, an afterthought.

BETWEEN JUNE 2012 AND MAY 2016, ESTINA WAS PAID

R280.2 MILLION

BY THE FREE STATE DEPARTMENT OF AGRICULTURE. THE R280.2 MILLION WAS TRANSFERRED IN EIGHT PAYMENTS OR TRANCHES:

R30 MILLION
on 11 June 2012, to Estina's bank account at Standard Bank;

R34.95 MILLION
on 18 April 2013, to Estina's bank account at Standard Bank;

R30 MILLION
on 26 April 2013, to Estina's bank account at Standard Bank;

R19.05 MILLION
on 3 May 2013, to Estina's bank account at Standard Bank;

R29.95 MILLION
on 20 December 2013, to Estina's bank account at Standard Bank;

R30 MILLION
on 25 July 2014, to Estina's bank account at Standard Bank;

R60 MILLION
on 8 May 2015, to Estina's business account at First National Bank; and

R46,252,652
on 5 May 2016, to Estina's account at First National Bank.

WASHING THE ESTINA MONEY: THE METHODS AND MEANS

The funds transferred into Estina's bank account were subject to extensive laundering. The laundering served two purposes. The first was to make tracing the flow of funds incredibly difficult, potentially confounding a criminal investigation. In this, the Gupta enterprise was successful: when the Asset Forfeiture Unit attempted to seize funds related to the Estina project, they failed to understand fully the sophisticated banking methods used by the Gupta enterprise.

The second reason was even more fiendish. As we noted at the beginning of this section, a central component of Estina's contract with the Department was that Estina would invest in the Vrede Dairy Project to the tune of R220 million. The circular laundering systems used by the Gupta enterprise, which recycled Estina money multiple times through multiple accounts, made it appear that money additional to the Free State funds was being paid into the account; in simpler terms, that Estina was receiving deposits from other sources and investing them in the project. In reality, almost all of the money paid into Estina's accounts derived from money paid to it by the Free State Department of Agriculture.

To achieve these two objectives, the Gupta enterprise used a multitude of well-known laundering methods to achieve the three main steps of laundering – placement, layering and integration, which we described in the early part of this report. To achieve this, the Gupta enterprise made use of two techniques typical of many money-laundering schemes: "round-tripping" and "loan-backs".

As the name suggests, "round-tripping" involves transferring funds into a number of placeholder accounts, from where they are paid onto a further set of intermediary accounts, before being repaid and reintegrated into the original transmitting account. "Loan-back" systems involve taking out personal or business loans secured against the proceeds of crime. The proceeds of crime are laundered by "loaning" them "back", hence the name. Both of these techniques become difficult to investigate and trace if, at any stage in the process, the funds travel to offshore secrecy jurisdictions.

To launder the Estina money, the Gupta enterprise made use of a local laundromat and an offshore laundromat. The heart of the local laundromat was formed by Estina's accounts with Standard Bank, First National Bank and, most importantly, the Bank of Baroda. We look at each of these banks and how they were used in more detail below.

The offshore laundromat was built around four offshore companies: Accurate Investments, Fidelity Enterpises, Gateway Limited and Global Corporation LLC, all of which were registered in the United Arab Emirates, a notorious secrecy jurisdiction. All of these companies held accounts with Standard Chartered, Bank of Baroda and Mashreq Bank. Global Corporation LLC held a further account with the National Bank of Abu Dhabi.

TABLE 1: THE OFFSHORE LAUNDROMAT COMPANIES AND ACCOUNTS

	Standard Chartered	Bank of Baroda	Mashreq Bank	National Bank of Abu Dhabi
Accurate Investments	✔	✔	✔	✘
Fidelity Enterprises	✔	✔	✔	✘
Gateway Limited	✔	✔	✔	✘
Global Corporation LCC	✔	✔	✔	✔

These offshore companies were integrated into the Gupta enterprise through extensive cross-shareholding with South African-based Gupta companies. Accurate Investments, for example, owned an 8.01% share in Tegeta. Fidelity Enterprises meanwhile held ten per cent of the shares in Mabengela Investments (along with, *inter alia*,Tony Gupta and Duduzane Zuma) and 25% of the shares in Tegeta Resources. Fidelity held these shares alongside Mabengela, Oakbay Investments and Aerohaven Trading, the last of which was used, as we show below, in the elaborate loan-back structures employed by the Gupta enterprise to launder Estina funds.

In broad terms, the local and offshore laundromats operated as part of a five-stage laundering strategy:

1. The funds were paid to Estina's Standard Bank or FNB accounts by the Free State government.
2. These funds were extensively washed through local accounts, either through round-tripping or through loan-backs.
3. After washing, the laundered funds were reintegrated into Estina's Standard Bank or FNB accounts, from where they were transferred to Gateway Limited in Dubai.
4. The funds were moved between the offshore accounts.
5. Finally, the funds were either sent to pay Gupta bills abroad, deposited into Gupta-controlled *hawala* accounts, or, more notably, transferred into the accounts of South African Gupta companies such as Linkway Trading and Oakbay.

Describing the laundering system used by the Gupta enterprise in abstract terms can make it hard to visualise and understand. To really appreciate how it worked, we turn to the way in which laundered Estina funds became part of the Sun City wedding.

A CASE-STUDY IN DUPLICITY: THE STATE-FUNDED WEDDING

Among the most important discoveries in the #Guptaleaks is a set of Excel spreadsheets with the innocuous names "Funds 13-14.xls" and "Bank summary amended.xls". The spreadsheets were sent to Ashu Chawla after being compiled by Sanjay Grover, the Gupta's accountant and manager in Dubai. The spreadsheets recorded the transactions of the Gupta's offshore laundromat for a period of just over a year. The first sheet of the workbook, called "summary", includes an entry for Estina Pty Ltd showing that the offshore laundromat was paid US$8 348 700 by Estina. Other, more detailed account-by-account spreadsheets, when read against Estina's bank statements, allow us to trace how the money made it into the offshore laundromat, and where it was sent.

One of the biggest recipients of funds from the Estina project was Linkway Trading – one of the Gupta enterprises' more active accounts. The #Guptaleaks show Linkway being used for a vast array of transactions that benefitted the Gupta family and their associates. Linkway Trading was 53% owned by Islandsite Investments 180. The shares in Islandsite were split equally between Atul Gupta, Tony Gupta, Chetali Gupta and Arti Gupta. Ronica Ragavan, a vital Gupta lieutenant, also owned 25% of Linkway Trading.

Linkway was paid a neat US$3 333 000 by Accurate Investments in August and September 2013. This amount was made up of two payments: US$1 986 000 on 12 August 2013 and US$1 347 000 on 9 September 2013. These payments were laundered through complex routes, which we describe below. However, a written description can sometimes be hard to follow when tracing laundered funds, and so we also provide visual diagrams of the transfers below.

THE FIRST LINKWAY PAYMENT

The first payment of US$1 986 000 was sourced from the fourth tranche of money, R19.05 million, paid to Estina by the Free State government on 30 May 2013. This meant that the full amount paid to Estina by the government in this tranche was ultimately paid out of Estina to benefit the Gupta enterprise. The way it reached the Gupta enterprise was circuitous.

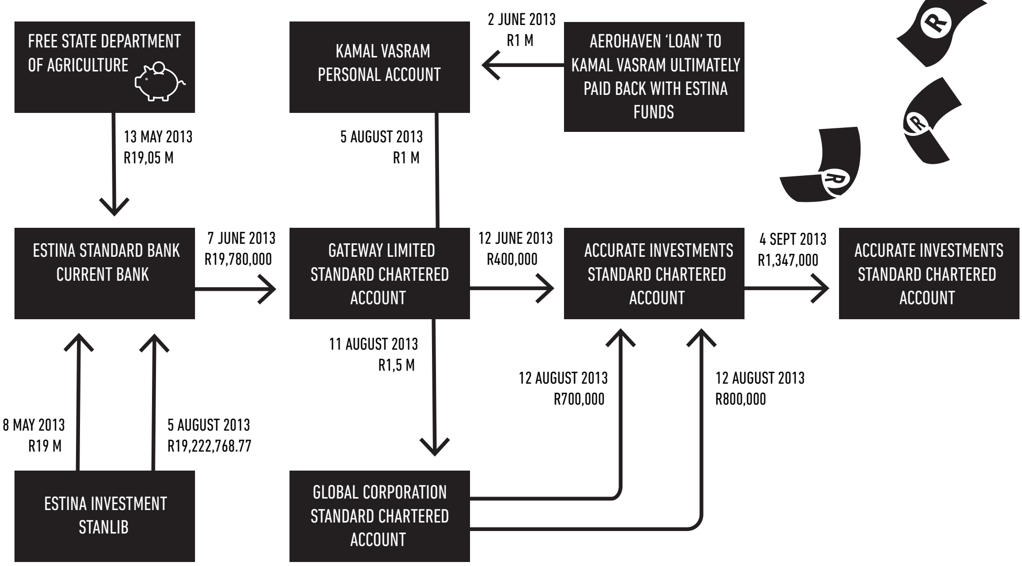
On 8 May 2013, five days after receiving the money from the Free State, close to the full amount, R19 million, was transferred into an investment facility held by Estina with Stanlib. The funds were parked in the facility for just under three months, after which they were transferred back into Estina's Standard Bank account (with an additional R222 758.77 that had been earned from the investments in the interim). There, the funds were mingled with a R1 million payment made into Estina's Standard Bank account that derived from another Free State government deposit (about which more below). Once combined, R19 870 000 was then transferred from Estina's Standard Bank account into Gateway Limited's account with Standard Chartered in Dubai, thus entering the Gupta's offshore laundromat. (See graphic on the following page).

