ANALYSING STATE CAPTURE THROUGH PUBLIC PROCUREMENT WEAKNESSES IN SOUTH AFRICA

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DECLARATION

I, **Nana Aikins** (Student No: 1407057), declare that this research report is my work and it has not been submitted anywhere else apart from the '**Research Proposal Development'** course at the Wits School of Governance.

ABSTRACT

This research report reviews and analyses the procurement system in South Africa concerning the legislative and institutional frameworks that govern state-owned enterprises (SOEs). This study aims to assess the system's flaws and inherent weaknesses and highlight how these pitfalls have ultimately aided the phenomenon of state capture.

It is a constitutional requirement that when organs of the state contract for goods and services, they do so in a fair, equitable, transparent, competitive and cost-effective manner. When a public organisation is captured by private interests, it loses its autonomy to act in the furtherance of public welfare, which manifests in its inability to contract competitively, achieving low prices and high quality. A postulation is made in this study that public procurement personnel lack the integrity and personal will to resist collusive behaviour and do not have the institutional strength to detect and withstand corrupt dealings that contribute towards state capture. Following the publication of the State Capture report by the Public Protector of South Africa in 2016, the concept has gained significant political momentum. However, despite this development, there has been a notable lack of academic research on the phenomena, particularly regarding its connection to public procurement. This research aims to fill this gap.

This study draws most of its data from the transcripts of the hearings conducted by the Judicial Commission of Inquiry into State Capture. Through a qualitative explanatory case study approach, using thematic analysis, the study sought to understand the patterns of abuse that occur at each stage of the procurement cycle and what factors contributed to these transgressions. The findings of the study identified challenges associated with lack of capacity, non-compliance with legal policies, bid-rigging and collusive behaviour, and political interference.

Key words: *State capture, public procurement, collusive behaviour, tender corruption, bid-rigging*

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LIST OF ABBREVIATIONS

ARC .... Audit and Risk Committee
BAC .... Bid Adjudication Committee
BADC .... Board Acquisition and Disposals Commitee
BBBEE ....Broad-based black economic empowerment
BEC ....Bid-Evaluation Committee
CAQDAS .... Computer-assisted qualitative data analysis software
CEO .... Chief Executive Officer
DA .... Democratic Alliance
EMEA ....Executive Members' Ethics Act
FDI ....Foreign Direct Investment
GDP ....Gross Domestic Product
MFMA.. Municipal Finance Management Act
O-CPO ....Chief Procurement Officer
OECD .... Organisation for Economic Co-operation and Development
OPOC.. Office of the Chief Procurement Officer
PARI ....Public Affairs Research Institute
PEPs .... Politically Exposed Persons
PFMA ....Public Finance Management Act
PPPFA ....Preferential Procurement Policy Framework Act
PSJV ....Pooling and Sharing Joint Venture
RMC ....Ritchersveldt Mining Community
SCM .... Supply Chain Management
SMMEs ....Small, Medium and Micro Enterprises
SOEs ....State-Owned Enterprises
SSI .... Scarlet Sky Investments
UNCTAD .... United Nations Conference on Trade and Development

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CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

Over the past two decades, the South African government has become responsible for procuring the largest portion of goods and services in the country. Part I Volume 3 chapter 4 of the Judicial Commission of Inquiry into State Capture Report, which explicitly deals with issues of procurement, states in its opening paragraph that the government in the year of 2017 “channeled R967 billion through public procurement, which equates to 19.5% of the GDP” (Judicial Commission of Inquiry into State Capture, 2022, p. 720). This is higher than average OECD countries which totals about 12% of their GDP in public procurement (OECD, 2016). With the estimated total procurement spend of government being over R800 billion per year, the Public Affairs Research Institute has labelled South Africa a ‘contract state’ that has become functional only through the capabilities of the private sector (PARI, 2014). Due to the monetary scale and sheer volume of transactions at stake, public procurement has become one of the government activities most susceptible to corruption (OECD, 2016).

Good governance is a compounded effort of political accountability, adequate checks and balances and continuous engagement from several stakeholders. The World Bank (2012) attributes good governance to increased value for money, efficient service delivery, and a conducive environment for private sector-led development. Public procurement forms a vital part of all of these factors and is thus in need of constant reform and adequate management. Public procurement is identified as "the supply chain system for the acquisition of all necessary goods and services by the state and its organs when acting in public pursuit or interest" (Mazibuko & Fourie, 2017, p. 107). When the public procurement system functions optimally, substantial gains are made that contribute to the development of society. Similarly, when the system is rendered incapacitated due to abuse by government officials and private interests - the poor are often first to suffer as economic loss exacerbates conditions of poverty. The Economic Model argues that corruption affects poverty by first impeding economic growth factors, which, in turn, impact poverty levels (Chetwynd, Chetwynd & Spector, 2003).

