



**Evidence for the People's Tribunal on Economic Crime
(03-07February 2018)**

**3. State Capture:
The case of Denel and VR Laser**

**Drafted by:
The Public Affairs Research Institute (PARI)**

January 2018

Introduction

1. This submission presents arguments on contemporary State capture in South Africa with a specific focus on the arms sector. In particular, we examine the irregular and corrupt activities that have occurred in recent times at Denel, a State-Owned Enterprise (SOE) that operates in the military industry and the global arms-trade. We contend that these activities are in direct violation of South African and international law and therefore warrant due criminal prosecution.
2. We argue that this case is a continuation of a tradition of corruption historically characteristic in government in South Africa both from the Apartheid and Democratic era administrations. In particular, this case fits squarely within the phenomenon of State capture which encapsulates seizure of control of State administration by private corporate networks to benefit their private interests, at the expense of the general public. In State capture, operations of government ordinarily decided within structures of the State are being directed by privately constituted networks who are not accountable to the public as prescribed by South African administrative and constitutional laws.¹
3. We commence this submission with a background to this case and a brief account of the political conditions that have facilitated the corruption in Denel. We argue that the Denel case is not an isolated case of corruption, but a significant component of a string of attempts to reconfigure State institutions away from their publicly mandated functions, to benefit a network of powerful oligarchs. This network, currently masterminded by the Gupta brothers (as will be elaborated upon further below) has collaborated with select elite government officials, with Jacob Zuma at the helm, in order to facilitate a “shadow state”². In “the shadow state”, the two actors are symbiotically connected to simultaneously enrich private businesses of the oligarchs while strengthening the political power of government elites.
4. Finally, we provide a chronological account of the important events relating to this case and we duly present to this tribunal pertinent legal issues arising as a result of these events.

State-owned Enterprises

5. There are varying definitions of SOEs worldwide because in different contexts they serve different functions. In South Africa, SOEs have historically had a number of differing functions and purposes.

¹ The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017

² The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017

6. The Public Finance Management Act (PFMA) promulgated in 1999³ established the term “national government business enterprise’. In terms of section 1 of the Act, a national government business enterprise is an entity which:
- (a) is a juristic person under the ownership control of the national executive;*
 - (b) has been assigned financial and operational authority to carry on a business activity;*
 - (c) as its principal business, provides goods or services in accordance with ordinary business principles; and*
 - (d) is financed fully or substantially from sources other than*
 - (i) the National Revenue Fund; or*
 - (ii) by way of a tax, levy or other statutory money governs the conduct of SOE’s. There is no definition that is provided for an SOE but Schedule 2 and 3 of the PFMA lists all the companies that are considered by the PFMA to be an SOE.*
7. All national government business enterprises are by definition national public entities as indicated in the PFMA.⁴
8. In terms of the South African Companies Act,⁵ a “state-owned company” is defined in section 1 of the Act as:
- ... an enterprise that is registered in terms of this Act as a company, and either*
- (a) is listed as a public entity in schedule 2 or 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or*
 - (b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph (a).”*
9. According to the Companies Act, state-owned companies fall within the ambit of the PFMA, thus they have to comply with additional provisions over and above those in the Companies Act.
10. Under Apartheid, SOEs were initially focused on providing a substitution for importing services and therefore aimed to maintain self-sufficiency. At a later stage, SOEs began to have a more explicit developmental agenda that aimed to protect the Afrikaner business class. The Armaments Corporation of South Africa (Armcor), which is currently the procurement agency dedicated to the Department of Defence (DOD), was during the Apartheid period a very successful State-owned exporter of

³ The Act became effective on 1 April 2000

⁴ PWC, *State-owned companies: The new Companies Act, PFMA and King III in perspective*, August 2012.

⁵ Companies Act, No. 71 of 2008 as amended by the Companies Amendment Act, 2011; read with the Companies Regulations, 2011.

arms. Armscor was, however, deeply entrenched in sustaining the Apartheid State through the clandestine and illicit trade of arms during the 1970's when an arms trade embargo was placed on South Africa.⁶

11. Under Apartheid, SOEs in South Africa were the largest contributors to the country's GDP, outside of the Soviet bloc⁷. This illustrates the centrality SOEs played in the South African State. SOEs in the democratic context have as much significance as they had under Apartheid. The distinguishing factor of SOEs in democratic South Africa, however, is their profits and benefits are meant to accrue to all South African citizens and not just a few in society. Further, their operations are subject to regulations enshrined in the Constitution and later the PFMA.
12. The prominence of SOEs in South Africa currently is illustrated by their line of governance. SOEs are currently not under the authority of line departments under which they operate. For example, Eskom which is the largest power producer in the country, is not under the leadership of the Minister of Energy and Denel is not under the administration and leadership of the Minister of Defence. These SOEs are all under the leadership of a governmental department dedicated to SOEs which is called the Department of Public Enterprises (DPE) led by the Minister of that department.
13. SOEs are strategically important for infrastructure development. There are peripheral industries that develop around SOE's that stimulate and diversify economic activity driven by supply to, or cooperating with the SOE. Further, SOEs in South Africa provide key services like electricity and transport.
14. SOEs function in the current context as a tangible representation of the developmental state which intervenes in economic development in key areas to generate and maintain economic growth. The infrastructure projects and the related procurement initiatives directed by SOEs, aim to reduce the reliance on exporting industries which allows for internal economic exchange through the development of peripheral industries⁸.
15. Recently, however, four major SOEs with the largest budgets; Eskom, Transnet, South African Airways (SAA) and Denel have all come under scrutiny for alleged gross mismanagement and for being central to the project of State capture.

⁶ Open Secrets. Declassified: Apartheid Profits inside the arms money machine. News 24 online. 6 September 2017. <https://www.news24.com/Opinions/declassified-apartheid-profits-inside-the-arms-money-machine-20170905>. See also Apartheid, Guns and Money: A Tale of Profit" by Hennie van Vuuren

⁷ D Fourie. *The role of Public Sector Enterprises in the South African Economy*. African Journal of Public Affairs. Vol 7 no 1. March 2014

⁸ D Fourie. *The role of Public Sector Enterprises in the South African Economy*. African Journal of Public Affairs. Vol 7 no 1. March 2014

The Current Political Environment

16. SOEs in recent years, have been a dominant feature in the public discourse as being identifiable sites for the failure of governance, the mismanagement of State institutions, corruption and most recently, State capture. In May 2017 a collaboration by a group of researchers from different institutions released a report titled *The Betrayal of the Promise: How South Africa is being stolen*, (*'Betrayal of the Promise'*). This report is annexed hereto and marked as "SC1". The objective of this report was to conduct a comprehensive study on the widely reported on issue of State capture. *Betrayal of the Promise* underscores a vast number of events and issues that have served to create the political conditions conducive for State capture to thrive. The report presents pertinent issues relevant to this case as context to comprehensively grasp the elements of State capture in the Denel case.
17. *Betrayal of the Promise* correctly diagnose State capture as more than incidental corruption, but as a network of a broader political project. This distinction is important to determine the gravity, sophistication and cost of State capture, and to establish a link between current oligarchy and similar cases that scandalised previous governments in South Africa. State capture requires not only that perpetrators of corruption be criminally prosecuted, but requires a systemic cleansing of public institutions to rid them of the rot and to strengthen them against similar violations in the future.
18. According to *Betrayal of the Promise*, the election of Jacob Zuma as President of the African National Congress (ANC) at its elective conference in 2007 in Polokwane, was a significant political moment in the prevailing political environment in South Africa.⁹ The ANC elective in Polokwane rejected former President, Thabo Mbeki's pro-economy administration and resented his corporate friendly approach to the economy which factions in the ANC and the broader alliance viewed as anti-nationalism, calling for increased State interventions in the economy.
19. Black Economic Empowerment (BEE)¹⁰ regulations instituted by the Mbeki administration, aimed to provide black businesses with access to opportunities in the economy. Theoretically, BEE is an affirmative action mechanism intended to transform participation and control of the South African economy from predominantly white actors to a dynamic that reflected the aspirations of a new South Africa. In operation, BEE regulations required white-owned businesses to have a representation of black people in ownership structures of their business. BEE compliance provided some positive spin offs for companies. However, those not tethered to real transformation of the economy in South Africa manipulated the requisites of BEE by using black people in businesses as fronts for deals that gave the impression that the economy was being transformed when it was not. The result of the BEE framework was the

⁹ The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017

¹⁰ Black Economic Empowerment is a legislative framework that establishing codes of good practices for businesses. Under the BEE, companies are given rewards for fulfilling targets set out by the act. Among these are the presence of black people in the ownership structures of companies

emergence of a small black business elite while white people remained largely in control of the private sector.

20. President Zuma's election victory was essentially a repudiation of policies that were directed by Mbeki to create a small black elite while the economy remained inaccessible to most black South Africans. The State, under President Zuma, was meant to have a greater influence on the economy and to be a driver of development for greater access into the economy. The centrality of SOEs as a political factor emerges under the rise to power of Jacob Zuma. He garnered support from those on the left of the political spectrum in the ANC and alliance partners, South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU), to diverge from what was viewed as the hyper-neoliberalisation of the State under Mbeki.
21. The most prominent narrative to emerge from the above political tension is the idea of radical economic transformation. Radical economic transformation sought not to gain access to the private sector already controlled by white people, but rather to use the power of the State through the enormous procurement budgets of the major SOEs to give preference to black businesses. This was done in order to create an emergent black business class not reliant on favours from white businesses. However, as noted in the *Betrayal of the Promise*, there are some issues that emerge in relation to this.
22. Public procurement in South Africa is not only statutorily conceived but is enshrined in the Constitution. The section of the Constitution that deals with public procurement is important because it reveals the tension between the political conviction to generate a black business class on the strength of the large procurement budgets of SOEs through giving preferential treatment on the one hand, and the guidelines set out in the Constitution that demand efficiency with public funds on the other. Section 217 of the Constitution states that:
 - (1) *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
 - (2) *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—*
 - (a) *categories of preference in the allocation of contracts; and*
 - (b) *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*¹¹
23. Read together, these provisions are not easily reconciled. The Constitution seems to not anticipate any tension between the demand for procurement to be "fair, equitable, transparent, competitive and cost-effective" and the necessity of

¹¹ Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

preferential treatment for disenfranchised businesses. There exists a subtle but very significant tension between the demand to use state money prudently in procurement and giving preferential treatment for historically disadvantaged people. This tension is created because of the historical imbalances that were nurtured under Apartheid and its systemic discrimination against black people in favour of whites. This discrimination effectively precludes black people from economically competing with their white counterparts. It would thus be ahistorical to demand from black businesses, competitive prices for their products.