A week after the funds were transferred to Gateway Limited, they were split into two streams. In the first stream, US$1.6 million was transferred on 11 August 2013 into Global Corporation's Standard Chartered account. The following day, the US$1.6 million was split into two amounts (US$890 000 and US$700 000) that were transferred to Accurate Investment's Standard Chartered account. Here, they were joined by the second stream, which involved Gateway transferring US$400 000 into the same Standard Chartered account held by Accurate Investments. Finally, once all the amounts had been reintegrated with Accurate, they were transferred, on the same day, to Linkway Trading.

Needless to say, the transfer of funds from Estina's South African bank accounts into the offshore laundromat, after which they bounced between the accounts of the offshore laundromat for a few days before being paid to Linkway Trading, made no business sense. A much more straightforward (and cheaper) option would have been to transfer the money directly from Estina's Standard Bank account to Linkway Trading. This would have saved money in bank charges and potential currency fluctuations. The only logical conclusion is that the funds were moved in this way in an attempt to disguise the fact that a company owned by the Gupta brothers, Linkway Trading, was getting paid by Estina with money from the Free State government.

TRACING THE FIRST LINKWAY PAYMENT

The first payment of US$1 986 000 was sourced from the fourth tranche of money, R19.05 million, paid to Estina by the Free State government on 30 May 2013. This meant that the full amount paid to Estina by the government in this tranche was ultimately paid out of Estina to benefit the Gupta enterprise. The way it reached the Gupta enterprise was circuitous.



THE SECOND LINKWAY PAYMENT

The second payment made to Linkway – $1 347 000 on 9 September 2013 – took an even more circuitous route. This amount derived mostly from the first payment made to Estina on 12 June 2012: the R30 million that was paid to Estina in order to "kick-start" the project. We say "mostly" because the funds from the first payment were also commingled with funds from the second payment from the Free State government during the laundering process.

Just over a month after the first amount of R30 million was deposited, R28 million of it was transferred to Estina's current account at the Bank of Baroda. On the same day, the full R28 million was placed into a fixed deposit account (a high interest-bearing savings account), where it was left for a number of months. On 4 September 2013, the fixed deposit account was closed and the R28 million was paid back into Estina's current account at Baroda. It was joined by a further R2 million payment that we suspect was also drawn from this tranche (the bank records are incomplete on this point), which was transferred into Estina's Baroda account on the same day. On the same day the total of R30 million was received, it was transferred from Estina's Baroda account back into Estina's Standard Bank account -- into which the original amount had been paid by the Free State government.

The R30m was commingled in the Standard Bank account with a payment of R1.3 million that was made on the same day (4 September 2013) into this account from Kamal Vasram's personal account at Standard Bank. This is where things get particularly complicated. The R1.3 million payment from Kamal Vasram was not, in fact, sourced from Kamal Vasram; it was actually sourced from the second payment that the Free State government made to Estina (the R34.95 million paid on 18 April 2013). The money was made to look as if it came from Kamal Vasram through the adoption of a complicated loan-back system.

The loan-back system worked as follows. The first leg involved a Gupta company, Aerohaven Trading, opening a loan account for Kamal Vasram, through which they paid over R22.6 million in multiple payments to Vasram's personal account at Standard Bank between 6 July 2013 and 20 December 2013. The payments to Vasram were immediately transferred from his account into Estina's Standard Bank account, where they were paid onwards to either Vargafield (a Gupta company in South Africa run by Ashok Narayan), or to Gateway Limited. Of importance to the Linkway transactions, R900 000 would be transferred from Estina's Standard Bank account to Gateway. This was derived from the R1.3 million payment made by Kamal Vasram (and sourced from Aerohaven) mentioned above.

The second leg, which happened at the same time as the first, involved laundering Free State money so that it could be used to pay back the "loans" given to Vasram (and paid to Estina) by Aerohaven. This was done through some fancy financial footwork. After Estina's Standard Bank account had received its second payment from the Free State government (R34.95 million paid in April 2013), it transferred these funds into Estina's Baroda current account. Of this amount, R25 million was immediately placed into a fixed deposit account with Baroda. This account was then used to secure and open a personal loan for Kamal Vasram with the Bank of Baroda. Vasram used this personal loan, secured against Estina's fixed deposit account (itself funded by the payment from the Free State government), to pay back a portion of the Aerohaven loan paid to Vasram. Vasram's loan with Baroda was closed about six months later, when Estina closed its fixed deposit account and used the funds to settle the personal loan.

Picking up where we left off, as noted above, by 4 September 2013, R31.3 million had been reintegrated back into Estina's Standard Bank account. The following day, 5 September, US$2 999 975 was paid from Estina's Standard Bank account to Gateway Limited's account at Standard Chartered in Dubai, thereby entering the offshore laundromat. Four days later, on 9 September, $1.4 million of this amount was transferred from Gateway Limited to Accurate Investment's Standard Chartered bank account. Finally, on the same day, Accurate Investment transferred US$1 347 000 to Linkway's account at the Johannesburg branch at the State Bank of India.

THE WEDDING CONNECTION

Sadly, the funds paid to Estina by the Free State government were subject to further indignities. Documents from the #Guptaleaks reveal that the payments made to Linkway Trading were laundered into Linkway's books by using costs from the Sun City wedding.

This process, unlike the laundering of the fund described above, was relatively simply achieved. Linkway Trading drew up an invoice addressed to Accurate Investments on 31 July 2013. The invoice provided a detailed breakdown of costs related to the wedding, including line items like "bulk kiwi slices" (R2 421), "beverages" (R364 243.16), "dancers" (R331 427.44), and "accomodation [sic] – 19/4 to 3/5" (R2 169 209.58). The total value of the invoice, once VAT was included, was a neat, round R30 million. The invoice helpfully indicated that this was "the equivalent of USD3333400@ZAR=1USD" [33] – almost exactly the same amount (US $3 333 000) that was transferred to Linkway by Accurate Investments, all of which was ultimately derived from payments made to Estina by the Free State government.

This exchange of invoices and the trail of payments meant two things. First, the invoices and transfers strongly indicate that the Sun City wedding was paid for with funds that were meant for the Vrede Dairy Project; a more venal use of the funds is hard to imagine. Second, the invoice was used to enable the Guptas to avoid paying tax – with the help, as we discuss below, of KPMG.

THE ENABLERS

Much of the wrongdoing we have described above may be familiar. The role of Free State officials in the scandal has been well-reported, as have the parts of the story about how the Guptas benefited from Estina's looted funds. Far less, however, has been written about the institutions and companies that made all of this possible: the banks and auditors that had a duty under law to stop the theft and laundering that took place. Here, the roles of Standard Bank, FNB, the Bank of Baroda, Standard Chartered Bank and KPMG are particularly notable.

STANDARD BANK

On 12 March 2019, Ian Sinton, a member of Standard Bank's legal department, appeared at the Commission in terms of a subpoena issued to Standard Bank.[34] In that testimony, Sinton acknowledged that the legal provisions of both FICA and PRECCA placed a legal duty on the bank not only to ensure they were not knowingly aiding corrupt activity, but also created a positive duty to investigate suspicions of wrong-doing.[35] Sinton stated:

> **We monitor all of our clients activities on an ongoing basis and where we have reason to believe quite apart from what is reported on the Financial Intelligence Centre where conduct appears to us to be suspicious we will investigate and if we think that conduct is such as it will expose us to contravention of any of these acts we typically prefer to terminate the relationship, rather than face the risk of prosecution ourselves.** [36]

Sinton then went to explain how the decision of ABSA to terminate relationships with entities linked to the Gupta family, and KPMG soon following in terminating their audit services to the same entities, were clear red flags to Standard Bank.[37] This was in late 2015. While Sinton's testimony did not discuss the accounts of Estina, the fact that he focused on ABSA's decision in late 2015 raises questions about why transactions linked to Estina in 2013 were not investigated and acted on sooner.

The evidence above illustrates that Estina's bank accounts at Standard Bank should have been subject to rigorous scrutiny by the bank. At a bare minimum, this would have required filing suspicious transaction reports (STRs) with the relevant financial oversight authority – namely the FIC. As discussed in the first part of this report, Section 29 of the FIC Act requires South African banks to report any transaction to the FIC when it has or is about to receive the proceeds of a crime, which have no apparent lawful or legitimate purpose, and which have facilitated the transfer of unlawful proceeds. [38]

It is not known whether Standard Bank made any suspicious activity reports in relation to money-laundering activities linked to Estina and the Vrede Dairy Project. We put a series of questions to Standard Bank regarding the accounts of Estina and Vasram, including whether the bank conducted due diligence on these clients, if it enquired into the source and rationale of the deposits into Estina's accounts, and whether it reported any suspicious activity reports to the FIC related to these accounts. Standard Bank responded:

> **Standard Bank has complied with its regulatory responsibilities and has engaged where applicable and appropriate with the relevant authorities and/or Commission of Inquiry within the ambit of the law. The Code of Banking Practice prohibits Standard Bank from divulging any confidential information relating to its clients to third parties.** [39]

When Sinton appeared before the Commission, he made no disclosure of any suspicious activity reports, also citing confidentiality. The Commission indicated that any reports provided by the bank could be confirmed with the FIC away from the public gaze.[40] Regardless, Sinton's assured the public in his testimony that beyond these basic reporting requirements, Standard Bank was proactive and as such monitored all clients "on an ongoing basis" in order to ensure it was not assisting any unlawful activity.[41] This suggests that Standard Bank's compliance department constantly assesses its clients and their transactions.