State capture as its own arrangement of corruption has become a tending topic in South Africa since the dismissal of the then Minister of Finance, Nhlanhla Nene in December 2015 (Dassah, 2018). Since then, South Africa has been inundated with investigations and public discussions around the growing phenomena. However, what the literature has revealed is that the term state capture lacks analytical clarity as there are faint lines between legal political lobbying, general corruption, white monopoly capital, and state capture (Dassah, 2018).

Writing during the period where the former Soviet bloc was being dismantled, Hellman et al. (2003, p. 3) first described the term state capture as "[firms] shaping the formation of the basic rules of the game (i.e laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials". They further elaborate that, "because these firms use their economic power to bar any policy reforms that have the potential to eliminate their advantages, state capture has become far more than a symptom of bad governance but rather a systemic cause" (Hellman et al., 2000, p. 4). In this view, the captured economy forms part of a repetitive cycle in which policies and institutional reforms necessary to improve governance and society at large are compromised by collusion between powerful firms, business elites and public officials who benefit off the continuation of poor governance (February, 2016).

The manifestation of state capture in South Africa is owed to the entanglement of the state-business relationship between former President Jacob Zuma and the notorious Gupta brothers Ajay, Atul and Rajesh. Former Public Protector Thuli Madonsela investigated allegations relating to the apparent appointment and dismissals of ministers and board members of SOEs; various conflicts of interests concerning the Gupta-Zuma relationship; bribery; money-laundering; and other accusations of state corruption in the controversial "State of Capture Report" (Public Protector South Africa, 2016). The report paved the pathway for the Judicial Commission of Inquiry into State Capture, where respondents like Shadow World's Investigations Researcher Paul Holden revealed that the cost of state contracts redirected to Gupta-linked entities is an estimated R57 billion (Chabalala, 2021). In this web of corruption includes SOEs such as, Transnet a large rail, port and pipeline company, Eskom South Africa's only electricity utility, and the Free State Provincial Government. Similarly, President Cyril Ramaphosa at the international investors at the Financial Times Africa Summit in London stated that state capture has costed the South African economy, "more than R500 billion" (SABC, 2019).

State capture affects poverty by negatively impacting economic growth. Not only does the public's trust and confidence in the government swiftly diminish, but also that of private investors. Prior to the announcement of a recession in 2017 after the release of the first state capture report, export and commodity prices steadily declined, while the economy contracted by 1.2 per cent in the first quarter of 2016 (Madonsela, 2019). Unemployment was at 26.7 per cent and according to the United Nations Conference on Trade and Development (UNCTAD) 2018 World Investment Repot, foreign direct investment (FDI) had fallen from R63 billion in 2012 to R18 billion in 2017. Contextualising the economy at present; as of the third quarter of 2022 the unemployment rate in South Africa is at a staggering 32,9 per cent (Stats SA, 2022). Furthermore, the energy sector is in a state of perpetual crisis as the issue of load-shedding turns 16-years-old in November.

The purpose of this research study is to investigate the South African public procurement system and analyse the structural weaknesses that have facilitated collusive behaviour between public officials and private interests. The study postulates that the lack of substantive integrity among public procurement personnel, combined with the absence of institutional strength within procurement institutions, have enabled the capture of stateowned entities by these illicit actors. Through a qualitative case study approach, this research shall review the transcripts from the Judicial Commission of Inquiry into State Capture and analyses how the public procurement cycle was expropriated.

The OECD (2016) in previous corruption surveys has repeatedly named public procurement as the most corrupt area of government activities. This evident given the amount of discretion required when making decisions about large sums of public finances (Fazekas & Tóth, 2016). In the 'contract state' fundamental roles of government such as service delivery are decreasingly being performed by the actual government administration and increasingly performed by private companies who tender for various roles (PARI, 2014). What was once identified as 'state capacity' has now morphed into how well the state is able manage these contracts with the private sector, which is not very well. In the context of public procurement, state capture involves targeting public organizations that manage the distribution and performance of contracts, as these are the primary sources of rents to be extracted. When a public organization is captured by private interests, it loses its autonomy to act in furtherance of public goals, which manifests in its inability to contract competitively, achieving low price and high quality.