24. The conflict between the urgent need to progressively pursue measures of transformation and constitutional demands for efficient public procurement procedures becomes a source of contention in South Africa. One such tension as illustrated in *Betrayal of the Promise* is the divergent views that at one time existed between Treasury and the Department of Trade and Industry (DTI), in terms of aligning BEE with state procurement policies. Treasury had emphasised efficiency and cost-effectiveness while DTI argued that more weight ought to be given to racial transformation in the consideration of awarding government and SOE tenders. The *Betrayal of the Promise* sets out numerous of these tensions within the ANC and the State. The report places the opposing views in two distinct camps where one group is referred to as the 'Constitutional Reformers', while the other camp is referred to as the 'Radical Reformers.' Constitutional Reformers sought to transform economic relations as regards race, within the framework of the law and the Constitution. The Radical Reformers, by contrast, placed the highest moral importance on racially transforming the economy even if at times this would be in conflict with the current constitutional and legal framework.
25. The Constitution is viewed by the radical economic transformation camp who support Zuma and his allies as obstructive to economic transformation. There are various instances detailed in the *Betrayal of the Promise* which suggest that the Zuma camp view that radical economic transformation as a question of morality which warrants political intervention and direction. Thus what emerges is a moral and political conviction to pursue the aim of transformation even if such pursuit is at odds with Constitutional demands. It is within this context that corrupt networks are able to flourish. The genuine and real need for the racial transformation of economic relations in South Africa is used as a platform for corrupt practices and the looting of the State by corrupt networks. State capture is birthed from this conviction according to PARI.
26. There is now an actual political strategy that targets the procurement budgets of SOEs by giving preferential treatment to black owned businesses as a way of creating a black industrialist class. This, however, becomes a convenient trope under which self-enriching and opportunistic networks have hijacked functions of SOEs for their own benefit. In other words, there emerges a political grounding to transcend the Constitution and to flout the rule of law and established regulations to repurpose State institutions to benefit a corrupt and opportunistic network.

The Gupta business network

27. The Gupta family at the centre of State capture in South Africa consists of three brothers; Rajesh Kumar (also known as Tony), Atul and Ajay Gupta.¹² The Guptas have been central figures in discussions of corruption at SOEs and State capture generally, mostly as beneficiaries of the project. They are the subject of a great proportion of media reporting in South Africa as well as several books. The Guptas importance with regards to the case at hand is the seemingly unsubstantiated influence in decisions at Denel. Moreover, the Gupta's are important because of their connection to VR Laser, the company whose subsidiary VR Laser Asia was attempting to enter into a joint venture with Denel to sell arms in the highly competitive and lucrative Asia-pacific defence market. The joint venture between VR Laser Asia and Denel (Denel Asia) and the related issues are the most important aspects of this case.
28. VR Laser had three directors, one was the son of one of the Guptas named Kamal Singhala and another was Salim Essa. Salim Essa is a close business associate of the Guptas and has been implicated in numerous irregular deals in other SOEs. Essa was identified as the sole director of VR Laser Asia. Due to their centrality to this case, a brief description of the Guptas is worth providing.
29. The Guptas are originally from India, immigrating to South Africa in the mid 1990's in order to look for business opportunities. The first business they owned in South Africa was a shoe shop in Killarney Mall in the North of Johannesburg. Their rise from low-level, middle-class businessmen to a business and political dynasty in South Africa has been meteoric.¹³ The Gupta business empire spans across sectors, including but not limited to, the media; IT, mining; and logistics. In a relatively short space of time the Gupta's have managed to amass a huge fortune largely through securing lucrative contracts from major SOEs and other government institutions. The Guptas seem to have excessive influence in powerful political circles due to, it is believed, their close relationship with President Jacob Zuma through his son Duduzane Zuma, who is a director at numerous companies owned by the Guptas.
30. Prior to 2013, there had been a number of media reports that detailed Zuma's close relationship with the Gupta's and some of the controversial business dealings of the family. However, it was not until the family was given permission to land an aircraft at Waterkloof air force base for a family member's wedding, that the Gupta family became a household name in South Africa whose name elicited public interest and scrutiny.
31. Waterkloof is a military base and an official national key point. As such, any loss, damage or disruption thereat is considered a threat to the Republic¹⁴. The permission given to the Gupta family to land an aircraft at that location, for the purposes of something as trivial as transporting guests to a wedding celebration of the Gupta

¹² Hereafter the three brothers will be referred to collectively as the Gupta's, unless one of them are specifically mentioned, in which case they will be referred to with their first name and surname in full.

¹³ Staff reporter. The Beginners' Guide to the Guptas. Mail and Guardian online. 7 May 2013.

<https://mg.co.za/article/2013-05-07-the-beginners-guide-to-the-guptas>

¹⁴ NATIONAL KEY POINTS ACT 102 OF 1980

brothers' niece, generated a media frenzy and vociferous public indignation. The public outrage was largely based on the fact that this event was considered as flouting national sovereignty. In a press conference that discussed the findings of a report on the incident, Minister in the Presidency, Jeff Radebe, said that it had "done immense reputational damage for South Africa." He also added that "the air force landing of the chartered commercial flight was a direct result of "manipulation of processes"¹⁵. The Waterkloof issue brought the Gupta's sharply into the focus of the public eye because of the power they are believed to wield to be able to pressure governmental officials to breach protocols and regulations so spectacularly. Since, the Guptas have featured predominantly into allegations of corruption with governmental structures, especially SOEs.

32. In October 2016, the constitutionally mandated independent office of the Public Protector, charged with administrative oversight of affairs of the State, released a report called 'State of Capture'.¹⁶ The report was in relation to "an investigation into alleged improper and unethical conduct by the President and other State functionaries relating to improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-owned Enterprises resulting in improper and possibly corrupt award of State contracts and benefits to the Gupta family businesses."¹⁷ The Public Protector's report marked the first independent and significant probe into State capture.
33. The State of Capture report revealed among other things, a close interaction between the President, the Guptas and high level executives who were based at Eskom at particular crucial time-periods. The report found for example, that Brian Molefe, the CEO of Eskom at the time, was in close proximity of the Gupta's Saxonwold residence in the north of Johannesburg and made forty four phone calls to the phone of Ajay Gupta and received fourteen calls from him between the 2nd August 2015 and 22nd March 2016. This was a significant revelation because it placed Brian Molefe in constant contact with the Guptas around the period when Tegeta, a Gupta-owned company, was attempting to and did acquire Optimum Coal mine. The Tegeta acquisition of Optimum mine is important in the series of events but they are numerous and convoluted. Some of the important events around the Gupta's acquisition of Optimum Mine are worth noting in brief to explain why the evidence gathered by the State of Capture report was persuasive evidence of the excessive and undue presence of the Guptas in Eskom to orchestrate events for their own benefit.
34. At the end of March 2015, the Eskom Board Chairperson at the time, Zola Tsoti, resigned from his position. The former South African Broadcasting Commission Chairperson (SABC), Ben Ngubane, became acting Chairperson of Eskom¹⁸. With this move also came the dismissal of high-level executives including the CEO of Eskom.

¹⁵ Zuma 'name-dropping' in Waterkloof scandal. News24 online. 19 May 2013.

<https://www.news24.com/SouthAfrica/News/Zuma-name-dropping-in-Waterkloof-scandal-20130519>

¹⁶ section 181 of the Constitution

¹⁷ The Public Protector. State of Capture Report no 6 of 2016/17. 14 October 2016

¹⁸ Mmanaledi Mataboge. *Eskom's Tsotsi resigns as chair and director*. Mail and Guardian online. 31 March 2015. <https://mg.co.za/article/2015-03-31-eskoms-zola-resigns-as-chair-and-director>

Brian Molefe was subsequently moved from his position as CEO of Transnet to be CEO of Eskom, where he brought along with him to Eskom, the CFO that worked with him at Transnet, Anoj Singh. Immediately after, Glencore which owned Optimum mine attempted to negotiate a new price for the supply of coal from the mine which was losing quality and becoming a liability¹⁹. Eskom put in place a long term coal supply agreement with Optimum in 1993 which was to expire at the end of 2018, to supply mainly its Hedrina Power Station. Even with the Optimum Mine losing money to the point where Glencore was forced to place Optimum Mine into business rescue to fend off the possibility of liquidation, Brian Molefe took a hard-line approach and refused to allow the negotiation of a new price. It is at this time that former Minister of Mineral Resources, Ngoako Ramthlodi, alleged that Molefe and Eskom Board Chairperson, Ben Ngubane, tried to coerce him to force Glencore to pay over R2billion penalty,²⁰ without which it would have its mining rights revoked²¹. Glencore maintained that the business was losing R100 million annually and had grounds for business rescue. Ramatlodhi refused the demand of Molefe and Ngubane and was shortly removed as Minister. He was then replaced by Mosebenzi Zwane, a Free State ANC member in the region, headed by Ace Magashule who is widely-known as a close ally of President Zuma. Optimum's mining license was then revoked and quickly reinstated. Then, as revealed by the State of Capture report, Zwane played a central role in the negotiations that culminated in Tegeta, the Gupta company, purchasing the Optimum mine from Glencore²². Subsequently, Tegeta applied for an upfront payment on the supply of coal. The Guptas were also able to secure a contract to supply another Eskom power station, effectively monopolising the supply of coal to Eskom.