This version sits at odds with what is now known about how Estina and the Gupta enterprise used Standard Bank accounts to launder and loot funds from the Free State government. There were at least three red flags that should have been identified. The first was that in a large number of cases, deposits made into Standard Bank accounts were almost immediately transferred onto external beneficiaries. This is usually a major red flag, as legitimate operating businesses tend to keep funds in liquid accounts in order to transact day-to-day business.

Estina's bank records show that, of the six payments that were made into Estina's Standard Bank account by the Free State government, only two deposits were left untouched for more than a week. In one case, the immediate transfer of funds was combined with inexplicable smurfing activity: on 26 April 2013, when Estina was paid R30 million by the Free State government, this full amount was immediately transferred to Estina's Baroda account in six transfers each equalling R5 million.

The second red flag was that Estina made a number of large and unexplained payments to a single offshore company registered in Dubai – Gateway Limited. Transacting with offshore entities in this way is often a major concern in money laundering.[42] Documents from the #Guptaleaks, when read against Estina's bank statements, show that Estina transferred US$8 348 000 into Gateway's Standard Chartered account.

If Standard Bank was pro-actively monitoring the Estina account, it surely must have wondered why Estina, an agricultural firm reliant on government grants, was transferred large amounts of operating capital, in round amounts, to an offshore company that had no online or public profile.

The final red flag was that for a good period of time during which Estina operated its Standard Bank account, it was already widely reported in the media that there were concerns with the project. The first media report raising concerns about the connections between Estina and the Gupta family was published in May 2013. By June 2013, amaBhungane had dug deep into the project, detailing additional compelling links.[43] Early the following year, it emerged that National Treasury had initiated an investigation into the project, and that a Free State official had testified that the project was linked to Mosebenzi Zwane. Estina's Standard Bank account was, during this entire time, receiving payments from the Free State Department of Agriculture and making a range of suspicious outbound payments. It is hard to see how, if Estina's accounts were being "pro-actively" monitored, Standard Bank could not have picked up these warning signs.

Red flags should also have been raised concerning the personal account of Kamal Vasram, which was also held with Standard Bank. As we noted above, Kamal Vasram's Standard Bank account was used to facilitate the various loan-backs that laundered Estina funds. Documents from court proceedings involving the Gupta enterprise have shown that Vasram received multiple payments from either Oakbay or Aerohaven, and immediately transferred these on to Estina's Standard Bank account. Through this method, Vasram's Standard Bank account received and immediately paid out R33.592 million between October 2012 and December 2013. These deposits, moreover, were received from Aerohaven and Oakbay, both publicly and undeniably part of the Gupta's stable of companies. Surely a "proactive" Standard Bank must have wondered why an IT salesperson, who was working full-time as a sales consultant for Lenovo and Toshiba, was handling large sums of money paid by Gupta companies, which were then immediately transferred to a dairy farm in the Free State.

FIRST NATIONAL BANK (FNB)

Like all the big four banks, FNB appeared before the Commission in September 2018 to testify about why they had closed Gupta-linked accounts in 2016. These discussions were limited to the banks' allegations that there had been an attempt by certain political factions to put pressure on them regarding the closure of these accounts. In his statement to the Commission, former FirstRand [44] CEO Johan Burger explained how he had declined an invitation to meet with an Inter-Ministerial Committee (IMC) if it was to discuss any individual clients. [45]

Burger was asked why FNB had closed accounts linked to the Gupta family and its businesses in 2016. His response, echoing Ian Sinton's testimony, was that the bank was acting to mitigate the "reputational and business risk" attached to continuing to provide banking facilities to the Gupta family and related companies.[46] Burger was keen to focus exclusively on the right of the bank to end relationships with clients on the basis of "perceived illegality", which creates a negative association, regardless of whether actual criminal activity took place. [47]

Burger's comments ring hollow when read against the role FNB played with regards to Estina. FNB provided essential banking services to Estina at a time when the company received two significant deposits from the Free State Department of Agriculture. These payments included a deposit of R60 million on 8 May 2015, as well as a deposit of just over R46 million on 5 May 2016. Estina also utilised an FNB call account that was used as a stopping-off point for Estina funds. Bank statements for Estina's FNB business account indicate that this account remained active until at least April 2017, although the last major transaction (R215 000 paid to an unknown South African company called Pwe Trading), which also constituted the last of the distribution of funds from the Department of Agriculture, took place on 31 October 2016.

There were a number of obvious red flags that FNB should have identified in relation to its provision of banking services to Estina. The first was that by the time Estina started making regular use of its FNB facility, the media had long since raised the alarm about the suspicious nature of the Estina/Vrede Dairy Project. More notably, it was publicly confirmed in April 2015 in the Free State legislature that Estina's role in the Vrede Dairy Project had been cancelled in August of the year before.[48] Later that same year, in August 2015, it was publicly confirmed that this cancellation was due to irregularities in the awarding of the Estina contract discovered by National Treasury. The extensive media coverage between 2013 and 2016, along with the cancellation of Estina's part of the deal in 2015, should have raised an alarm at the bank about their possible complicity in any criminal activity by continuing to permit these transactions.

The second red flag related to how funds were dissipated from the FNB account. Estina's FNB bank records indicate that amounts deposited into Estina's FNB account by the Free State government were paid out to secondary accounts almost immediately after the initial deposits. One example is the first payment received from the Free State Department of Agriculture on 8 May 2015 (valued at R60 million). On 13 May 2015, five days later, Estina transferred R59.75 million into an FNB account whose ownership remains unclear. From there, the funds were transferred into an FNB Money Market account, which started paying money into and out of Estina's FNB account on 28 May 2015. FNB, as the supplier of of these accounts, had sight of how these transactions flowed.

The final red flag related to the recipients of money paid out by FNB. In total, of the R106 million that was paid into Estina's FNB account by the Free State government in 2015 and 2016, over R85 million was paid out to Gateway Limited. The payments to Gateway Limited in 2016, drawn from the final tranche of money paid to Estina by the Free State government, were not even subject to any proper laundering. After the Free State government paid R46 million into Estina's FNB account on 5 May 2016, Estina transferred R40 737 452 directly to Gateway Limited. This amount was made up of four payments made between 9 and 18 May 2016. The dispersal of the 5 May 2016 payment was additionally remarkable in that it took place five months after ABSA had terminated its Gupta-linked accounts in December 2015.

Shadow World Investigations put these issues to FNB in September 2019, asking whether FNB had conducted any due diligence on Estina, the source and rationale of the payments into Estina's accounts, and whether FNB had filed any suspicious activity reports with the FIC. FNB responded:

> *Due to client confidentiality, FNB cannot comment on specific bank accounts. In instances where the bank is required to comply with external legal or judicial processes, the bank will adhere to such requests.*

Like Standard Bank, FNB's response is disappointing. It certainly does not answer any of the queries raised, or put to bed doubts about whether the bank met its obliga-

tions under FICA. In light of the seriousness of the issue, the clear-cut nature of the evidence, and FNB's underwhelming response, we believe that the Commission must call on FNB to testify and explain why FNB provided banking facilities to Estina after Estina's contract had been cancelled with the Free State government, and after the true nature of the Estina/Vrede Dairy Project had been laid bare in the public domain.

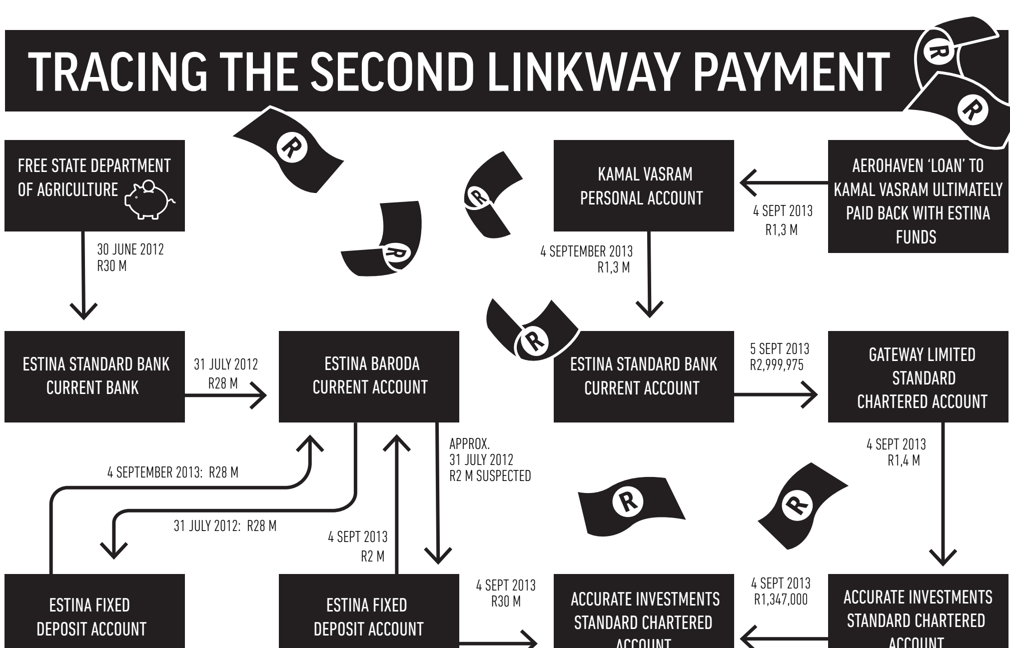
BANK OF BARODA

More than any other local bank, the Bank of Baroda was central to the money-laundering machinations of the Gupta enterprise. In addition to facilitating transactions in and out of Estina's current and fixed deposit accounts, the Bank of Baroda provided loan facilities that were used to create "fake loans" or "loan-backs" as part of the Estina money-laundering network.