Recent authors such Chetwynd, Chetwynd & Spector (2003), Bhorat et al., (2017) and February (2019) follows the pattern of analysing state capture and its effects from an economic standpoint. While this is necessary for painting a holistic picture, one of the aims of this study is to re-center the popular discourse from a focus on the economy back to the priority mandate of this country, which is its people. The South African case of state capture is just one typical example of a global trend in the growth of increasingly authoritarian, neo patrimonial regimes where the dichotomous relationship between the constitutional state and the private shadow state is maintained. Understanding the South African context and its challenges is therefore an important contribution to our understanding of this global phenomenon. It is also my own contribution to the broader struggle to save South African democracy and development practice from a power elite that pursues its own interests at the expense of the rest of South African society, in particular the poorest people who will suffer primarily from the consequences of what is a de facto silent coup (Bhorat, et al., 2017).

1.2 PROBLEM STATEMENT

It can be argued that South Africa is largely a contract state. The provision of goods and services by government agencies has declined, while the role of private companies bidding for these services has correspondingly increased. This change has exacerbated the threat of clientelism and corporate dominance, which can now be understood as state capture. At the genesis, state capture undermines the efficiency of the state and its ability to fulfil its priority mandate of serving the people. This takes place when fiscal resources are redirected away from the provision of public goods and services meant for the poor and from value-adding economic endowments towards private interests (Martin & Solomon, 2016). This consequence flows from the repurposing of SOEs. The mismanagement of the state enterprise has resulted in a never-ending shortfall of generating capacity that has negatively impacted businesses, disrupted households, and undermined economic recovery measures by the constant bailout of public funds (Alence & Pitcher, 2019).

For example, on the ground (quite literally), the capture of the Free State Provincial Government has impacted the most fundamental and basic facets of service delivery. The Democratic Alliance (DA) leader Roy Jankielaohn said, “we don’t even talk about sewage because it’s almost become a normal thing to see sewage running down the roads,” (Mahlaka, Davis & Payne, 2021). Many parts of the province lack basic infrastructure and on top of rolling blackouts, experience water shortages. State capture has done consequential damage to the economy and even though the basic functions of the government are still operational, South Africa faces the very real threat of becoming a failed state.

1.3 PURPOSE STATEMENT

This study's objective is to examine South African state-owned enterprises that have been probed by the Judicial Commission of Investigation into State Capture for alleged state capture. This study also aims to assess how the procurement process is managed, influenced, and abused in the granting of governmental contracts. In doing so, this research will identify areas in which the procurement system is inherently flawed and provide recommendations on how to prevent irregularities, improve effective monitoring and oversight measures in pressure point areas, and improve ethical business state-relationships between private sector stakeholders and government officials. In turn, this will promote effective governance and management and defend the system against further exploitation. This leads to the following research questions:

1.4 RESEARCH QUESTIONS

- What patterns of abuse occurred during the procurement cycle of state capture in Alexkor and Eskom?
- How have the institutional weaknesses of South African state-owned enterprises and their procurement systems enabled state capture?

- How has the lack of executive oversight resulted in poor transparency within governance frameworks?

1.5 RESEARCH OBJECTIVES

The aim of this research study is to analyse how state-owned enterprises have been captured in South Africa through the manipulation of the public procurement system. More specifically this study aims to:

- Establish the relationship between public procurement and state capture.
- Identify the patterns of corruption that occur in each stage of the procurement process
- Highlight the inherent weakness in both the theoretical and practical execution of public procurement policies
- Formulate recommendations on how to overcome identified challenges.

1.6 SUMMARY

The aim of this chapter was to give background and introduce the research study. The problem statement and the purpose of the research have been stated. The rest of the study is structured as follows: chapter two details a review of the previous literature, both theoretical and empirical; chapter three breaks down the research strategy, design, data and method; chapter four is a case study analysis of a SOE that has been investigated by the Judicial Commission of Inquiry into State Capture on allegations of possible state capture; chapter five is a detailed discussion of the findings; and chapter 6 concludes the study and provides recommendations.