35. Moreover, the State of Capture report revealed testimony from former State officials who have claimed that the Guptas offered them cabinet positions in exchange for certain favours. For example, ANC MP, Vytjie Mentor, claimed to have been offered the position of Minister of Public Enterprises by the Guptas, in exchange she was to order South African Airways, the national carrier, to cancel its route from South Africa to India because the Guptas owned a stake in a rival airline who used the same route. A further example is the former Deputy Minister of Finance, Mcebisi Jonas, who was later dismissed during a cabinet reshuffle in March 2017, was offered by the Guptas the position of Minister of Finance. The offer was made in the form of a bribe to Jonas to the tune of R600 million which Jonas claims to have declined²³.

36. The issues conjured by the State of Capture report were startling because it illustrated the extent to which the Guptas were able to influence people who direct key state institutions like SOEs and government departments. While the report provided deep insight into the way that the Guptas and their associates operate, the nature of the evidence that emerged from the report has not been able to drive legal processes

¹⁹ S Sole and S Comrie. How Brian Molefe 'Helped' Gupta Optimum Heist. Amabhungane. 16 March 2017. <http://amabhungane.co.za/article/2017-05-16-exclusive-how-brian-molefe-helped-gupta-optimum-heist>

²⁰ S Sole and S Comrie. How Brian Molefe 'Helped' Gupta Optimum Heist. Amabhungane. 16 March 2017. <http://amabhungane.co.za/article/2017-05-16-exclusive-how-brian-molefe-helped-gupta-optimum-heist>

²¹ The Minister of Mineral Resources is the authority with regard to gaining access to mine at a location

²² The Public Protector. State of Capture Report no 6 of 2016/17. 14 October 2016

²³ The Public Protector. State of Capture Report no 6 of 2016/17. 14 October 2016

against the Guptas and their accomplices located in the South African state. It was not until the Gupta-leaks emails, which emerged during 2017, that first hand evidence of discussions between the Guptas and their associates were finally obtained.

37. In June 2017, a data leak of some 100,000 emails between the Guptas, their associates and South African State officials starting from around 2011 to 2016 occurred. These leaked emails revealed that bribery and corruption were rampant; numerous State regulations were violated; and a wholesale repurposing of State institutions away from regular protocols that are legally regulated towards operations motivated to benefit and be in the interest of the network of individuals in the State and associates of the Guptas. The Amabhungane Centre for investigative journalism, the Daily Maverick and News 24 in collaboration, have a web page dedicated to the Gupta leaked emails wherein, discussions between state officials and Gupta associates illustrate that the Gupta's act at times as de facto bosses who state officials are answerable to²⁴. Some of the emails that are part of the Gupta leaks will be presented as evidence in this case.

Repurposing state Institutions, a feature of State Capture

38. The *Betrayal of the Promise* report has provided some key conceptual frames through which to comprehend State capture. One of the important concepts that emerge from the report is the repurposing of State institutions especially SOEs. The repurposing of State structures are one of the key features of State capture.

39. The repurposing of SOEs refers to a process whereby, the institutional and operational character of the SOE is altered in order to serve narrow commercial and political interests of private networks to the detriment of the institution and by extension the public on whose behest the SOE ought to serve.²⁵ Some of the salient features of the repurposing of SOEs have been:

- Shuffling the board to place people in there who are either compliant or who will benefit from deals that will go to the Gupta network;
- Major procurement projects are instituted once the new board and executive members are brought in;
- Major decisions with regard to procurement processes are made, not in the public interest as should be done as SOEs but made to suit the narrow interests of the elite group; and
- Rent-seeking and value extraction from the SOEs stemming from the major projects wherever possible

²⁴ The website to view the Gupta leaks emails is <http://www.gupta-leaks.com/>

²⁵ The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017

Repurposing at Transnet

40. In terms of the *Betrayal of the Promise* and numerous media reports, events relating to the major SOEs from 2011, have followed a similar pattern – following the institution of a new board, often for spurious and inexplicable reasons, people are appointed who are later proven to have benefited either directly through subsequent contracts, or by their association with the Gupta network through companies they own or are affiliated to, gaining large-scale contracts to supply the SOE. In the case of Transnet, the board of this company was reconstituted and subsequently embarked on a major procurement in the region of R50billion.
41. At Transnet in early 2011, the old board was replaced and a new board was constituted. Most notably, Iqbal Sharma the head of trade and investment South Africa based at the DTI was appointed to the board by DPE Minister at the time, Malusi Gigaba. Gigaba had initially attempted to appoint Sharma as the Chairperson of the board of Transnet but this move was blocked by Cabinet because Sharma by then was already understood to have had close relations with the Guptas.
42. Following the rejection of the attempt to appoint Sharma as chair, a new position of chair of the acquisitions and disposal committee was created for him, wherein he was responsible for awarding procurement contracts at Transnet. Along with this new board was the appointment of Brian Molefe as the Group Chief Executive. Following this, Transnet embarked on a major procurement project to purchase 1064 locomotives to replenish its existing fleet. The tender was awarded to four different companies, two of which were alleged to have paid kickbacks to Salim Essa presumably in exchange for winning the contract.
43. In 2013, Salim Essa's company Elgasolve in 2013, purchased a majority stake in VR Laser prior to the awarding of the tender to supply the 1064 locomotives to Transnet.²⁶ According to its website VR laser "specialises in the manufacturing of a variety of steel products for a broad range of end-users, including the defence, mining, rail and transport industries.... VR Laser offers a wide range of services without directly competing with its OEM (original equipment manufacturer) customers. It specialises in, amongst others: Armoured vehicle manufacturing and integration, LHD Manufacturing and integration, LHD Rebuilds, Mining equipment Bucket Manufacturing, Tipper(Rear and side) Manufacturing and integration, Water Bowser Manufacturing and integration, Drill rig manufacturing and integration, Cash in transit vehicle manufacturing, Bogie, underframe and other fabrications for Locomotives, Turret Manufacturing".²⁷
44. There are a number of controversies associated with VR Laser in relation to Transnet. In 2014, an investigation by the *Mail & Guardian* alleged that Sharma was a director

²⁶ Amabhungane and Scorpio. #GuptaLeaks: Guptas and associates score R5.3bn in locomotives kickbacks. Amabhungane Centre for Investigative Journalism. 1 June 2017. <http://amabhungane.co.za/article/2017-06-01-guptaleaks-guptas-and-associates-score-r53bn-in-locomotives-kickbacks>

²⁷ <http://www.vrlaser.co.za/profile.html>

at VR Laser after a deal was reached between it and Elgasolve. John van Reenen, a founding and original co-owner of VR Laser confirmed that Salim Essa purchased the operational part of the company and that Sharma acquired the VRLS properties which is an associated business.²⁸ It was on these grounds that Sharma attempted to evade the accusation of conflict of interest. On the 17th March 2014 Brian Molefe announced a split tender for the 1064 locomotives between four suppliers where China South Rail were contracted to supply 554 locomotive units.

45. VR Laser becomes important because State procurement policy required that winning bidders source 60% of their component parts from South African subcontractors. There is compelling evidence acquired by Amabhungane Centre for Investigative Journalism that during the period that the tender process for the locomotives were being completed, each of the four companies awarded a share of the major contract visited VR Laser's premises to establish the viability of VR Laser subcontracting to them.²⁹ There is a clear conflict of interest relating to Iqbal Sharma, the person at Transnet who was in charge of procurement at the level of the board. He owned part of a company which was associated with supplying parts to the companies who won tenders to the tune of R50billion.
46. Many other issues of corruption relating to Transnet outside the scope of Denel Ensued. However, it is important to highlight at this point the role that VR Laser played in corruption in Transnet because VR Laser is a prominent part in the narrative of this case.

Denel

47. Denel was formed in 1992 after most of the subsidiaries of Armscor, which was the armaments procurement agency during the Apartheid era, was broken up and reconfigured into a new State-owned company.³⁰
48. Denel's main purpose has always been to supply the South African National Defence Force (SANDF) with armaments and military technologies. While its main client is the SANDF, through Denel's historical association with Armscor, it has a substantial tradition of exporting military related goods. Denel have built on that tradition and currently provide comprehensive solutions to the international market, which has become an increasingly important part of its business. Structurally, Denel has a number of subsidiaries who provide their own specialty focus areas. The following divisions form part of Denel:

²⁸ L Faull, V Bhardwaj, M Letsaolo, S Sole, S Brümmer. *Transnet tender boss's R50-billion double game*. Mail and Guardian online. 4 July 2014. <https://mg.co.za/article/2014-07-03-transnet-tender-bosss-r50-billion-double-game>

²⁹ Faull, L, Bhardwaj, V., Letsaolo, M., Sole, S. & Brümmer, S. 2014. *Transnet tender boss's R50-billion double game*. Mail and Guardian online.

<https://mg.co.za/article/2014-07-03-transnettender-bosss-r50-billion-double-game>.

³⁰ <http://www.denellandsystems.co.za/>

Denel Aerostructures, Denel Aviation, Denel Dynamics, Denel Industrial Properties, Denel Integrated Systems and Maritime, Denel Land Systems, Denel Mechem, Denel Overberg Test Range, Denel PMP, Denel Technical Academy, Denel Vehicle Systems.

49. Denel also acts as a strategic partner in joint ventures with other international companies. The following is a list of companies partly owned by Denel:

- Airbus DS Optronics (Airbus Defence and Space owns 70% and Denel holds 30% of the shares).
- Rheinmetall Denel Munition (Rheinmetall holds 51% and Denel holds 49% of the shares).
- Turbomeca Africa (Turbomeca owns 51% and Denel holds 49% of the shares)
- LMT Holdings (Denel holds 51% of the shares).

50. Denel also has a strong research and technology emphasis. It designs military equipment and fully functional systems and also provides subsystems used to service clients who work in other areas of industry.³¹

Chronology of Events

51. What follows is an account of key events that relate to Denel and the issues concerning the allegation that important decisions at the SOE, were being directed by people connected to the Gupta business network for its own interests rather than the interests of the South African public as it is mandated to do. This account will deal serves to illuminate the important issues in this case such as, the links between the members of the board at Denel constituted in 2015 and the Guptas; the proposed joint venture between Denel and a Gupta-linked company (VR Laser Asia) to be called Denel Asia as well as the plans to create Denel India; a joint-venture between the Guptas and the Adani group, an Indian conglomerate, that would have seen Denel itself projected to own only a minority stake in the venture.