As discussed in the section dealing with Eskom, South Africa's arm of the Bank of Baroda was one of the most important service providers to the Gupta family and enterprises linked to it. Reporting by the Organised Crime and Corruption Reporting Project (OCCRP) and *The Hindu* provides excellent insight into this relationship.[49] In an article published in 2018, these investigative journalists showed how the banking of the Gupta enterprise comprised the majority of transactions processed by the Bank of Baroda's Johannesburg branch. The reporting also shows that the Bank of Baroda was delinquent in checking the legitimacy of payments made by the Gupta enterprise.

The Bank of Baroda was vital to the creation of the elaborate loan-back systems that were used to launder Estina funds. As noted previously, between 2012 and 2013, Kamal Vasram was "loaned" over R30 million by the Gupta-controlled companies Aerohaven and Oakbay. These loans were paid into Estina's Standard Bank account, where they were paid on to various recipients. To pay back the loans, Estina transferred money paid to it by the Free State government from its Standard Bank account into its Bank of Baroda current account. From there, the funds were placed into fixed deposit accounts. These accounts were used to open up loan facilities at the Bank of Baroda, and these loan facilities were in turn used to pay back the Oakbay and Aerohaven "loans".

Baroda, moreover, knew that in at least one instance that the loans they opened against the fixed deposit accounts were used to pay back Oakbay. In one instruction sent from Estina to Baroda, Baroda were told to open a loan facility against a fixed deposit account, and immediately transfer a portion of the newly opened loan to Oakbay.



The role of the Bank of Baroda as an enabler of the Gupta enterprise should be read alongside documents emerging from the #Guptaleaks. These show that employees of Baroda's Johannesburg branch received benefits from the Gupta enterprise, in particular arrangements for a Cape Town holiday, and assistance with other family matters. Five sets of correspondence are of particular interest. We believe that this may partially explain why Baroda provided patently problematic banking services to Estina, over and above the fees and profits it was set to make.

On 15 July 2014, Ramesh Salian, the Chief Manager of the Bank of Baroda's Johannesburg branch, emailed Ravindra Nath, a Gupta enterprise employee. The email was sent to Nath's personal gmail account. Attached to the email were scans of a student visa application for South Africa submitted by Salian's daughter, Nikita. This email was forwarded by Nath to Ashu Chawla). The email had the following explanatory text:

> Dear Ashu Ji
>
> Please find below the details of the Study Permit applied [for] by Mr Salian, Branch Manager, Bank of Baroda, for his daughter.
>
> Tony ji has asked me to forward it to you. Kindly help him in this regard. [50]

Connected with this correspondence, Ravindra Nath sent an email from his Oakbay account (nath@oakbay.co.za) to the same Bank of Baroda address that had emailed him (joburg@bankofbaroda.com). The email was sent by Nath on 21 July 2014, six days after receiving the request for assistance from Ramesh Salian, and the same day he forwarded the request, at Tony Gupta's suggestion, to Ashu Chawla. Attached to the email sent by Nath were a cash-flow document and a write-up in support of a R30 million loan that the Gupta enterprise was seeking for a project called Global Softech. [51]

A further extended email correspondence shows that Sahara Computers was arranging and (seemingly) paying for an extended holiday to be taken by the Chief Executive of the South African branch of Bank of Baroda (Murari Lal Sharma), his wife and four other individuals (whose precise relationship with Sharma is not known to us).

The holiday included a trip to Victoria Falls in Zimbabwe, the Lost City at Sun City, and Cape Town. Logistical details, which included numbers of individuals employed by Sahara to entertain the guests, were forwarded to ce.sa@bankofbaroda.com, the email address of the Chief Executive of the South African branch of Bank of Baroda. The assistance went as far as having a Gupta-enterprise employee purchase tickets valued at R175 each for Sharma and his party to ride the Table Mountain cable car. The holiday appears to have taken place in February 2012, just months prior to the Bank of Baroda opening multiple banking facilities for Estina.

Another set of relevant correspondence from the #Guptaleaks included extensive email communication between Sanjiv Gupta and Ashu Chawla and related persons. Sanjiv Gupta served as a senior manager at Bank of Baroda's Johannesburg branch.[52] This correspondence (sent from Sanjiv Gupta's personal email address, san_jeev61@yahoo.com) shows that he had asked for and received help with employment and internship opportunities for his children, Archit and Esheetaa Gupta.

Email exchanges show that Sanjiv Gupta sent Archit Gupta's details to Ashu Chawla, asking that Archit (Sanjiv's son) be allowed to undertake an internship at Sahara. Further correspondence shows the internship was agreed to, and that Sahara assisted with Archit's travel arrangements.

The email exchanges also reveal that Sanjiv Gupta was sending emails, or was copied into emails, regarding Sahara's employment of Esheetaa Gupta. Documents from the leaks show that Esheetaa was employed by Sahara in 2014. The documents further show that prior to this, she had held a position at SES Technologies, the Indian-based company controlled by the Guptas which had sponsored Peter Thabethe's visa to India.

Another set of emails shows that Maruti Sharma and Neema (alternately Neelima) Sharma, a married couple, were employees of Sahara Computers from at least 2012 until 2014. Maruti Sharma's CV, which appears in the #Guptaleaks, indicates that he served as the Chief Financial Officer of Sahara computers. He is also listed in at least one Excel spreadsheet as a potential employee of

ANN7, the Gupta media enterprise. He also operated a JIC email account, marutis@jic.co.za. JIC was another business in the Gupta empire.

Documents and emails from the #Guptaleaks show that Maruti Sharma was also related to Murari Lal Sharma, the Chief Executive of the South African branch of the Bank of Baroda. Emails further show that on at least one occasion, flights were paid for by the Gupta enterprise for Maruti and Murari Sharma to travel, together with the rest of their family.

In considering all the emails related to Murati Sharma, it is particularly disturbing to note a set of correspondence running from October to November 2012. The correspondence shows that Maruti and Neelima Sharma needed to extend their work visas in South Africa (both were Indian nationals) and to receive waivers from the Department of Home Affairs. For some unknown reason, there appear to have been delays in securing the waivers.

On 16 November 2012, Ashu Chawla sent an email to one boitumela.marishane@dha.gov.za with the subject "Request for a Waiver". This email address is self-evidently the address of a Department of Home Affairs employee. Attached to the email were waiver requests for three Gupta enterprise employees, Maruti and Neelima Sharma and Sandeep Dubey (the latter, incidentally, helped with logistics for the holiday of Murari Lal Sharma described above).

Copied into this email was the son of the President of South Africa at the time, Duduzane Zuma [duduzani.zuma@gmail.com]. The body of the email read:

> Dear Ms. Boitumelo,
>
> As discussed with Mr. Duduzane I am forwarding you the detail to get the waiver for 3 employees. Attached herewith please find:
>
> - Passport copy
> - Request for Waiver Letter
>
> Thanks,
> Ashu

Ms. Boitumelo responded the same day, about two and half hours later, simply saying "Dear Ashu, thank you."

It is not apparent what role Duduzane Zuma could legitimately play in relation to this issue. We believe that it is possible, indeed likely, that Duduzane Zuma's name may well have been used to secure preferential treatment from a government employee, trading on the consequences of his father's position as President.

We are not in a position to conclude whether the contacts between Baroda employees and the Gupta enterprise constituted quid pro quo agreements or criminal conduct. This needs to be established by the relevant legal authority or the Commission itself, and should be the focus of a rigorous investigation by a well-resourced authority.

However, it is highly unusual for a bank's employees to enjoy such benefits from their clients. At the very least, the failure of the Bank of Baroda to identify, report and halt suspicious payments, and in many instances the decision to assist in the creation of elaborate systems that were used to undertaken money laundering, has to be seen in a context in which Bank of Baroda employees were receiving benefits from the Gupta enterprise.

STANDARD CHARTERED AND OTHER GLOBAL BANKS

As noted above, the vast majority of funds paid to Estina by the Free State Department of Agriculture were transferred out of Estina's banking facilities and into a network of offshore companies controlled by the Gupta enterprise. These facilities were used to further launder funds and, in certain instances, recycle these funds back into South Africa.