CHAPTER 2

LITERATURE REVIEW

2.1 INTRODUCTION

This chapter reviews the existing academic literature on the regulatory environment within which public and private interest operate and the institutional arrangements for stateowned enterprises as stipulated in national legislation. This chapter will also explain the concept and theories of public procurement and state capture. Through a review of the literature this discusses the gap this study aims to fill by highlighting the makings of the shadow state, and how its operations affects the ability of the legitimate state to perform its developmental mandate for the betterment and advancement of South African citizens.

2.2 PUBLIC PROCUREMENT REFORM

The promise of 1994 by the new leaders of a democratic South Africa was to imagine a state that would serve the public good at its core (Bhorat et al., 2017). That undoubtedly would mean transforming and reimagining several key organizations, including SOEs, that would be the drivers of efficient service delivery and sustainable development. This would be no small task due to the deep-rooted institutional reforms that had to follow. Sincere dedication and remarkable skill would be required to displace the remnants of the apartheid era. Three decades later, admirable progress has been made, however there is national dissatisfaction, and within the ruling party that promise of 1994 has not been fulfilled.

South Africa as a young democracy still faces a myriad of development challenges: an unwavering unemployment crisis, particularly amongst the youth; low levels of economic prosperity; unacceptable levels of crime and gender-based violence and femicide (Turley & Perera, 2014). Despite these challenges, South Africa still holds ample potential to be the drivers of economic and social change in Africa. A big driving force behind this ambition will undoubtedly be public procurement. Public procurement is the single biggest state function. As it stands, the South African government spends close to a trillion rand each year through public procurement, this amounts to 19.5 per cent of the gross domestic product (GDP) (Brunette, Klaaren & Nqaba, 2019). As such, public procurement has adverse effects on the tone and performance of the South African economy. Due to the objectively deficient performance of the South African economy, there is a consensus, sustained by evidence, that South Africa's public procurement system is in crisis. The system displays unacceptable levels of blatant non-compliance and corruption, too often produces fruitless and wasteful expenditure, and fails to fulfil the states obligation to provide goods and services to its people (Brunette, Klaaren & Nqaba, 2019).

In 2012, former Minister of Finance, Pravin Gordhan in his budget speech introduced the formation of the Office of the Chief Procurement Officer (OPOC). He further unpacked the current state of South Africa's public procurement system and acknowledged the adverse political challenges involved in its reconstruction:

> Let me be frank. This is a difficult task with too many points of resistance ... While our ablest civil servants have had great difficulty in optimizing procurement, it has yielded rich pickings for those who seek to exploit it. There are also too many people who have a stake in keeping the system the way it is. Our solutions, hitherto, have not matched the size and complexity of the challenge ... This is going to take a special effort from all of us in government, assisted by people in business and broader society (Gordhan, 2012).

It is here where we see how intimately entangled public procurement is with party politics and the true revelation of it has on society if left unkept.

2.3 CENTRALISATION VS DECENTRALISATION

Before 1994, South Africa operated a highly centralized procurement systems that was understood to be the international standard (PARI, 2014). The argument back then was that the practice of centralization allowed for strong central control over government expenditure and subsequently the limitation of corruption. However, the analysis now of centralization can amount to a highly radicalized one. The national State Tender Board was comprised of political figures, officers of the state, and corporate interest, that would engage differently during the allocation of tenders (Brunette & Klaaren, 2020). The rational here was that the competing interests would balance one another out making the distribution of tenders fair and impartial (Brunette & Klaaren, 2020). The dealings of the State Tender Board were kept confidential. In theory, this was done to protect the business of bidders, but it created a smokescreen that allowed for unaccountability in the decision-making process (PARI, 2014). Couple this with the lack of justiciable legal norms and standards, service provides had little protection against unjust decisions (PARI, 2014).

This was the model in place since the formation of the Union of South Africa. The amalgamation of high-level political control, with political monopoly that was not subject to any form of scrutiny from civil society made it seemly easy for the ruling party to push the agenda of white dominance through the procurement system (PARI, 2014). It was widely recognized that the boards favoured open competitive tenders but commonly deviated from the lowest-priced rule, favouring larger, better-established business for contracts of high value and longer terms. This bias became institutionalized in product specifications, norms, standards, rules and procedures creating an environment where public procurement became exclusively for white business due to the competitive advantage they held over black businesses (Brunette, Klaaren & Nqaba, 2019). This was done in pursuit of a broader Afrikaner economic advance, and while though these preferences were never officially legislated, they were accepted and discretionary (PARI, 2014).