52. Reviewing the chronology of events that have taken place will allow for an overall picture to emerge that will illustrate how this particular case fits into the broader narrative of State capture in South Africa.

53. In the early 2000s there had been various supply contracts ongoing between Denel and India. One of these contracts, entered into in 2003, became central to an investigation by the Central Bureau of Investigation (CBI) in India, which ultimately resulted in the cancelling of all contracts between Denel and India in 2005. In terms of this contract, Denel would supply 400 anti-material rifles (AMR) to the Indian Ministry of defence including the supply of ammunition, the building of an ammunition factory as well as the supply of G6 self-propelled howitzers. The AMR contract drew the suspicion of the CBI because of Denel's alleged use of a third party 'agent', a company called Varas Associates situated on the Isle of Man to secure the deal. According to media reports, the CBI alleged that Denel paid Varas Associates a 12.5% commission

³¹ <http://www.denel.co.za/>

fee to secure the deal because of the “undue influence” it had in the Indian Army.³² The Indian defence Minister, Shri Pranab Mukherjee, was of the view that “based on the information furnished by Denel, South Africa, there [was] *prima facie* evidence of violation of clauses relating to use of undue influence and agents/agency commission, as contained in the contracts of AMR.”³³ Following this investigation Denel, was barred from operating in India for around nine years.

54. In 2008, the steel manufacturing company, VR Laser Services, which was part of the VR Steel group, had a R270 million transaction in which Benny Jiyane, an industrialist who was part of Barloworld, Anglo American, and other prominent companies, bought into VR Laser. This was dubbed a ‘Black Economic Empowerment Deal’ because of Jiyane’s presence. Consequently, this rendered VR Laser Services eligible to tender for infrastructure development programmes initiated by the SOEs. By this time VR Laser was supplying parts to Armscor for Denel’s Hoefyster project to develop 264 infantry combat vehicles.³⁴ The purchase of a stake in VR Laser by Benny Jiyane is a significant moment with regard to the connection between Denel and VR Laser. This is because Jiyane, being a black South African, meant that his ownership stake in VR Laser elevated the company’s BEE status and thus made it better placed to be rewarded major contracts with SOEs.
55. In late 2013, Elgasolve owned by Salim Essa, purchased a majority stake in VR laser. Salim Essa is a proven Gupta associate. Further, the connection between VR Laser and the Guptas is propagated by the fact that Kamal Singhala, who is the son of Ajay Gupta, was at one time a director at VR Laser.
56. On the 12th August 2014, the Indian Ministry of Defence sent a letter to Denel, effectively lifting the ban which had barred Denel from operating in India since 2005. The CBI probe had not been able to prove any wrong doing on the part of Denel. In reaction, Vuyelwa Qinga, the Denel group communications manager told a news publication that “the investigation found that there was in fact no illegal or untoward activities that had been conducted by Denel in India...In time, as Denel, [they would] present a more comprehensive view of the kind of capabilities and technology this opportunity open[ed] up for Denel within the Indian market, which [was] one of the most critical markets for [the] company”³⁵.
57. Less than a year later, on 24 July 2015, the Minister of Public Enterprises at the time, Lynne Brown, who succeeded Malusi Gigaba in that post, replaced the Denel board with a new board. The new list of new board members ignored a list duly prepared by

³² PTI. *FIR filed in Denel arms scam*. Jun 6, 2005. Times of India online.

<https://timesofindia.indiatimes.com/india/FIR-filed-in-Denel-arms-scam/articleshow/1134159.cms>

³³ Peter Fabricius, *Denel may still get India contract – analysts*. Independent online. 5 October 2005

<https://www.iol.co.za/news/south-africa/denel-may-still-get-india-contract---analysts-255239>

³⁴ J Faurie, *BEE Deal Benefits Steel Company*, Creamer Media’s Engineering News. 11 July 2008.

<http://www.engineeringnews.co.za/print-version/bee-deal-benefits-steel-company-2008-07-11>

³⁵ HT Correspondent. *South African arms manufacturer Denel eyes a comeback in India*. Hindustantimes online. Update 30 March 2016. <http://www.hindustantimes.com/india/south-african-arms-manufacturer-denel-eyes-a-comebac2221k-in-india/story-RbsmHfolYOhdxXCEjm81PL.html>

the Department of Public Enterprise (DPE) which sought to retain most of the existing board members on the grounds that they performed very well during the appointment period and that the maximum two-term stint had not been served.³⁶ Minister Brown's new board retained only Mr Johannes "Sparks" Motseki "for purposes of continuity"³⁷. Motseki is a close friend of Duduzane Zuma and owned a stake in Dixie Investments which has a shareholding in Island Investments 255, and which is a subsidiary of Gupta controlled Oakbay Investments.³⁸ In relation to the composition of the new board, the former Denel CEO admitted thus: "It was inexplicable, replacing the entire board. I had some misgivings. For corporate governance it would have been better if some of the previous board was maintained. The skills set [of the new board] was not really up for understanding the complexity of Denel's business."³⁹

58. The majority of the new board at Denel had never served on a board before and were clearly without the skills and knowledge of a highly technical and complex industry in which Denel operates. The new board members at Denel included Mrs Pinkie Martha Mahlangu, Lt Gen Themba Michael Nkabinde (retired), Ms Mpho Kgomongoe, Ms Khumbudzo Ntshavheni, Ms Nonyameko Mandindi and Ms Refiloe Mokoena.
59. Daniel Mantsha was appointed as Non-Executive Director and Chairperson of the Board of Denel. Before the revelations made by Gupta leaked emails, where Daniel Mantsha's proximity to the Guptas was demonstrated,⁴⁰ questions were raised regarding his appointment to the Denel Board. From the period immediately following his appointment, questions were raised around Mantsha's fitness to hold such a crucial office after he had been previously struck off the roll of attorneys in 2007 for acting in a dishonest and deceitful manner as well as his unimpressive performance as legal adviser to Faith Muthambi after his readmission to the attorney's roll in 2011. According to DA shadow Minister Gavin Davis "it was on Mr Mantsha's advice that Minister Muthambi... overturned Parliament's legal opinion on the removal of three SABC board members." He argued therefore that "Now that [they knew] that Mr Mantsha [was] a discredited lawyer, it follow[ed] that his advice to the minister [could] be discredited too."⁴¹
60. The remaining board members of Denel were, Mr Thamsanqa Msomi, who is currently an adviser to Malusi Gigaba who is now the Minister of Finance. Msomi was Chief of Staff at Home Affairs while it was headed by Gigaba. Described in the media as a

³⁶ The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017 pp

³⁷ Lynne Brown Announcement. 24 July 2015. <https://www.gov.za/speeches/public-enterprises-minister-lyne-brown-appoints-new-board-denel-24-jul-2015-0000>

³⁸ M Letsoalo, L Faull, M Mataboge, *Veterans' official in private deals*. Mail and Guardian online, 1 April 2011, <https://mg.co.za/article/2011-04-01-veterans-official-in-private-deals>

³⁹ Susan Comrie and Erika Gibson. Axed Denel Boss Speaks. City Press Online, 15 May 2016. <http://citypress.news24.com/News/axed-denel-boss-speaks-20160514>

⁴⁰ The emails show that Mantsha stayed in a Dubai hotel at the expense of the Guptas.

⁴¹ Emsie Ferreira, *Muthambi defends her legal advisor*. Independent online. 28 July 2015, <https://www.iol.co.za/news/politics/muthambi-defends-her-legal-advisor-1891968>

“fixer”, Msomi apparently acted as an agent for the Guptas.⁴² He is alleged to have gone beyond regular protocol to give preference to Gupta associates and to act as a private liaison for Gupta family associates in the Home Affairs Ministry. This allegation is revealed in an email exchange between Gupta associates and Msomi in an immigration matter. The email exchange is attached hereto and marked as “**SC2**”. The other new board member appointed was Mr Tauyane Mahumapelo who has the same surname as a close ally of Jacob Zuma, the Premier of the North West. The South African Communist Party have claimed that the two are related, this however has never been independently verified.⁴³

61. In the first significant decision taken by the new Denel board, less than two months following their appointment, CEO of Denel Riaz Saloojee, CFO Fikile Mhlontlo and Company Secretary Elizabeth Africa were placed on special leave pending an investigation into Denel’s prior acquisition of Land Systems South Africa (LSSA), a subsidiary of BAE Land Systems SA, which is a subsidiary of the globally renowned defence technology and aerospace giant BAE Systems International. In late April 2015, BAE Land Systems announced the sale of its 75% stake in Land Systems South Africa (LSSA) to Denel. By July 2015, LSSA was rebranded as Denel Vehicle Systems (DVS).⁴⁴
62. Amabhungane has alleged that Saloojee was informed a month before the announcement of the new board on the 26 July 2015, by Motseki, the only board member that was retained by Minister Brown that he, Saloojee, would be dismissed. The dismissal was apparently related to Saloojee’s non-compliance when requested to perform “certain actions”. According to Amabhungane, the then chairperson of Denel, Martie Janse van Rensburg, approached Motseki about these allegations which Motseki apparently confirmed. Another source revealed that van Rensburg was so concerned about these allegations that she repeatedly tried to arrange a meeting with Minister Brown to ventilate these issues but was unsuccessful. Van Rensburg further met with Deputy DPE Minister Bulelani Magwanishe on July 2 2015 to discuss the allegations.⁴⁵
63. Denel issued a statement in relation to the suspension of its senior executives (the statement is attached hereto and marked “**SC3**”) in which it held that:.

The decision to suspend these executives was taken to allow for the unfettered investigation to address concerns that the Board had raised regarding Denel's acquisition of BAE Land Systems South Africa (LSSA). What is distinct about this transaction from others, are the facts that transpired subsequent to the granting of Board and shareholder approval. The preliminary assessment

⁴² Q Hunter and K Cowan. Gigaba Adviser the Gupta ‘Fixer’. Business day online. 30 May 2017. <https://www.businesslive.co.za/bd/national/2017-05-30-thamsanqa-msomi-says-actions-as-a-gupta-fixer-were-not-out-of-the-ordinary/>

⁴³ M Magome. Former Denel CEO to Contest Firing. Independent Online. 19 April 2016. <https://www.iol.co.za/business-report/economy/former-denel-ceo-to-contest-firing-2011420>

⁴⁴ <https://www.globalsecurity.org/military/world/rsa/denel.htm>

⁴⁵ S Sole. How Denel was Highjacked, Amabhungane Centre for Investigative Journalism. 30 May 2016. <http://amabhungane.co.za/article/2016-05-30-how-denel-was-hijacked>

conducted by the Board during implementation of the transaction highlighted serious areas that required detailed investigation.