As noted in Shadow World Investigation's submission to the Zondo Commission, documents from the #Guptaleaks reveal that by February 2014, the accounts in this banking network had been paid US$8 348 700 (around R90 million) from Estina (Pty) Ltd to Gateway Limited. One of these recipients, discussed above, was Linkway Trading, which was paid against an invoice for the costs of the Sun City wedding. Another major recipient of funds paid out through the Gupta's offshore laundromat in Dubai was Oakbay, which was paid US$3.1 million after the funds were washed through Dubai accounts. Other notable transactions included payments to Achla and Shivani Gupta, and to unknown recipients through the *hawala* system. [53]

In 2017, Standard Chartered Bank publicly confirmed that it had closed all Dubai-based bank accounts linked to the Gupta family in early 2014.[54] Banking records from the #Guptaleaks confirm that the Standard Chartered Bank accounts for Global Corporation, Gateway Limited and Fidelity Enterprises were removed from the accounting ledgers maintained by the Gupta enterprise's accountants.

However, those same ledgers indicate that in the period from 2013 to 2014, these same companies transacted frequently through accounts with the other banks listed above. Thus, while Standard Chartered could be commended for taking swift action to close these accounts, their behaviour sheds a poor light on the remaining Dubai-based banks used by the Gupta enterprise, which should arguably have followed Standard Chartered's direction.

The fact that Standard Chartered closed the accounts in 2014 also returns us to the questions that should be asked of the South African banks noted above. Standard Chartered explained their decision to close these accounts in 2014 by noting that "Standard Chartered takes its responsibility to combat financial crime very seriously." [55]

Whether this is true or not, Standard Chartered's conduct shows that it was both possible and feasible to monitor the conduct of the Gupta enterprise and take decisive action (although arguably too late) once that conduct passed a certain threshold of risk. The failure of any South African bank to do the same when it came to Estina is not only disappointing, but demands further investigation.

KPMG

KPMG was responsible for providing both auditing and tax advisory services to Linkway Trading, the South African firm that invoiced Dubai-based Accurate Investments a perfectly round R30 million for organising the extravagant Sun City wedding.[56] KPMG's Jacques Wessels was responsible for Linkway's accounts.

While both Linkway Trading and Accurate Investment were ultimately controlled by the Gupta network, there were other reasons that these transactions were plainly suspicious. For one, Linkway Trading was listed as a construction company; its foray into wedding planning was hardly typical. Moreover, from a financial point of view, this single invoice accounted for a staggering 55% of the company's revenue in 2013, and was received from a single source, a firm registered in Dubai [57] – Accurate. These were all things that would raise questions for a reasonable auditor.

The fact both firms had the same beneficial ownership should also have been a red flag to KPMG. Despite this, audit reports did not even list Accurate Investments as a "related party" to Linkway.[58] This is a remarkable oversight given that related party transactions are commonly manipulated in financial statements for the purpose of evading tax.[59]

An additional factor was how Linkway treated this money on their books. After accounting for its expenditure, the company actually sustained a R6.9 million loss on the wedding. While it originally stated this as an operating expense, Linkway changed this on their 2014 annual financial report where the loss was stated as "cost of sales", a mis-statement aimed at obtaining a tax benefit. [60]

A junior auditor at KPMG at the time voiced concerns to Wessels and other seniors at the time. These concerns were firmly ignored. The lack of objectivity of senior KPMG auditors, in comparison to the junior auditor, may be explained by the attendance of a number of senior KPMG figures at the infamous Sun City wedding – including Jacques Wessels. [61]

The impact of the changes to Linkway's accounts was neatly summarised by amaBhungane and Scorpio, who explained:

> *…the net effect of this accounting sleight-of-hand is that not only was the wedding effectively paid for from funds diverted from the Free State government's coffers; but the Guptas paid no income tax on this windfall. This income was offset against Linkway's expenses, resulting in Linkway's receiving zero taxable income from its Free State windfall.*[62]

Despite early denials of any wrongdoing, KPMG would eventually confirm that the auditor's conduct in regard to Linkway trading fell short of professional standards. Jacques

Wessels left KPMG in 2017. By the time he had departed, KPMG had failed to take any disciplinary action against him.

In 2018, four years after the conduct in question, the Independent Regulatory Board of Auditors (IRBA) finally instituted six charges against Wessels relating to improper conduct and tax evasion, all related to the audit of Linkway Trading's accounts.[63] Faced with the damning evidence, Wessels plead guilty to all the charges but in qualified form. Seeking to protect his career, he insisted that his conduct had not been deliberately dishonest or misleading. He conceded that the movement of funds into and out of Linkway Trading were, in fact, irregular, and that "he failed to evaluate the business rationale for this transaction that was outside the normal course of business to identify whether there might be fraudulent financial reporting or misappropriation of assets." [64]

Yet Wessels insisted that this was not a case of fraud and corruption covered up. Rather, at the IRBA hearing, Wessels' version was that he had been naïve and had failed to display the professional scrutiny expected of all auditors. [65]

To their credit, IRBA rejected this argument. On 28 March 2019, IRBA made a ruling striking Wessels off the auditors' roll, ordering him to pay part of IRBA's legal costs, and instructing that Wessel's name, KPMG's name, and the findings, were made fully publicly available.[66] The IRBA's detailed findings noted that Wessels displayed "egregious dishonesty" and had been an "active participant in the subterfuge". [67]

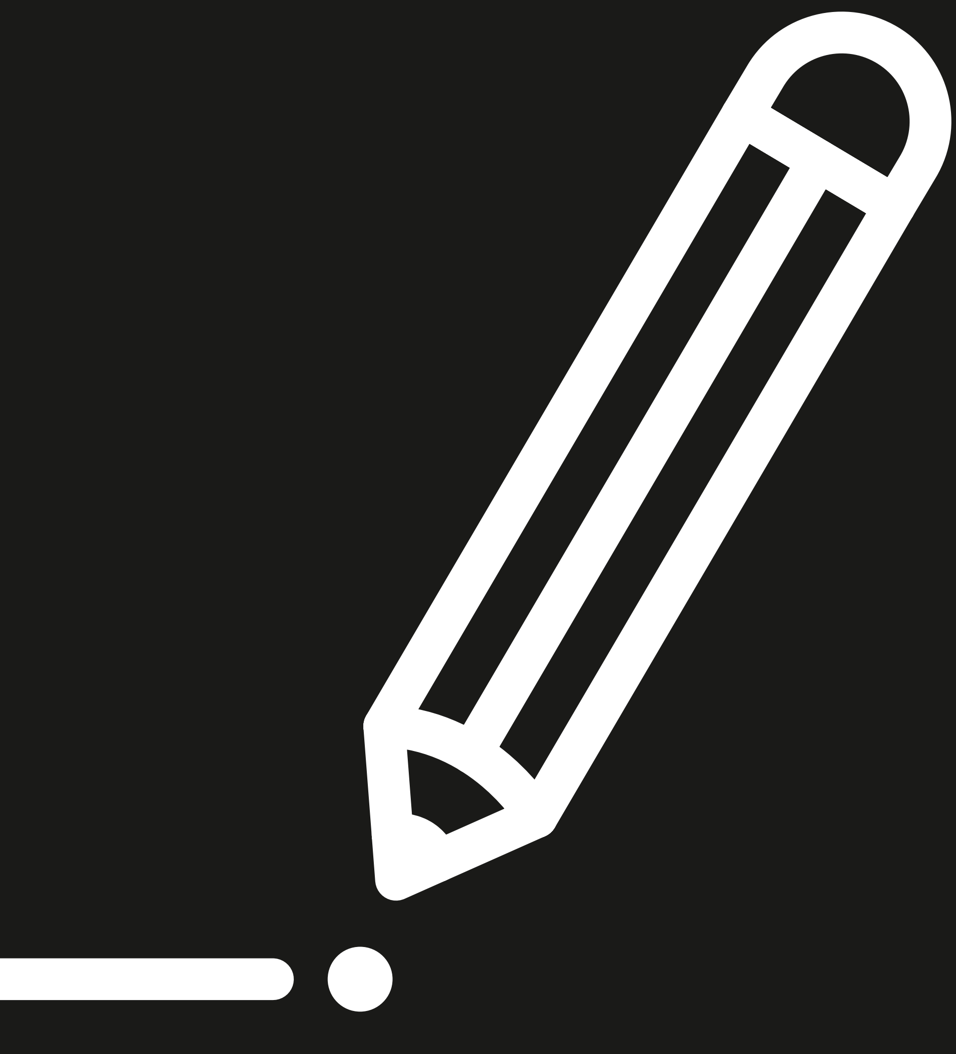
The IRBA also criticised Wesselsfor attending the Sun City wedding, finding that he had not applied his mind to the intent behind the invitation.[68] Yet it is important to recall that Wessels was not the only KPMG employee to attend the wedding. Then CEO of KPMG Africa, Moses Kgosana, attended with his wife. He was the individual who later, in a gushing email to Atul Gupta, described the wedding as the "event of the millennium". [69]

This was not the only issue that raised questions about KPMG's independence. When media reports started to accelerate in their revelations about criminality linked to the Gupta enterprise, Kgosana wrote to Atul Gupta (copying Wessels) to ask how the family intended on dealing with what he called "miscommunication" by the media.[70] One worrying interpretation of this exchange was that KPMG's Kgosana was relying on the Gupta enterprise to diffuse a situation that reflected poorly on KPMG's image.