This was the procurement system the newly elected democratic government of 1994 inherited. While the significance of a centralised or decentralised system may appear far removed from the bigger state capture picture as a whole; accompanied by the individualistic behaviour at the helm of the saga. Analysing the breakdown of the State Tender board and how the decentralisation of the procurement system may have impeded effective monitoring and oversight mechanisms, whilst concurrently increasing the number of persons required to understand and work the procurement system (Judicial Commission of Inquiry into State Capture, 2022). Existing academic literature is at odds with one another concerning whether centralisation or decentralisation is the appropriate way to go.

The State Tender Board Act, 1968 (Act 86 of 1968) was amended to empower accounting officers (Director Generals, Provincial Head of Departments, Municipal Managers, and Chief Executive Officers of municipal entities) to manage their own procurement affairs (Munzhedzi, 2016). It is here that several new challenges arose. Those in favour of centralisation like Ambe and Badenhorst-Weiss (2012) argue that the large number of tender fraud cases and poor service delivery may be accredited to the lack of knowledge and/or the intention to get the best value for tax-payers money on provincial and local levels. Munzhedzi (2016) states that this is due to the lack of skills, capacity, noncompliance with policies and regulations, and accountability of procurement officers. Furthermore, centralisation is argued to leverage scales to decrease spending costs (Ambe & Badenhorst-Weiss, 2012). Munzhedzi (2016) in accordance states that governments tend to reduce expenditure by purchasing in bulk. This is because, in the grand scheme of things, South Africa function as a single unit, and often, the goods and services required are the same across different departments and provinces.

Centralised procurement eliminates duplications which is a common occurrence, as there may be only one or two bid committee, bid administration unit and bid adjudication committee (Munzhedzi, 2016). These committees then control all procurement processes of government in its entirety or at least for the whole province, particularly for larger procurements (Munzhedzi, 2016). To add, Fourie and Malan (2020), mention how government institutions often find themselves in competition with one another for the same resources. This drives the purchase price up, subsequently increasing expenditure. Turley and Perera (2014, p. 25) neatly highlight the impact of the foregoing issues by stating that “the implications for the economy are significant—both directly by draining the public purse and therefore hampering economic development, or indirectly by causing macroeconomic instability, and diminishing confidence in the economy as a result of declining foreign investment”. The existence of numerous public procurement sites creates room for fraud and corruption.

On the other side of the spectrum, there are several arguments that advocate for the advantages of decentralisation. During the post-apartheid reforms, there was a growing realisation that decentralisation methods were necessary for flexibility. Operating a highly centralised procurement system meant that the entirety of the country's needs was concentrated through state tender boards. In a large nation like South Africa, procurement would be time-consuming, and the danger of a bottleneck would often arise (PARI, 2014). This would be problematic in cases that require an urgent response. Additionally, as previously mentioned, the undue political influence over the tender boards meant that procurement decisions were made under discretion with no legal prescriptions as to how offers were solicited or accepted (PARI, 2014).

Meyer and Auriacombe (2019) argue that a centralised procurement system impacts society negatively, especially at the grassroots levels. They highlight that service delivery is usually first to suffer as national and provincial governments are often ‘out of touch’ with the needs and wants of communities (Meyer & Auriacombe, 2019). This leads to insufficient service delivery and a failure to create sustainable development. Accordingly, Ambe and Badenhorst-Weiss (2012) argue a similar point. They believe that because decentralisation relies on local knowledge, this leads to a better responsiveness to purchasing of goods, and a better understanding of unique local needs.

Efficiency and effectiveness aside, a critical issue that the Judicial Commission of Inquiry into State Capture (2022) highlighted was the abuse of power the Boards of SOEs displayed. The directors of the boards of SOEs are appointed by the Minister on behalf of the nation state. It may be argued that the Board plays the most crucial role in ensuring as well as setting the example for good governance within SOEs. They are responsible for oversight, sustainable development, and the compliance with all legislative and regulatory demands (Judicial Commission of Inquiry into State Capture, 2022). The evidence uncovered by the Commission revealed that often, “the Boards of the SOE’s have shirked their responsibilities, or worse, used their powers to corrupt the SOEs which they have been appointed to protect. This collective misconduct was often evidenced by the abuse of centralised procurement processes so that the approval authority for high value tenders became concentrated into the hands of a small group of top executives and Board members” (Judicial Commission of Inquiry into State Capture, 2022, p. 754).