The Board has previously refrained from commenting in detail on the matter, given the nature of the disciplinary process. However, given the degree of misrepresentation and misreporting over the past few days, the following points now need to be made:

The assessment undertaken by the Board is a normal process required in the ordinary monitoring of transactions as part of its oversight and fiduciary duties. This was not aimed at purging any of the executives or employees of the company but, to solicit a clearer understanding of the transaction from the executive who was part of the decision-making process then and privy to the rationale presented to the former Board.

It is unfortunate that what was intended to be an internal company matter became a subject of media and public speculation -- casting serious aspersions on our motive as the Board.

At the core of the allegations against these officials is the fact that the funding model that was approved for the BAE LSSA transaction was not implemented in that form, and BAE LSSA's liquidity was misrepresented.

The CEO's contractual obligation to Denel was terminated as his contract was about to expire, and Denel is proceeding with disciplinary action against the other two officials.

64. This statement is important to examine because it leaves out some crucial information. In relation to the board suspending CEO Saloojee, it must be emphasised that the new Board was constituted only six weeks prior to the decision to suspend Saloojee. The haste with which the decision to suspend an executive who had never faced any prior disciplinary procedures and who by most accounts performed his duties well, seems unreasonable and raises warranted suspicion. Saloojee was suspended to allow for the investigation into his conduct to commence. At time his employment contract was coming towards its conclusion. Although his contract was ended, it would have been eligible for renewal but the decision to suspend him effectively dismissed him from his position as CEO of Denel. The investigation was meant to be concluded with the same kind of efficiency that the suspension had been undertaken, however, this did not occur.

65. The conclusion of the investigation was halted on numerous occasions. This was reflected in the following notes from the Portfolio Committee on Public Enterprises meeting on 24 May 2017:

The Committee asked about progress on the September 2015 suspension by the Denel board of its CEO Mr Riaz Saloojee, CFO Mr Fikile Mkhontlo, and Company Secretary Elizabeth Africa. Denel indicated that [it] was running a business and they could not afford to have instability, or a vacuum. So in the business of parting ways, those individuals were never charged because there was a settlement. It was purely a business decision. The disciplinary action was taking

too long and they had reached a separation agreement with the CFO and Company Secretary and had allowed the CEO's contract to run out in January 2017.⁴⁶

66. It is clear that the grounds for suspending Saloojee, and the other executives, were not cogent at the time of the decision and those grounds have not subsequently been vindicated because to date, no investigation has found them to have acted inappropriately. Allegedly, Saloojee was removed in order to clear the way for the joint venture between VR laser Asia, Denel Asia.

Issues relating to the Joint Venture between Denel and VR Laser (Denel Asia)

67. The following is extracted from a press release from Denel on their website that reported on the Parliamentary Portfolio Committee on Public Enterprises on the 11 May 2016. The press release is annexed hereto and marked as "SC4".

Denel is increasingly looking at export sales -- including in the rapidly-expanding Asia-Pacific region -- in terms of its mandate to create a financially self-sustainable defence business, Mr Odwa Mhlwana, acting Group Chief Financial Officer, told the Portfolio Committee on Public Enterprises in Parliament today⁴⁷."

"Mhlwana said joint ventures and partnerships have been part of Denel's operational model for more than a decade, but are becoming increasingly necessary as Denel expands its global footprint. As examples, he cited the fact that Denel holds a 49% stake in Turbomeca Africa, a subsidiary of the global Safran Group, and has a joint venture with Airbus Defence and Space called Airbus DS Optronics. Likewise, Tawazun Dynamics was established to manufacture precision-guided munitions in the United Arab Emirates, and Rheinmetall Denel Munitions contributes more than R2-billion to Denel's annual revenue.

Asia is also becoming an increasingly important market, he said, and defence industry experts estimate that half of future global defence sales will involve countries on the Asia Pacific.

Mhlwana said the selection of partners is largely driven by market intelligence and existing relationships of trust. VR Laser has been doing business with Denel for more than 15 years and is responsible for the fabrication of hulls for mine-protected vehicles and mechanical structures for weapon systems.

He explained to the Portfolio Committee that the decision to form Denel Asia was initiated by Denel's previous Group CEO, Mr Riaz Saloojee, who made a

⁴⁶ The Portfolio Committee on Public Enterprises meeting on Denel Asia; Denel CEO & CFO disciplinary action: update, with Deputy Minister, *Meeting Summary* . 24 May 2017. <https://pmg.org.za/page/Denel%20Asia%3B%20Denel%20CEO%20%26%20CFO%20disciplinary%20action:%20update%2C%20with%20Deputy%20Minister?via=homepage-feature-card>

⁴⁷ Denel's Venture in South East Asia Forms Part Of Global Growth Strategy. Denel SOC LTD website. 11 May 2016. <http://www.denel.co.za/press-article/Denels-Venture-In-South-East-Asia-Forms-Part-Of-Global-Growth-Strategy/127>

proposal in this regard to the current board on 10 September 2015. The board approved Saloojee's request for authorisation. Four potential partners were considered before a decision was taken to select VR Laser Asia based on the company's experience and track record of VR Laser working with Denel.

VR Laser Asia is wholly-owned by Mr Salim Essa and the company is familiar with the industrial landscape in the world's fastest growing defence market, specifically in India. Denel has been black-listed from doing business in India for more than 10 years but a thorough investigation cleared it from any wrong-doing in 2015 and it has since already spent more than R500-million to explore business opportunities⁴⁸."

68. The statement by Mhlwana is important not for what it says but for what it omits. Denel's interest in the Asia-Pacific region is known and backed up by the international market environment and appears in its Annual Report in 2013.⁴⁹ Denel and VR Laser did have an existing relationship and VR Laser was an experienced supplier. What was omitted from the statement was that the joint venture was not going to be between Denel and VR Laser but rather Denel and VR Laser Asia, which is essentially a shell company⁵⁰ with no operational capacity. Denel has emphasised the importance of the Asia Pacific market but have chosen to go into a joint-venture with a partner that had no history to speak of on the grounds that it had an entry into the important Asian market. The issue of Denel opting to go into a joint venture with VR Laser is a crucial component of this case and the issues relating to this will be elaborated in what follows.
69. Gupta leaks revealed an internal DPE memorandum regarding pre-notification for PFMA approval of the Denel Asia joint venture which was sent to the Minister of Public Enterprises and subsequently passed on by Denel CEO, Daniel Mantsha and another individual, to the Guptas. The emails are annexed hereto and marked as "SC5".
70. In a memorandum dated 20/11/2015 from Vuyo Tlale acting Deputy Director General (DDG) to Minister Brown,⁵¹ it was cautioned that Denel is not clear on VR Laser Asia's background and that desktop research conducted revealed it to be a subsidiary of VR Laser based in South Africa, which operated as a steel plate processing centre among other things. The memorandum identified the directors of Denel Asia as Salim Essa, Ugeshni Govender, and Kamal Singhala (son of Ajay Gupta). The memorandum noted further the difficulty of penetrating the Asian market because of it being a target for global original equipment manufacturers whose funding proposals were unable to be matched by smaller players such as Denel. The memorandum therefore questioned VR Laser Asia's value because it did not clearly demonstrate how it planned to break

⁴⁸ Denel's Venture in South East Asia Forms Part Of Global Growth Strategy. Denel SOC LTD website. 11 May 2016. <http://www.denel.co.za/press-article/Denels-Venture-In-South-East-Asia-Forms-Part-Of-Global-Growth-Strategy/127>

⁴⁹ Denel Annual Report 2013,

⁵⁰ One of the definitions of a shell company offered by Collins English Dictionary denotes the sense of the term shell company used here. It is defined as "a company existing as a legal entity but having no significant assets, independent business operations, etc., often owned or controlled by another company and used for various, often illegal, purposes"

⁵¹ under Section 3 titled Analysis and Findings

into this highly competitive market nor did the pre-notification make any mention of the advantages Denel would gain from partnering with VR Laser Asia. The DPE expressed concern relating to the funding model which gave the impression that funding would be provided by shareholders without indicating whether the project funding would be proportionate to the shareholding. Moreover, the memorandum stated that there was no clarity on whether the R100million investment by VR Laser Asia to establish Denel Asia was a loan, whether that would be sufficient to fund operational costs and if it was a loan, what the repayment terms would be.

71. In terms of the memorandum, based on the information provided by Denel, it was recommended that it continue discussions with VR Laser Asia on the condition that, *inter alia*, it gains approval from the Minister of Finance in terms of section 51(g) of the PFMA, to establish a new entity. Once such approval was acquired, it was recommended that Denel should submit a section 54(2) application that included among other things, areas that addressed the concerns raised in the memorandum.
72. Found in the same email exchange was an official letter from Minister Brown addressed to Mantsha as Denel Board Chair in response to the pre notification on the proposed formation of Denel Asia dated the 23/11/2015.
73. In a different email correspondence, attached hereto and marked as “SC6”, from Mantsha to Ashu Chawla, Minister Brown’s response was attached. Brown’s response echoed the recommendations submitted by the DPE which conditionally granted approval for negotiations for the formation of Denel Asia to continue. She requested for the submission of a section 54(2) PFMA application to herself and the Minister of Finance which addressed among other things, the issues highlighted in the department memorandum. Thereafter, Denel was required to apply and gain approval from the Minister in terms of section 51(g) of the PFMA as a prerequisite for establishing a new entity.
74. Formation of Denel Asia was announced to the Public on the 29th January 2016 where statements were made by Denel and VR Laser with no mention of any of the concerns raised about the partnership⁵².
75. In relation to the events above, the following can be extracted from Parliamentary notes during Denel’s appearance thereat on 11 May 2016 (“SC4”):

Mhlwana said Denel submitted a pre-notification letter for the approval of Denel Asia to the Department of Public Enterprises (DPE) and National Treasury on 29 October 2015 and received approval, with conditions, from DPE the following month.