Despite vehement denials of impropriety during this period, KPMG would eventually be exposed for playing a key enabling role in the Gupta enterprise. The IRBA ruling on Wessels highlighted that he had in fact been the auditor for a range of Gupta enterprises in the "Islandsite Group", of which Linkway was just a part.[71] The reputational consequences of KPMG's role were significant, threatening the very survival of the firm in South Africa, and leading to over a thousand people leaving the firm or being retrenched as a range of public and private clients dropped the firm.[72]

In 2018, KPMG Chairman Wiseman Nkuhlu admitted that "we know we made mistakes and we will accept responsibility, as appropriate, for our misdeeds…. In return, I would like to make an appeal to South Africa business, government and the public. An appeal for your recognition that KPMG South Africa is today a very different business to what it was 18 months ago." [73]

We should be cautious of accepting the claim that KPMG has since magically transformed, or that it was acting as a rogue company out of step with the audit industry more broadly. KPMG's failure to exercise independence and professional scrutiny to Linkway Trading's accounts is typical of an industry that has seen a steady decline in audit quality as profits from advisory services have increased.[74] The auditing industry, meanwhile, is riven with structural problems that will continue to raise major conflict-of-interest issues. It is imperative that these are confronted and tackled urgently.



RECOMENDATIONS

HOLD PRIVATE SECTOR ENABLERS TO ACCOUNT

The evidence in this report shows that the private actors that enable state capture and grand corruption are not rogues or "bad apples". Rather, the evidence shows that the role of private enterprise in state capture has been typical of how professional enablers operate around the globe with impunity.

The professional and financial service sectors have been thoroughly complicit in the looting of the South African fiscus. Banks, accountants, consultants and lawyers are not just bit-part players in these schemes. In many instances, they have assisted in designing, perfecting and implementing the illicit systems used to extract, move and hide the proceeds of corruption and other crimes. They are certainly integral to the mechanisms that launder the proceeds of crime – itself a criminal offence.

Illicitly obtained assets are useless unless they are placed, layered and integrated into the global financial system in a way that obscures their illicit origin and makes them appear legitimate.[1] The cases of Transnet, Eskom and the Estina/Vrede Dairy Project unequivocally show that many of these enablers are not unwitting participants, but that they choose to participate because the profits outweigh any costs they might face.

It is imperative that these actors are held to account for their conduct. Hard accountability is the only way to change the calculus for these firms and individuals. The Zondo Commission is in a unique position to begin this process. Now armed with detailed and overwhelming evidence, the Commission should urgently use its powers under The Commissions Act of 1947 to summon the private actors in this report to appear before it and respond to questions regarding their conduct in the cases in which they are implicated.

Each bank, accounting firm, consultancy and legal professional implicated here must publicly answer, at minimum, the following:

- **Were they knowing participants in the illicit and illegal activities in question?**
- **If not, did they satisfy the duties required by the law and their professions to stop becoming unwitting accomplices to criminal activity?**
- **Why did they not identify the obviously suspicious nature of many of the transactions sooner, and if they did, why did they not act to stop them sooner?**
- **Do they acknowledge that a reasonable and responsible professional in their position should have done more to identify the criminal intentions behind many of the transactions and deals that they facilitated?**
- **How much have they profited from these transactions, and how much of this illicit gain has been repaid, if any?**
- **What punitive action have they taken against individual executives and employees identified as being complicit in illegal activity? Further, what structural to prevent similar conduct in the future?**

While many private corporations are implicated by this report, we submit that the following crucial players and their senior executives should be summoned as a matter of priority, given the extensive evidence of their complicity:

HSBC

बैंक ऑफ़ बड़ौदा
Bank of Baroda

Standard Bank

BAIN & COMPANY

FNB

NEDBANK
MAKE THINGS HAPPEN

KPMG

McKinsey&Company

The Commission should use its powers to compel parties to submit evidence to it, as well as its powers to enter and search premises to collect evidence that remains in the hands of these actors and remains unavailable to investigators like ourselves.

Cumulatively, these steps will allow the Commission to make rigorous and effective recommendations to other law enforcement authorities regarding further legal action to be taken against these and other private actors implicated in wrongdoing.

The findings of the Commission, being non-binding, will only be a first step. The Commission must proactively share information with the National Prosecuting Authority (NPA) and other law enforcement authorities so that preparations for prosecutions, where possible, can be started. Though the particular crimes in question will vary from case to case, it is important to note that the Prevention of Organised Crime Act (POCA) not only criminalises bribery and other offences, but also money laundering. [2]

We note that the Investigative Directorate (ID) is a specialised NPA unit announced in May 2019 and led by Advocate Hermione Cronje. Its specific focus is on "serious, complex, high-profile corruption", with a particular emphasis on cases emanating from, among others, the Zondo Commission.[3] This unit is ideally placed to pursue such prosecutions.

Finally, it is crucial that this accountability does not begin and end with fines. Global evidence suggests that the large banks and other corporations discussed here are able to absorb fines as a cost of doing business. Authorities must pursue cases of criminal accountability against executives and employees where possible. We note that South African law, through the Criminal Procedure Act, allows personal criminal liability for individual directors in charge of firms that have committed criminal acts.[4] Personal liability would send a strong message to those who enable looting that their role will not go unpunished, an essential first step in building in deterrence for this kind of complicity.

CHANGE THE NARRATIVE

As much as private actors escape legal accountability for their complicity in serious economic and financial crimes, they are also able to avoid public scrutiny as a result of the ways in which state capture is examined and understood. These corporations dedicate significant resources to burnishing their images, and to ensuring that the public's gaze remains on the state. When they have appeared before the Zondo Commission, it has been to bemoan political interference, not to answer hard questions.

South Africa's public discourse, like many places across the world, places most of its emphasis on how state capture and grand corruption should be understood as the exclusive domains of state and public sector institutions. It is clear that it is vitally important to dissect the failures and weaknesses of public institutions and failures of governance in order to diagnose state capture and rebuild a more resilient state.

> **But any analysis of state capture is fundamentally incomplete if it excludes the role of South African and international private corporations that have been both enablers and active participants in corruption. Such an understanding would not only be incomplete, but would run the risk of obscuring the systemic features of the "legitimate" economy that facilitate and thrive on criminality.**

The fact remains that those who stole hundreds of millions of rand from poor farmers in the Free State, or who extracted billions in kickbacks from corrupt procurement deals, did not only need to capture a minister and corrupt a provincial government department. They needed South African and global banks to move their money. They needed company formation agents to set up shell companies for them around the world. They needed an accountant to sign everything off as "business expenses". They had no trouble finding these participants.

Laundering money for criminals and the corrupt has become big business. Money laundering is now estimated to be a US$2 trillion global industry. [5] The bankers, accountants and lawyers that construct this system profit at every stage. That is why they continue to build and protect a global economy based on secrecy and the absence of rules and controls while pushing back hard against efforts to bring about accountability and transparency in global finance.

This report is an attempt to challenge the public discourse that minimises or ignores the role of the private sector in state capture. While it draws on predominantly public sources, illustrating that journalists and others have tackled these important actors, it is an attempt to consolidate the current evidence in such a way as to drive home the systemic and extensive nature of the collaboration of private actors. We hope that it will be a first step in challenging the silences in the narrative on state capture.

Yet the Zondo Commission is in a unique position to contribute to shifting this narrative. This Commission is not just a fact-finding process. It is also a discursive project that, through choosing what to include and exclude from its findings and recommendations, will make some issues visible and obscure others.[6] If it fails to confront the complicity of the corporations implicated in this report and elsewhere, it risks obscuring the central role of these actors in the grand corruption of this epoch.

"State capture" and the role of private corporations in deep state networks is nothing new in South Africa. The criminal apartheid state relied on global networks of powerful and wealthy corporations to fund and facilitate its crimes. It remains a glaring omission of South Africa's transition that it did not uncover these actors, nor hold them accountable. This failure is one reason that such networks were able to morph and continue operating in the shadows in South Africa's democratic state.

The Zondo Commission is thus an important part of efforts to pursue accountability and restitution for those responsible for crimes that have had a crippling impact on the country. It offers a unique opportunity to uncover the networks of the powerful that have long enjoyed impunity for their crimes. To take this opportunity, the Commission must move the private enablers of state capture from the margins to the centre of its analysis.

REFORM THE LAW

The ease with which criminal actors, whether in the public or private sector, can move, hide and then benefit from the proceeds of their crimes is deeply concerning. In the first sections of this report, we set out why this is the case, highlighting in particular how the lines between licit and illicit activity have become blurred in the global economy. It has become easier to set up anonymous corporate entities, move money with speed, and simulate legitimate transfers in order to shift assets across different jurisdictions. This report is evidence that a lucrative industry has developed that is dedicated to maintaining this global financial order.

This system of secrecy and lax regulation is an integral part of a "rentier capitalism"[7] that has eroded democracies and contributed to soaring inequality while the wealthiest corporations and individuals hide their wealth and evade the rule of law. What this report shows is that this system is also the beating heart of the criminal economy. The legal framework intended to regulate the worst excesses of this system have lagged behind, leaving gaping holes in society's ability to hold corporations to account.

While this report is not intended to be a full exploration of the required law reform to address these deficiencies in regulation, the evidence presented here raises several priorities for legal reform on both the domestic and international stage.

In terms of domestic law, there are systemic weaknesses in South Africa's legal framework regarding public knowledge of beneficial ownership of corporations. In all of the case studies discussed in this report, it was not only foreign jurisdictions that were utilised to set up shell companies. Many of them were registered in terms of South African law by dedicated company formation agents such as Legal Frontiers – the company that sold BEX to Salim Essa. Bex was used to receive kickbacks in the Transnet CNR deal.