The Commission drew most of its evidence from Transnet, one of the primary sites of capture. The centralisation of procurement made it possible for both internal and external captors to collude in the award of tenders and redirect excessive public funds into private pockets. Contrary to the complex shadow state that operates underground, the execution of state capture on the surface may in some instances be quite straightforward. Power is centralised in certain individuals that enable them to make procurement choices at their own will, as opposed to committees and acquisition councils that require the buy-in of other individuals (Judicial Commission of Inquiry into State Capture, 2022). Preceding 2011, the Board of Transnet did not have a significant say in procurement-related affairs. It was not till 2011 when the Board Acquisition and Disposals Committee (BADC) was created that gave the Board authority to approve and conclude high-value contracts over R500 million (Judicial Commission of Inquiry into State Capture, 2022) The once decentralised, democratic procurement system was reorganised into a form of dictatorship. What is more, is that like the State Tender Board, the BADC had the liberty of concealing procurement processes from the scrutiny of other Transnet officials who could have detected and reported irregularities (Judicial Commission of Inquiry into State Capture, 2022).

2.4 FRAGMENTED POLICIES AND LACK OF CAPACITY

The new democratic government faced the challenge of merging a dual economy where; on the one hand there was the white minority that made up just 13 per cent of the 40 million population that were the leaders in the economy; and on the other hand was the historically disadvantaged groups that comprised the remaining 87 per cent of the population that had a growing economy of small, medium, and micro enterprises (SMMEs) that were attempting to break into the market (Turley & Perera, 2014).

The legislative framework that guides public procurement in South Africa has admirable provisions that aims to empower and support previously disadvantaged groups. The Constitution of the Republic of South Africa (Constitution, 1996) is at the center of South Africa's procurement regulatory regime. More specifically, Section 217 sets out the primary and secondary procurement objectives, Subsection (1) stipulates that when organs of the state, be it national, provincial, or local, contract goods and services, they must do so in accordance with a system that is “fair, equitable, transparent, competitive, and cost-effective” (Constitution, 1996). Subsection (2) of Section 217 provides that procuring entities can enforce their own procurement policies based on certain categories of preference (Constitution, 1996). Lastly, Subsection 3 builds on the former, making it mandatory that national legislation prescribe a guiding framework within which the preferential procurement policy must be implemented (Constitution, 1996).

While the provisions of the Constitution are merely a guideline and require other supporting pieces of legislation to realise any effect. The problem here is that there are too many supporting regulatory frameworks that all speak to the same point. In the year of 2020, there were “about 22 pieces of primary legislation that deal with public procurement in a significant way” (Brunette & Klaaren, 2020, p. 9). One of the crucial points that Brunette and Klaaren (2020, p. 9) argue in their analysis of the structural failure of South Africa’s procurement system is that ‘the regulatory framework for South Africa’s public procurement laws is unnecessarily complex, fragmented and inconsistent.’ While having a substantive regulatory framework can be essential for mitigating the risks of corruption, it is entirely useless if the frameworks cannot be understood, let alone applied properly. The evidence shows that even for seasoned professionals in the public procurement, there is difficulty in determining which laws are applicable to the different intended procurements (Brunette & Klaaren, 2020).

Going together with the former point, is the lack of capacity within regulatory authorities and procuring entities (Brunette & Klaaren, 2020). Due to how public procurement as a government function has grown over the years to meet the developmental demands of a constantly expanding economy, the sector is understaffed and under-skilled. Advocating for the same reasoning as to why Supply Chain Management in South Africa faces great challenges, Ambe and Badenhorst-Weiss (2012) state that the shortage of skills and necessary capacity has been a significant hinderance to the success of public procumbent in the state. The National Treasury makes provisions for the development of training materials to government personnel but despite that, the skills and abilities of some government officials still do not level up to scratch (Ambe & Badenhorst-Weiss, 2012).

While this can also be attributed to a poorly designed organisational structure as discussed under the broader topic of decentralisation vs centralisation the problem of inadequate capacity is still at large. To put the predicament into perspective; The Office of the Chief Procurement Officer (O-CPO) a division of the National Treasury is tasked with reforming and regulating the procurement system that deals with all national contacts. In 2016 the office had a total of 68 employees. Couple this with the other 204 employees under the provincial treasuries that support the O-CPO, the number rises to 274, which is still 100 personal short of the 374 funded posts advertised (Brunette & Klaaren, 2020). What is more is that while employees tend to have a satisfactory level of education that usual includes postgraduate qualifications, very few personal are educated specifically in procurements or related fields such as supply-chain management and coordination (Brunette & Klaaren, 2020).