⁵² S Dlodla, Denel Expands its Horizons, Independent Online, 29 January 2016.
<https://www.iol.co.za/business-report/companies/denel-expands-its-horizons-1977303>

It then submitted an application in terms of the Public Finance Management Act (PFMA) to both DPE and Treasury on 11 December 2015. No response to this request has yet been received from Treasury. In terms of Section 54 (3) of the PFMA applicants may assume that approval has been granted if no response is received within 30 days. Denel proceeded with the registration of Denel Asia in Hong Kong only after 47 days, and 98 days after the first pre-notification was sent.

While the events as they are presented here may be factual, the circumstances around the PFMA applications submitted on the 11th December 2015 were not fully revealed. It must be borne in mind that approval for the application must be granted by the Minister of Finance. Two days prior to the submission of the application, the erstwhile Minister of Finance Nhlanhla Nene, was removed from his position and was replaced by Des van Rooyen who was the Minister when the application was submitted but was subsequently removed two days later without providing approval for Denel Asia. Des van Rooyen was replaced by Pravin Gordhan.

76. Subsequent to Gordhan's appointment, there was public tension between Denel and Gordhan wherein Denel maintained that the Denel Asia venture was legally constituted and therefore valid to operate. Gordhan, on the other hand, denied that approval for the formation of Denel Asia was ever granted by Minister Brown or himself when he had previously been the Minister of Finance. After a number of exchanges, Denel announced on the 25th August 2017 that it was pulling out of the partnership citing reputational damage as the reason.⁵³ The tension between Gordhan and Denel is extensively documented in the case of *Denel SOC LTD v and Minister of Finance and and Department of National Treasury*,⁵⁴ in which Denel sought to push through the ambitions to establish Denel Asia. The record is hereto attached and marked as "SC7". The record contains, *inter alia*, numerous correspondences and documentation between Denel and Treasury and the responding affidavit by Lungisani Fuzile, the Director-General (DG) of Treasury at the time. The salient points regarding the tension between the two parties, which is demonstrated by the record, can be summarised as follows.
77. The legal basis regarding Denel's decision to proceed with the formation of Denel Asia was based on a reading of PFMA 51(1) (G) and 54(2) read with 54 (3). Sections 51 (1) and 54 (2) and (3) of the PFMA provide:

General responsibilities of accounting authorities. An accounting authority for a public entity—

*must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal Establishment.*⁵⁵

⁵³ G Nicolaides. *Denel ends partnership with Gupta-owned VR Laser Asia*. EWN online. <http://ewn.co.za/2017/08/25/denel-ends-partnership-with-gupta-owned-vr-laser-asia>

⁵⁴ Case no. 20749/ 17 in the Gauteng High Court (Unreported).

⁵⁵ Sec 51(1)(g)

Information to be submitted by accounting authorities. The accounting authority for a public entity must submit to the relevant treasury or the Auditor-General such information, returns, documents, explanations and motivations as may be prescribed or as the relevant treasury or the Auditor-General may require.⁵⁶

[Sub-s. (1) substituted by s. 31 (a) of Act No. 29 of 1999.]

Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction.⁵⁷

A public entity may assume that approval has been given if it receives no response from the executive authority on a submission in terms of subsection (2) within 30 days or within a longer period as may be agreed to between itself and the executive authority⁵⁸

78. In terms of the interpretation of these sections, according to Denel, it could validly proceed with Denel Asia because under 51 (g) it submitted the relevant information to Treasury and had allowed it reasonable time to respond. When the 30 days prescribed by Section 54(3) lapsed, Denel argued that it assumed that approval was granted and therefore proceeded to make the announce the establishment of Denel Asia on the 29th January 2016, without a formal response from Treasury. In a correspondence between itself and Treasury (“**SC6**”), Denel justified its actions by arguing that it believed it had the legal grounding to proceed and that any further documentation provided to Treasury was merely for information purposes and not relevant regarding the legality of the decision to proceed with the joint venture.
79. Treasury argued that Denel’s interpretation of the law was fundamentally flawed and that it (Denel) had failed to comply with the PFMA. Treasury believed that Denel was meant to send two different applications under 51(1)(g) and 54(2) and that Denel conflated the two sections which then led it to confuse the wording in 51(g) relating to the reasonableness of the time for Treasury to respond with “within 30 days”, found in 54(3). Treasury also argued that even if the wording relating to “a reasonable time” was contentious, the application submitted by Denel was sent on the 11th December 2015, two days after a new Minister came to office. Since the department closes for a period during the December holidays, Treasury was at its busiest between January and February. In this context, the assertion that 30 days could be interpreted as reasonable time for Treasury to respond to the application after all the relevant considerations would be incomprehensible.
80. Further, Treasury challenged the decision by Denel to attempt to force through the Denel Asia joint venture with the assertion that, even if it were to be conceded that

⁵⁶ Sec 54(1)

⁵⁷ Sec 54(2)

⁵⁸ Sec 54(3)

Denel Asia was legally formed, based on an interpretation of time by Denel, there was nothing in the PFMA that precluded Treasury from declaring the formation incorrect and ordering that the decision be reversed. It is emphasised that Treasury was constitutionally mandated to be the accountable institution with respect to matters of the public purse such as joint ventures with SOEs.⁵⁹

81. Treasury emphasised the need to urgently resolve the matter and out of the glare of the media, and thus requested responses to concerns that were raised in its initial application for approval, while making clear its position regarding the legality of the joint venture.⁶⁰ The affidavit from Fuzile and other correspondences, in annexure “SC7”, also question the joint venture in terms of the issues raised in the initial responses. These concerns were echoed in an independent due diligence report from the law firm, Edward Nathan Sonnenberg (ENS), into the viability of the joint venture. ENS questioned the value of VR Laser Asia as the chosen partner even though it was insolvent, the fact that it had no operational abilities, and the allegations that it had close proximity to politically exposed persons as well as numerous other issues such as the terms of the R100million loan.⁶¹

Denel and State capture

82. Denel Asia joint venture is a clear instance of State capture in South Africa. Denel was essentially going to be giving away its brand and institutional capacity at the expense of the people of South Africa who are beneficiaries of the viability and profitability of SOEs. The R100million initial investment that VR Laser Asia was going to put forward was an interest bearing loan whose liability for repayment was on the shareholders, in exchange for Denel giving up all its capacity to Denel Asia while it operated in the Asia-Pacific region. In a particular email thread on or around the 16th October 2015 , Pieter van der Merwe, CEO of VR Laser, forwarded an email to recipients including Tony Gupta which contained an edited version of the draft agreement of Denel Asia. This email thread is hereto attached and marked as “**SC8**”. In terms of Section 2.2 of the draft agreement:

⁵⁹ The Constitution of the Republic of South Africa act 108 of 1996, Chapter 13 section 216: 216. (1) National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing— (a) generally recognised accounting practice; (b) uniform expenditure classifications; and (c) uniform treasury norms and standards. (2) The national treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures. [

⁶⁰ See Annexure “SC7” -on page 74 which is an extract of minutes from a meeting held between Treasury and Denel where the acting DG at the time remarks that Treasury does not intend to deal with the matter through the media-on page 89 Lungisa Fuzile writes an email to a Denel employ where he states that Treasury is trying to fast track a resolution to the issues of PFMA approval for Denel Asia. The email further explains that Treasury understood the matter to be urgent and took it as such themselves because it wanted to conclude the issue swiftly to avoid more media scrutiny of the issue

⁶¹ The Betrayal of the Promise: How South Africa is being Stolen, State Capacity Research Project. May 2017
Page 34

VR Asia [would] lend to the Company the equivalent of up to R100 000 000-00, over 5 years (R20 000 000 per year), as a shareholders loan, to set up an office for sales and marketing. [The] amount [would] bear interest at the Repo Rate of the South African Reserve Bank, per annum, and [the] shareholder's loan plus such interests accruing thereon, [would] be repaid from of the first profits of the Company. If there [was] insufficient profits to pay the full shareholder's loan plus interest no dividends [would] be declared until such time as [the] shareholder's loan plus interest ha[d] been fully repaid.

Under section 4 titled 'Operations' it was stated that:

4.1 Due to the nature of each Party's business, VR Asia [would] attend, advise and execute all functions in regards to fabrication, manufacturing and operational aspects at an agreed rate. Denel [would] make available to the Company, all products manufactured by Denel in South Africa, for manufacturing and sale, and [would] transfer all information in regards to these products to the Company on terms to be agreed between Denel and the company. Denel and VR Asia [would] be jointly responsible for the sales and marketing of the Company and its products. Denel [would] enter into a relevant licensing agreement with the Company. For the avoidance of doubt, Denel [would] not alienate its intellectual property in any way whatsoever.

4.2 Notwithstanding anything contained in 4.1 above, it [was] specifically recorded that VR Asia [would] be obliged to utilize all its resources, including its established network of potential business sources as referred to in the preamble of [the] agreement, in performing marketing activities on behalf of the Company and in generally ensuring that potential business opportunities [were] fully exploited within the Company.

4.3 The Company [would] be liable for any Offset Obligations and or similar obligations that [could] arise in the territories in which it ha[d] secured opportunities.

4.4 Each of the Parties [would] transfer to the Company sufficient start-up training and other transfer support. Each party [would] transfer technology, information and training to the Company in order to operate."

83. These provisions illustrate that VR Laser was providing an interest bearing loan to form a new entity where Denel would be providing its entire capacity which included its intellectual property to the new entity. It must be noted however, that VR Laser Asia at this point had no verifiable marketing capacity or business networks that could be verified for this formation to make any business sense. The agreement was clearly lopsided in the favour of VR Laser who essentially would be providing a loan which would be paid back with interest, in order to leverage on Denel's established capacity for gainful profit, all the while bringing no advantage to Denel whatsoever. The Denel Asia proposed joint venture was clearly an attempt at leveraging the institutional capacity of Denel for the benefit of the Gupta business network, the business network attached to VR Laser.