In 2015, when BEX was operating, a review of South Africa's AML framework by Transparency International revealed that the deficiencies in terms of beneficial ownership were systemic and serious.[8] At the time, there was not even a legal definition of beneficial ownership in South Africa, let alone a public registry where beneficial ownership could be checked.[9] While some of these issues have been addressed subsequently (there is now at least a definition of beneficial ownership in South African law), there remain gaping holes in the ways in which beneficial ownership transparency is regulated in South Africa. The manner in which corrupt networks have utilised front companies extensively to profit from corruption linked to state capture is testament to this. BEX is only one example.

The most important steps taken regarding beneficial ownership were contained in the Financial Intelligence Centre Amendment Act 1 of 2017, which introduced a definition of "beneficial ownership". [10] Section 21 of the Act now also requires "accountable institutions" (this includes attorneys, banks, and a range of other financial institutions)[11] to establish, *inter alia*, the nature of their client's business and the ownership and control structures of that business.[12] These are important developments, but several problems remain.

The obvious one is that this information is not accessible to the public. There is no public open registry for beneficial ownership.[13] Rather, this requires financial institutions, lawyers and accountants to undertake investigations, and to use that information to guard against facilitating illicit or illegal transactions. Yet the evidence in this submission, together with the evidence before the Commission from other witnesses, shows that these institutions are systemically failing to do this.

This submission has also shown that, in many cases, these institutions are conflicted in performing these duties, torn between their duties to the law and the needs of their clients. It is problematic that these private entities are being asked to be both referee and player – in a game that takes place behind closed doors.

The failure of South Africa's financial institutions and professional bodies to prevent grand corruption has meant that investigative journalists and activists have been solely responsible for pursuing transparency and accountability. To enable this kind of work, and to empower ordinary citizens to exercise their own rights to access vital information, it is essential that South Africa begins the process of creating a publicly accessible register of beneficial ownership of private companies. Currently, the CIPC (Companies and Intellectual Properties Commission) does require private companies to provide annual returns, but they are not publicly accessible, nor do they contain beneficial ownership information. [14]

Given the extensive evidence of the abuse of corporate vehicles for the purposes of fraud and corruption, there is an urgent need for greater corporate transparency. Since 2016, various civil society groups have made recommendations to include provisions for a publicly accessible beneficial ownership register in amendments to the Companies Amendment Bill. [15]

Unfortunately, the latest draft did not include these recommendations. This is despite the global trend, including in Kenya, Ghana and Nigeria, towards including beneficial ownership transparency as an essential tool in fighting corruption and corporate crimes.[16]

The Commission should highlight the urgent need to make these reforms and entrench transparency so as to give citizens the tools to monitor and identify criminality early.

There is equal urgency in the need to reform global legal frameworks related to money laundering, and to ensure enhanced enforcement of the existing rules. The jurisdictions central to the stories in this report – places like Hong Kong, Dubai and the UK's British Virgin Islands – are just some of the secrecy jurisdictions around the world that have made the choice to profit from financial services that are used to facilitate and hide criminality and other abuses in other parts of the world.

It is predominantly wealthy countries that facilitate these abuses, and they enjoy net inflows of resources and capital from poor countries reminiscent of colonial extraction. Yet they are lethargic and disinterested when it comes to reforming the system and stopping the diversion of ill-gotten gains into their financial systems.

Whether it is systemic tax evasion or the laundering of the proceeds of corruption and theft, the consequences of this offshore world are most keenly felt in poor and developing countries. The fact that South African authorities cannot find billions in stolen assets today because they are stashed offshore is testament to this.

It is thus the responsibility of the South African state to lead attempts to bring greater transparency and accountability to the global financial system. The process of recovering stolen funds is an ideal starting point for a concerted diplomatic campaign to address the scourge of secrecy jurisdictions, tax havens, money laundering and illicit financial flows. This in turn is essential to building a more just and equitable global economy.

PAY BACK THE MONEY

It is inevitably difficult to estimate the true cost of the contemporary era of state capture. One estimate, which takes into account ballooning debt, slowed growth, direct losses to corruption and kickbacks, as well as lost tax revenue, suggests that South Africa may have lost up to R1,5 trillion between 2014 and 2019, during Jacob Zuma's second administration.[17] Of course, the costs of state capture are not just monetary. There are equally important costs in the erosion of important institutions, as well as the destruction of public trust in public and private institutions alike. Perhaps most devastating are the very real and ultimately incalculable human costs of lost opportunities and corroded public services.

The causes and reasons for poverty, unemployment and inequality are many and complex, but what is undeniable is that over the last decade, South Africa has witnessed an increase in all these evils. While billions were moved through complex money-laundering systems in Hong Kong and Dubai (with the help of highly paid bankers, accountants, consultants and lawyers), millions more South Africans were added to the official poverty statistics.[18] One of the reasons for this is that up to 2.5 million job opportunities were lost between 2007 and 2017.[19] In this context, it is no surprise that South Africa's income inequality remains appalling: ten per cent of South Africans own around ninety per cent of all the country's assets.[20] The corporate executives at the big banks and other corporations implicated in this report belong to the ten per cent.

The corporations implicated in contemporary state capture are jointly responsible for many of these costs and consequences. But it would be difficult to discern this from their responses, which have followed an almost identical pattern to allegations against them. These responses have been guided by concerns for their own PR rather than the consequences of their actions (or the resulting human suffering). This has meant a familiar pattern of making strong denials of any wrongdoing when a story first breaks. When the truth of the allegations is beyond doubt, meek apologies are then offered. When their conduct has been particularly egregious, they may offer to repay the fees they earned, following which these companies proclaim to have "transformed" and learnt from their past transgressions.

There are several examples of this. McKinsey first denied that it had ever worked with Trillian or Regiments on their Eskom and Transnet contracts. Later, the firm admitted that they had failed to perform adequate due diligence on these contracts and agreed to pay back nearly R1 billion to Eskom. They kept the interest on the sum. In 2017, KPMG executives maintained that there had been no ethical breaches by the firm related to the Gupta accounts. By the end of 2018, KPMG was pleading to the South African public that they were a "new firm" and should not be judged on their unethical conduct in the immediate past. Bain & Co eventually repaid the millions in fees that it earned to co-operate in the destruction of SARS – but has not acknowledged that this pales in comparison with the R100 billion in lost tax revenue for which it is jointly responsible.

The large South African banks all appeared at the Zondo Commission in September 2018 to tell them how they closed accounts in 2016 due to money-laundering fears. They have made no effort to explain how they missed nearly a decade of red flags before this.

All of these corporations, and the others discussed in this report, have yet to account for their role in the looting of the South African state and the attendant human costs for South Africa's poorest citizens. As a first step, these firms and their leaders should offer a full and frank account of their role in state capture. Moreover, beyond criminal and civil accountability for specific legal violations and any associated fines, it is incumbent on them to pay back any and all fees, with full interest, obtained from illegal and illicit contracts.

These repayments will add to the asset forfeiture efforts by the Special Investigative Unit (SIU) and the NPA. The efforts to recoup funds particularly linked to corrupt contracts with SOEs is well underway. Over R2 billion has been recovered already.[21] Yet there are billions more that asset forfeiture agents are struggling to trace. For example, nearly R600 million paid to Trillian by Eskom as part of an allegedly illegal deal is said to have "disappeared". [22]

A recent investigation by the OCCRP reveals why this is the case. It shows Trillian used an elaborate mechanism to pay on these funds to a series of shell companies in South Africa.[23] These shell companies usually shared a physical address, directors and had no discernible business activities, yet received hundreds of millions of rands from deals linked to various SOEs. While this should have raised suspicions, Standard Bank, FNB and ABSA (among other local and international banks) all provided the banking facilities necessary for these transactions and the front companies involved.[24] The money would eventually travel offshore, through notorious tax havens like Bermuda, and ultimately to India and Dubai. As with all of the case studies in this report, the banks and, and the law firm (Stein Scop attorneys) that housed this money-laundering architecture, were complicit in helping the Gupta network make this money "disappear" beyond the reach of South African authorities.

In the context of this depth of complicity and failure to fulfill their legal duties, the repayment of fees from illicit dealings is not enough. As well as repayments, all the implicated corporations should contribute money towards a fund that can be mobilised to assist social movements and civil society as they work towards addressing the costs of grand corruption and building a more transparent, accountable and responsive state and private sector. Importantly, these corporations should not be able to pick and choose where this money goes, nor pay for specific programmes of their choice that can be utilised to whitewash reputations. Such a fund could, for example, pay for an extensive review of South Africa's AML framework to make it tougher and more effective.

Such payments should be significant. Corporate executives, especially those who led companies at the coalface of corruption and state capture, should forgo their bonuses, freeing up money for a project of this nature. While the people in suits will no doubt balk at the suggestion, it would be one small way of ensuring that the elites who profited from corruption face consequences for their actions.