Adding to the already existing difficulty of understanding and implementing the wide range of regulatory frameworks related to procurement, is the ability for National departments and provisional and local governments to expand and devise their own policies, systems, and structures within the orbit of the national legislative (Munzhedzi, 2016). The Preferential Procurement Policy Framework Act (the 'PPPFA') (Act 65 of 2000) regulates the way organisations of the state development and implement their own preferential procurement policies. It does so by grounding invariable process that aims to include the participation of previously disadvantaged people as well as SMMEs. The PPPFA is designed in such a way that it is mandatory for organs of state to devise their own preferential procurement policies within the legislated framework (Government Gazette No. 34350). This is achieved through a preferential point system for the award of government contract to redress the effects of the racist practices of the apartheid government.

In practice, when an organ of the state contracts out for a service, bids are assed on a point-based system, which considers prices, firstly, and secondly the compliance with the goals to advance historically disadvantaged persons (Bolton, 2010). It is stipulated that for government contracts between R30 000 and R1 000 000 the 80/20 points system applies, where bidders are awarded points out of 80 for price and a maximum of 20 points for preference (Section 2(b)(ii), PPPFA and regulation 5 of the PPPFA regulations). For tenders above R1 000 000 the 90/10 points system applies, where points out of 90 are awarded to price and a maximum out of 10 for preference (Section 2(b)(i), PPPFA and regulation 6 of the PPPFA regulations).

The Public Finance Management Act, 1999 (PFMA) is an equally important piece of legalisation which in theory and practice is the bridges between the PPPFA and what the constitution has to say about SOEs (Caswell, 2016). SOEs such as Eskom, Transnet, South African Airways, Alexkor and so on do not fall under the “national, provincial or local sphere of government” as referred to in section 217(1). Thus, the PFMA is there to highlight the differences between nations and provincial public entities, as well as categories the diverse types of SOEs being listed as either schedule 2 or 3 (Caswell, 2016). Additionally, the PFMA provides that all national and provincial organisations have accounting officers, what their responsibilities are, as well as provides disciplinary measures in the case of negligence in fulfilling these responsibilities (Section 36, PFMA). The chapter sets out to clarify the division of responsibilities between the relevant chief executives or heads of department (the accounting officer) and the political heads (called the ‘executive authority’ – either a Minister or an MEC) when government departments and state organs spend public money (Sections 38(1)(l) and 40(4)(c), PFMA). The significance here lies in the emphasis on accountability as the relevant executive authority is responsible for policy choices and outcomes, while the accounting officer implements the policy and achieves the outcomes by taking responsibility for delivering the objectives defined in the departmental budget (Caswell, 2016).

Brunette, Klaaren and Nqaba, (2019) argue that by dismantling the central tender boards in the hopes of modernising the procurement system by giving state managers the will to manage and be accountable for their own affairs. The outcome was that several higherlevel managerial powers and duties were decentralised in roles that were scattered across executive authorities and accounting offers. They argue that this “confused the lines of accountability” (Brunette, Klaaren & Nqaba, 2019, p. 541). Likewise, Munzhedzi (2016) adds that it is in this decentralisation that individual public sector organisation has become vulnerable to mismanagement, fraud and corruption as the previous oversight mechanism that rested in a central tender board that allowed for cheeks and balances are not as greatly concentrated.

2.5 POLITICAL INTERFERENCE

Political interference has emerged as a reoccurring topic within the broader discussion of procurement globally. This is owed to a system of awards, appointments, and dismissals in government administration. Brunette and Klaaren (2020) highlight how integrity within public procurement depends on a system of checks and balances. Integrity is at the center of the OECD Recommendation on Public Procurement (2016).

The document speaks to how integrity is the pillar that upholds the entire procurement system and if sustained, reduces the risk of corruption (OECD, 2016). They define integrity as:

> Upholding ethical standards and moral values of honesty, professionalism and righteousness, and it is a cornerstone for ensuring fairness, non-discrimination and compliance in the public procurement process. Therefore, safeguarding integrity is at the basis of any effort to curb corruption in public procurement (OECD, 2016, p. 11).

In South Africa, duties are split up and delegated across the various stages of the procurement process such as end-user departments, supply-chain-management units, bid-specification committees, bid-evaluation committees, and bid-adjudication committees to protect integrity (Brunette & Klaaren, 2020). The rational here is to prevent the concentration of power. No single person should have the overarching authority to decide or influence the outcome of contracts at any stage of the process for their own personal gain or the gain of others.