Denel India

84. Denel India was a lobbied joint venture between Denel Asia and the Adani group, an Indian conglomerate. Anil Gupta, a relative of the Gupta brothers was meant to own a portion of Adani's stake in the business. The discussions around the creation of Denel India began immediately after Daniel Mantsha, the Denel Chairperson, was added by Ashu Chawla to a reservation at the Oberoi Hotel in Dubai on or around 3 October 2015. This revelation is contained in an email attached hereto and marked as "SC9".
85. On the 12th October 2015, Pieter van der Merwe, the legal representative for the Gupta's and CEO of VR Laser, emailed Tony Gupta, Kamal Singhala and an unknown email address "infoportal1@zoho.com" which email confirmed the arrangement with Denel to form Denel Asia. Van der Merwe further suggested in the email exchange, a timeline for securing formation of Denel Asia. This included gaining authorisation from the Minister of Public Enterprises and the Finance Minister under the Public Finances Management Act (PFMA). This email exchange is attached hereto and marked as "SC10". Following the conclusion of the steps outlined by Van der Merwe, the Denel India joint venture was to proceed.
86. On the 28th October 2015, Van der Merwe emailed Tony Gupta, "infoportal1@zoho.com" and Kamal Singhala relating to the shell company to be created between Adani and Anil Kumar Gupta. This email exchange is hereto attached and marked as "SC11". On the 3rd November 2015 Suresh Tuteja sent Tony Gupta emails relating to the draft agreement to create the investment company that would own half of Denel India. This email exchange is attached hereto and marked as "SC12". On the same day, Ashu Chawla a Gupta associate, forwarded the passport numbers of people from the Adani group to Major Kobese, an official at Home Affairs, in order to expedite their visa requests. This email exchange is attached hereto and marked as "SC13".
87. On the 25th November 2015 Parasmal Lodha of Adani wrote an email to Tony Gupta with the subject-line: *Denel JV. In relation to the agreement to create an ISPV for Denel India*. As the subject-line suggests, the email is about a discussion on the creation of an ISPV. An ISPV refers to an Investment Special Purpose vehicle – "A special purpose vehicle/entity (SPV/SPE) is a subsidiary company with an asset/liability structure and legal status that makes its obligations secure even if the parent company goes bankrupt."⁶² Lodha expressed concerns about Anil Gupta getting a direct vote in the ISPV, even though he was in the joint venture. Lodha argued that Anil Gupta was precluded from having a direct vote by Indian law. He argued further that the agreement proposed a 75% voting right at board level decisions when the prior agreement was that there would be equal share in decision-making. He therefore submitted that consent of both parties was needed. He recommended for amendments to be duly made and for the business to commence. In response to Tony Gupta regarding Lodha's concerns, Pieter Van der Merwe explained that there might be an issue in Indian legislation which was a concern of his from the start. He then drafted a letter in which he asserted that the Joint Venture was an investment holding company and that denying Anil Gupta a vote was tantamount to taking away his right

⁶² <https://www.investopedia.com/terms/s/spv.asp>

to have a voice in the operations of the company. Van der Merwe further asserted that they would comment once they had received a new draft. He stated that if both directors had the same rights and both agreed on a decision to be taken then they would be in agreement. This email exchange is attached hereto and marked as “SC14”. This email exchange is important to consider because it reveals that the CEO of VR Laser, Pieter van der Merwe, was heavily invested in the interests of Anil Gupta in the structure of Denel India and its decision-making. It is also important to note how the idea of bypassing the relevant Indian legislation was being discussed so casually in the interests of Anil Gupta.

88. According to Gupta leaks, the email address “infoportal1@zoho.com” was the same address with which the Curriculum Vitae of Richard Seleke was sent to Duduzane Zuma on the 29th June 2015. At the time, Seleke was in the Free State Provincial government under Mosebenzi Zwane and by November 2015 Richard Seleke became Director-General of Public Enterprises.⁶³ This email address which we suspect belongs to Seleke is copied on every correspondence relating to the Denel Asia and Denel India deals. On the 24th November 2015 infoportal1@zoho.com forwarded an email with an attachment of an internal memorandum within the DPE, from Deputy Director General Vuyo Tlale to PPE Minister Lynne Brown. On the 28th November 2015, Mantsha emailed the same official letter he received from Minister Brown to Ashu Chawla.

89. There are some important points that can be drawn from the email exchanges explained above:

- (i) The emails show that two weeks after the deal between Denel and VR Laser Asia was first discussed, the VR Laser representative and CEO Pieter van der Merwe was already in communication with Andani group to work out a deal that would create a new company. Structurally, the agreement left Denel with a 25% stake in Denel India.
- (ii) The emails illustrate the importance that is placed on Anil Gupta receiving a portion of the Adani group’s stake in the company. Anil Gupta is a wealthy businessman in India who is also the father of the woman who got married in Sun City when the Guptas landed an aircraft at Waterkloof air force base. The Gupta leaks emails have revealed that in 2012, a Gupta associate and former SAA board member Rajesh Naithani along with an immigration official, went to extraordinary lengths to get Anil Kumar Gupta the position of honorary-consul of Uttar Pradesh and Uttarkhand States in India to South Africa. The immigration official, Harris Majeke, and Rajesh Naithani and Gupta associate Ashu Chawla were in correspondence regarding the attempt to get Anil Gupta into that office despite the fact that there already existed a consulate situated in Delhi which borders the

⁶³ Amabhungane and Scorpio. #GuptaLeaks: Duduzane Zuma, Kept and Captured. Amabhungane Centre for Investigative Journalism. 1 June 2017. <http://amabhungane.co.za/article/2017-06-01-guptaleaks-duduzane-zuma-kept-and-captured>

States of Uttar Pradesh and Uttarkhand in the North of India.⁶⁴ The attempt to make this happen over five years ago illustrates a few things. First that Anil Kumar Gupta's links to the Gupta brothers and the network is very strong. Second, he has been in South Africa in the shadows for a long time and seems to have remained here. Thirdly, that the attempt at forging and solidifying linkages between India and South Africa using State institutions like ambassadorial posts has been present for a sustained period of time and that the Denel India formation was part of the fruits of those linkages. In terms of the structure of the proposed Denel India deal, Anil Kumar Gupta would have a stake of around 20% of Denel India for himself.

- (iii) The idea that Denel India was even conceived is preposterous given Denel would only have a 25% share of the joint venture even though its capacity would have been the driving force behind the company. This occurs after Denel stated that the main reasons for the formation of Denel Asia, was to enter the Indian arms market. However, the manner in which Denel India deal was conceived was that Denel India would have had the rights of operation within India, meaning that Denel would have relinquished another 25% of its stake in a region that it had chosen.
- (iv) The Adani group's involvement in this deal must be taken seriously because of the numerous allegations of fraud and corruption that have been levelled against it in its operations in India and that have recently dominated public discourse in Australia.⁶⁵ Parasmal Lodha who is in one of the email exchanges is a well-known Indian property tycoon who was arrested in 2016 on charges of counterfeiting Indian bank notes.⁶⁶ In a response to questions from a news publication in India regarding the Gupta Leaks showing Adani's interest in the Denel India formation, an Adani group spokesperson said "Adani Group had exploratory discussions with Denel in 2015. However the Group was neither comfortable with the partners involved nor with the proposed proposition. Hence, the discussions were not taken forward by Adani Group." The same article also alleged that the Guptas were actively looking for business partners in India.⁶⁷ The statement by the Adani representative is clearly an attempt at obfuscation because it is clear that there was an investment in the project from their side. Anil Kumar Gupta is part of the business conglomerate and had numerous interactions with the Gupta family in South Africa.
- (v) Adani Group's relation to the deal is worrisome because it seemed to signal a convergence of linkages between private business networks who are operating across international borders, using public resources to benefit the networks. The

⁶⁴ A Serrao. #GuptaEmails: SA High Commissioner helped get Gupta a job as Consul. Fin 24. 30 May 2017. <https://www.fin24.com/Economy/guptaemails-sa-high-commissioner-helped-get-gupta-a-job-as-consul-20170530-2>

⁶⁵ M Safi, *Adani mining giant faces financial fraud claims as it bids for Australian coal loan*. The Guardian online, 15 August 2017. <https://www.theguardian.com/world/2017/aug/16/adani-mining-giant-faces-financial-claims-as-it-bids-for-australian-coal-loan>

⁶⁶ *ED gets transit warrant for Parasmal Lodha, may bring him to Chennai*. Times of India, January 4 2017. <https://timesofindia.indiatimes.com/city/chennai/ed-gets-transit-warrant-for-parasmal-lodha-may-bring-him-to-city/articleshow/56321905.cms>

⁶⁷ Manu Pubby, *Leaked mails of South African Gupta family talk of selling arms company Denel to Adani*. The Economic Times online. <https://economictimes.indiatimes.com/news/defence/leaked-gupta-mails-talk-of-selling-denel-to-adani/articleshow/59116515.cms>

chronological order of events that relate to Denel and its attempts to enter into the Indian market must be read with the presence of Adani foremost in mind. The Guptas (through Salim Essa) who clearly have strong ties with powerful people in India, purchased a controlling stake in VR Laser in late 2013. By August 2014 India suddenly lifted its ban on Denel's operations in India. A new board at Denel was constituted in July 2015 and negotiations to form Denel Asia which was primarily aimed at doing business in the large Indian arms market began. Within two weeks of commencement of discussions around Denel Asia, plans to create Denel India emerged, which saw the Adani group gun for a 50% stake in the company. The influence of the Adani group on this entire process has seemingly been present from the beginning. It must be noted that the Adani group have only recently begun its foray into the military industry. On the 30th March 2016, Adani Aero Defence Systems & Technologies Ltd was registered. It sought to enter the market in compliance with Modi's Made in India programme, launched in September 2014, which aimed to make India a global manufacturing force.