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RECOMMENDATIONS

1: Financial Action Task Force (FATF), *Laundering the Proceeds of Corruption*, July 2011, 6.
2: Prevention of Organised Crime Act 121 of 1998.
3: Rebecca Davis, "Shamila Batohi: 'The state of the NPA is much worse than expected'", *Daily Maverick*, 28 June 2019. https://www.dailymaverick.co.za/article/2019-06-28-shamila-batohi-the-state-of-the-npa-is-much-worse-than-expected/ [accessed 19 September 2019].
4: Section 332(5) of the Criminal Procedure Act holds the following: "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart there from, and shall on conviction be personally liable to punishment therefore".
5: Alan Katz, "The Cost of Dirty Money", *Bloomberg*, 28 January 2019.
6: Zunaida Miller, "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice", *International Journal of Transitional Justice* 2, no. 3 (October 2008): 266–91.
7: Martin Wolf, "Why rigged capitalism is damaging liberal democracy", *Financial Times*, 18 September 2019
8: Transparency International, "South Africa – Beneficial Ownership Transparency", *Country Report*, 2015.
9: Ibid.
10: The definition, per s1 of the Financial Intelligence Centre Act 38 of 2001, is as follows: beneficial ownership "in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly, –(a) owns the legal person; or (b) exercises effective control of the legal person."
11: See Schedule 1 of the Financial Intelligence Centre Act 38 of 2001.
12: Section 21 of the Financial Intelligence Centre Act 38 of 2001; quoted in Nkateko Mkhwashu, "Identifying the beneficial owner", De Rebus in 2017 (Oct): 22.
13: Andrew McGregor, "Advocacy: A call for disclosure for beneficial owners", *AmaBhungane*, 20 February 2019. https://amabhungane.org/advocacy/advocacy-a-call-for-disclosure-of-beneficial-owners/ [accessed 12 June 2019].
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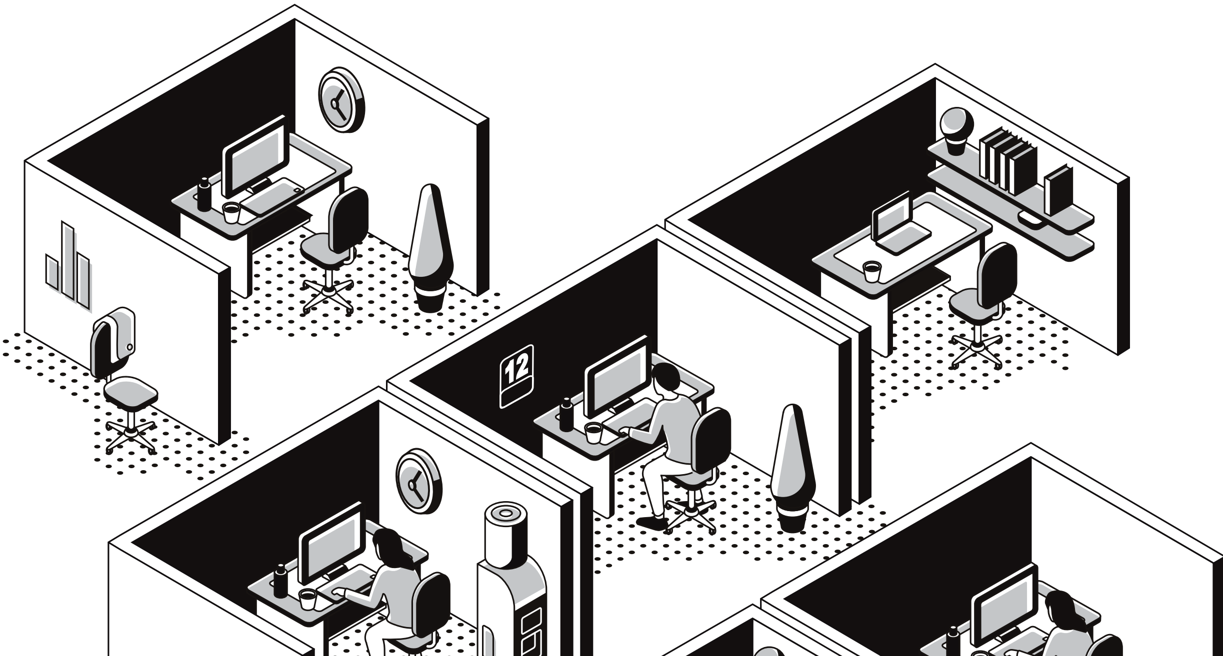
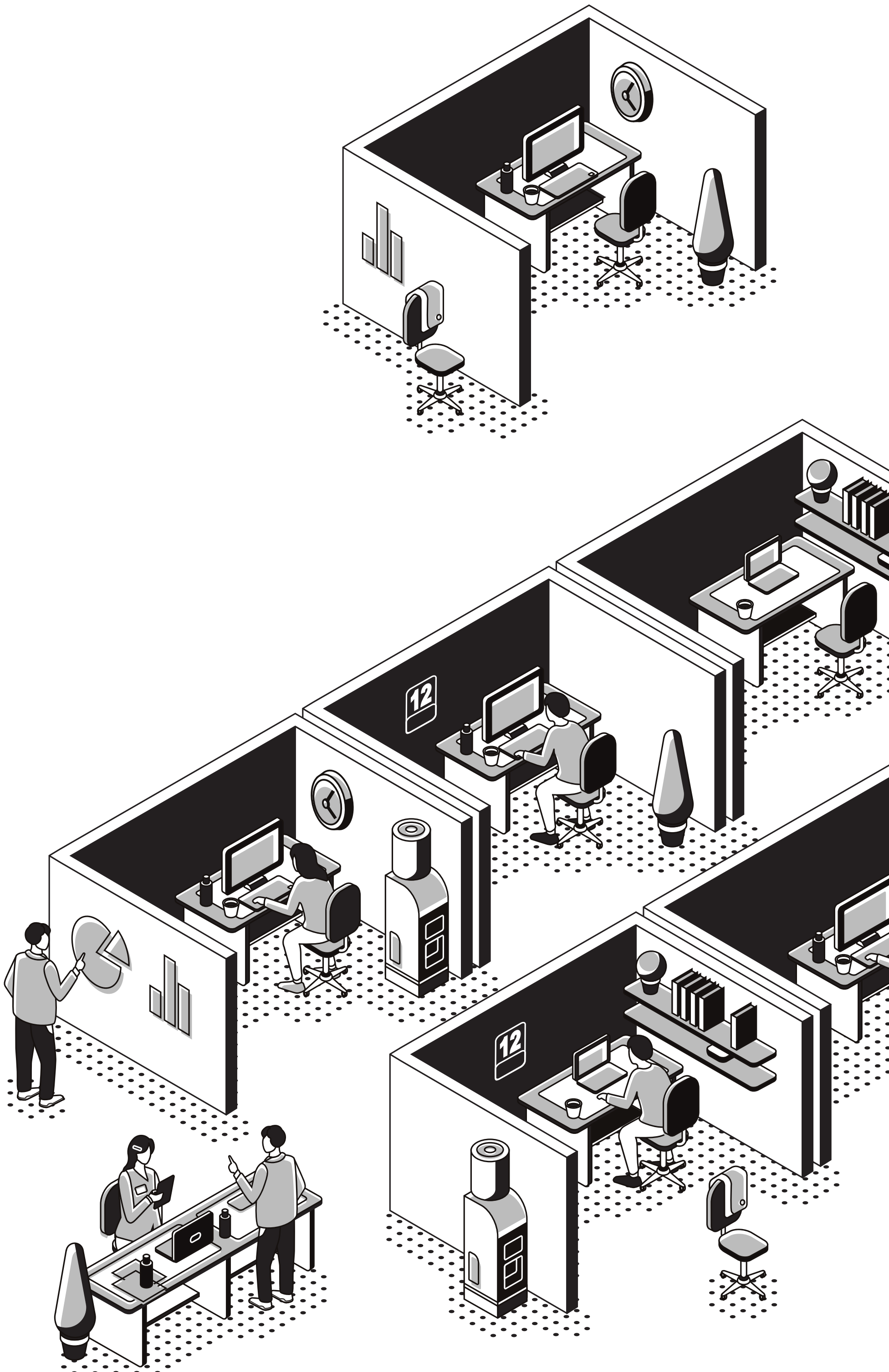
18: *The Corporations and Economic Crime Report*, Volume 1: The Bankers, *Open Secrets* (2018).
19: This broad estimate is obtained from calculating the job opportunities that would likely have been created had South Africa kept pace with other emerging market economies.
20: Anna Orthofer, "Wealth Inequality in South Africa: Evidence from Survey and Tax Data", Redi3x3 Working Paper 5, June 2016.
21: Iavan Pijoos, "State capture rot is deep, says Gordhan – but R2,1 billion has been recovered so far", *The Sowetan*, 21 August 2019. https://www.sowetanlive.co.za/news/south-africa/2019-08-21-state-capture-rot-is-deep-says-gordhan-but-r21bn-has-been-recovered-so-far/ [accessed 27 August 2019].
22: Karyn Maughan, "Eskom's R595m paid to Trillian 'can't be found'", *Sunday Times*, 24 May 2018.
23: Khadija Sharife and Marc Anderson, "Down the Gupta's financial rabbit hole", OCCRP, 18 September 2019. https://www.occrp.org/en/investigations/down-the-guptas-financial-rabbit-hole [accessed 19 September 2019].
24: Ibid.

Any analysis of state capture is fundamentally incomplete if it excludes the role of South African and international private corporations that have been both enablers and active participants in corruption. Such an understanding would not only be incomplete, but would run the risk of obscuring the systemic features of the "legitimate" economy that facilitate and thrive on criminality.

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