90. Due to the complexity of this case and the numerous events that are important to consider, it is worth summarising the key issues and events that are central to this case as follows:

- The Denel case fits squarely within the general pattern of State capture, with one of its prominent features being the repurposing of State institutions. This process aimed to materially alter lucrative SOEs away from their publically mandated functions, for the interests of a network that exists in a symbiotic relationship of patronage with a shadow State. There is a mutual reinforcement and corrupt relationship that exists between individuals who hold important political and administrative positions in the State on the one hand and a private network of people who are linked to the Gupta family on the other.
- In conforming to the frame of repurposing as seen in other SOEs, there is a distinct process of the hollowing out of the institution through the dismissal of high level management who are not compliant and the constitution of a new management, who then begin to make important decisions on large projects that benefit the narrow interests of the Gupta network and its associates and contravene regulations such as those found in the Public Finances Management Act, which are meant to regulate activities of SOEs so that they operate in the most effective and efficient way possible.
- Despite being mostly similar in form to the other instances of State capture, the Denel case has features distinct from the other cases that have been documented in South Africa. While the likes of Transnet and Eskom have received greater public attention through the media because of their high volume capital, in the Denel case, there is a clear attempt at not just repurposing but leveraging the institutional presence of the SOE (Because of its reliance of financial support from the State) in order to fashion completely new entities that could be almost entirely controlled by and would almost exclusively benefit a private business network.

- The proposed venture Denel Asia, attempted to dilute Denel's ownership to almost half in a strategically important and lucrative Asian market, with the other half benefiting a company in VR Laser Asia, with no business history and its VR Laser South Africa parent company not being a significant player in the Asian market either.
- In terms of Denel's assertion, the choice to partner with VR Laser made absolutely no business sense. Important to consider is that, the only reasonable explanation for Denel to prefer VR Laser as a potential partner in the important Asia-Pacific market, is the Gupta's, who it would seem, do have strong links to business contacts in the Indian market. Denel has however continued to deny the Gupta's influence in this decision.
- The Gupta's were informed through email correspondence during every step of the official discussion that related to the formation of Denel Asia proving their investment in the deal and activities at Denel.
- Gupta leaks have revealed that as soon as negotiations began for Denel Asia, the Gupta network were already in talks to constitute Denel India with the powerful Indian conglomerate Adani. Anil Kumar Gupta, a Minister in Uttarakhand State, a wealthy business and a family member of the Gupta's who is also a member of the Adani group was set to own around 17% of Denel India. The deal would have left Denel with a mere 25% of the deal to operate within India which is the largest importer of arms in the world. The whittling down to 25% of total ownership in a place like India constitutes a manoeuvre that goes beyond how we understand the repurposing of State entities. The international connection and its influence is brought into focus through observing the events that led to the forming of Denel Asia where the ban in India of Denel operations was suddenly lifted after the Guptas gained a stake in a company in VR Laser. Immediately after the discussions around Denel Asia began, Gupta associates were already in discussions to with the Adani group who reportedly have influence in the highest echelons of political power in India.

Legal Issues

- This case being related to an SOE invokes the legal issues that are concerned with acts of corruption between individuals in a privately constituted network and people acting in their capacity as representatives of the State. Therefore this case hinges on the Prevention of Corrupt Activities Act (PRECA)
- The mechanism through which these State actors who have stepped outside of their publicly mandated duties and have worked to benefit the Gupta network is bribery

The following are questions that arise out of the murky details of this case:

- What was the rationale behind changing the board at Denel in July 2015 against the recommendations of the DPE?

- What was the motivation behind appointing Daniel Mantsha as Board Chairperson considering his chequered history and having not served on any other significant boards?
- Why was the extreme decision of suspending Saloojee done in less than 6 weeks from the announcement of the new board to Saloojee, Africa and Mhlonto being suspended?
- Why was the investigation into the apparent transgression not conducted as quickly as the decision was made to suspend Saloojee, Africa and Mhlonto?
- Was Saloojee et al, removed to clear the way for the Denel Asia joint venture?
- What was Saloojee et al official position regarding VR Laser Asia being the partner of choice as it pertains to the Denel Asia joint venture?
- Why did Denel choose VR Laser as a partner in the joint venture in an important market like Asia/Pacific when VR Laser had no discernible footprint in the notoriously difficult market?
- Was the reason Denel chose VR Laser because it was connected to the Guptas?
- Why were the Guptas sent, through email, official and confidential governmental correspondences relating to Denel?
- Why were the Guptas copied on correspondences that related to the Denel Asia joint venture?

Charges

- **Thamsanqa Msomi**, a board member of Denel at the relevant time of this case, in his capacity as Chief of Staff of Home Affairs as illustrated by annexure A was in breach of PRECA.
“Part 2 (4) Offences in respect of corrupt activities relating to public office 2) to act includes (C) expediting, delaying or preventing the performance of an official act”. Thamsanqa Msomi used his powerful administrative office to provide preferential treatment on State matters to private individuals
- **Daniel Mantsha** should be investigated for bribery and corruption because of his proximity to the Gupta network and the conflict of interest this relationship represented which Mantsha has never declared. There have been reports in the media that Organisation Undoing Tax Abuse (OUTA) have laid criminal charges against Daniel Mantsha because in the Gupta leaks emails it was revealed that Mantsha sent the Guptas his personal municipal bill presumably to have it paid. The Gupta leaks have also demonstrated that Daniel Mantsha stayed in a luxury Dubai hotel at the Gupta’s expense. This is demonstrated by annexure G. This would be a breach of PRECA. Also related to offences relating to Part 2 in the occupation of public office, (1) directly or indirectly accepting gratification from any other party. Mantsha also shared a confidential cabinet memorandum in breach of Part 2 (4) B (i) of PRECA which relates to the misuse or selling of information.
- **Richard Seleke** of the DPE was also in contravention of PRECCA Part 2 (4) b (i) as the other party who allegedly shared the DPE memorandum on to Ashu Chawla which was confidential.
- **Lynn Brown** should be investigated for corruption for going against the recommendations of the department in the selection of Denel Board constituted in July 2015. This would related as well to Part 2 (4) (2) (b) which relates to performing duties in an inadequate manner

- **The Gupta network** and associates are also in contravention of PRECA. The Gupta leaks amount to evidence that at least Rajesh Kumar Gupta aka Tony Gupta was being provided government information that he was not privy to for purposes that were against the interests of the South African public. This is a breach of PRECA Part 2 (4) (1) (b) relating to any person who offers gratification to public officials
- **Johannes “Spark” Motseki** who was the only board member retained and who **seemed to have known of Saloojee’s imminent dismissal prior to anyone else**

Connections in the Cases

The clearest link between this case and the other cases before the Tribunal are that their core they are all instances of corruption within the South African State relating to the trade of arms. The international arms trade is a murky space with unsavoury operators whose activities are located in the shadows and this enables it to exploit gaps that are opened by corruptible individuals within the State. This case is unlike the Apartheid era arms trade which would have been violating international treaties on arms because of sanctions against South Africa at the time. Under United Nations Arms Trade Treaty, the sale and purchasing of arms by South Africa in the Arms Deal and Denel cases, would not have been in contravention as the South African State is internationally recognised. However, it is the environment under which the international arms trade operates that creates the conditions for the corruption that is evident in the Arms Deal and Denel cases. The fact that Denel was formed from Armscor which is a company that was so entangled in State corruption cannot be dismissed as mere coincidence and must be taken seriously as an area to study in order to look for the continuities between the forms of corrupt activities that have endured in the passage of time from Apartheid to the democratic governance.

This case is more closely related to the Arms Deal case. There is at least one person who can be linked to this case and the Arms deal and that is Fana Hlongwane. His presence in the arms deal case is well documented through his position as legal advisor to Joe Modise, the Minister of Defence at the time. His position as a link between private companies offering bribes and the South African government has been reported on widely. He is linked to the present instance of state capture where the Gupta leaks have revealed that he was a guest of the Guptas along with other prominent political figures in early 2016 at the Oberoi Hotel in Dubai.⁶⁸

On the surface, this case seems to relate only to corrupt practices between State officials and the Gupta family and its close associates like Salim Essa. A broader view of this case will illustrate the vast expanse of the connections in the arms trade on a global level and the private networks that operate in these spaces.

The concept of State capture is bandied about to characterise this new form of private influence on the South African State but analysing these cases with the Apartheid era arms trade and the post-Apartheid Arms deal, demonstrate that the idea of the capturing of State institutions for the benefit of private networks especially as it relates to the arms trade, is an established tradition in South Africa. The most obvious difference in this instance of State capture is that the capturer is no longer controlled by Western powers but its centre now

⁶⁸ N Gules, Gupta emails Confirm Family’s Extravagant Dubai Palace. City Press. 31 May 2017. <http://city-press.news24.com/News/gupta-emails-confirm-familys-extravagant-dubai-palace-20170531>

resides in the East. This does not alter the nature of the capture because they continue to operate on the same logic and use the same kinds of methods. These are among others, the bribery of powerful political and administrative offices, obfuscation through setting up shell companies and a complete disregard for laws and regulations.

Denel case- policy and legal remedies

Depending on the vantage point of the observer, there are different sentiments that this case may evoke. On the one hand, one could view this case as a triumph of the openness of our democracy and the work of an open media landscape that was able to uncover an attempt at “high-jacking” a lucrative SOE and resulted in the move ultimately being obstructed. One could have the view that the resistance shown by the likes of Pravin Gordhan and the other officials in Treasury at the time, is something to be celebrate as the integrity of public officials is crucial to a functioning democratic system. However, on the other hand this case demonstrates in stark terms, just how deep the influence of private business networks goes.

The variance in how this case can be viewed makes it difficult to suggest what the policy and legal remedy could look like. One clear issue that must be resolved is the motivations and justifications behind the hiring and dismissing of executives and board members at SOEs, to ensure that their presence in those organisations is there for the benefit of the public and not private parties. This case demonstrates that board members and executives of SOEs have great influence in the business decisions made within these companies. The fact that the Denel India and Denel Asia joint venture was stopped however does indicate a success in the framework that relates to the activities within SOEs.

Since the Denel Asia joint venture was halted in its tracks we believe a public apology from the Denel Board and the Minister of DPE is warranted. There must also be a reinstatement of Riaz Saloojee if the tribunal finds that he was dismissed purely for the purposes of bringing individuals who would be compliant to the Gupta network.