The difficulty of insuring integrity arises from the top. Political interference often occurs when a small cohort of politicians appoint their allies in vital points of power throughout the procurement process. This is particularly the case when it comes to SOEs. In the

World Bank's (2020) Global Report *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption* it is stated that the boards of SOEs are often appointed by political parties or by government officials at the highest level. These are often ministers, party leaders, and other state officials who emanate an elevated risk due to their position and influence (World Bank, 2020). The elevated risk of the position and influence of these prominent individuals, is at the very base of the structure, undermines the checks and balances that are meant to function as a safeguard, leaving the entire procurement process vulnerable to further abuse.

In the report, the case of South Africa is used as an example of the costs of 'a faulty appointment process' (World Bank, 2020, p. 96). The report issued by the World Bank highlights how a R564 million contract was awarded to a company owned by former Presidents Jacob Zuma's son and close family friends - which one could safely assume is in reference to the Guptas. The World Bank attributed the negligence to the role of politics and private interest groups in board deliberations, an informal system of patronage, failure to adhere to the correct decision-making channels, and limiting the span of key decisions to a few individuals without second reviews (World Bank, 2020). This sort of politicisation of essential administration operations appears to be an obvious pattern within South Africa's procurement system (Brunette & Klaaren, 2020). It is the sustained cause of poor compliance, which inherently decays the integral regard for rules, procedures, and the discipline necessary for the diversion of corruption.

2.6 THE ORGINS OF STATE CAPTURE

The close of the twentieth century marked new beginnings for many across the globe. The twentieth century may be categorized as the most eventful century to date with historical moments including World War I and II, The Holocaust, Space Race, Rwandan Genocide, The Great Depression, and many more. The twentieth century furthermore saw the dissolution of the Soviet Union, which signified the start of political transition for multiple states in Central and Eastern Europe (Meirotti & Masterson, 2018). In the subsequent years, these states saw the move from communism to democracy and a liberal market economy (Meirotti & Masterson, 2018).

During this transitional period, one central challenge was to minimise and reposition the state's role in the economy (Hellman et al., 2000). The introduction of liberalisation and privatisation strategies aimed to move from ridged command methods to market freedom. The emphasis on redirecting state power and influence left little interest in the possible reverse side effects, namely the potential ways firms exercise influence over the state (Hellman et al., 2000). The underestimated danger lies in the conditions surrounding transitional states. Weak and underdeveloped societies are more susceptible to influence of any kind that may shape the pace, design, and implementation of political and economic institutions. This new threat, "about powerful oligarchs who manipulate politicians, shape institutions, and control the media to advance and protect their own empires at the expense of the social interest" (Hellman et al., 2000, p 2), persuaded the World Bank to launch a study on the trend of corruption emerging in the former Soviet bloc, which has come to be known as 'state capture.'

Hellman et al. (2000) performed a comprehensive Business Environment and Enterprise Performance Survey in 1999 for the World Bank and European Bank for Reconstruction and Development. It was in this study where 'state capture' was termed and used to describe aspects of grand corruption among political and business elites within the forgoing Soviet Union (Dassah, 2018). The authors state how, "state capture is defined as shaping the formation of the basic rules of the game (i.e., laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials" (Hellman et al., 2000, p. 3). From this point of departure, the literature is replete with a plethora of definitions. Hall (2012) emphasises how the specific underpinnings of this form of corruption lies in the act of payment of bribes and the purchase of political influence to advance private interests. Meirotti & Masterson (2018), in a more colloquial sense refers to state capture as a situation where specific interests - politicians or members of a certain social community possesses control over government and public administration in such a way that their authority is unlikely to be challenged. Sebake (2016) suggests that state capture is an evolution of oligarchy. While Dassah (2018) draws attention to a critical means of capture - the funding of political activities such as illegal contributions to political parties and candidates to influence and manipulate a country's policy, legal environment, and economy to the captor's advantage.

Since the literature fails to come to a consensus of what the definition of state capture should encompass. It is important, at the very least, to un-blur the lines between state capture and its close cousin corruption. According to Sitorus (2011), the distinguishing factor between corruption and state capture is that acts of corruption normally involve subverting the implementation of laws, rules, and regulations through acts of bribery, whereas state capture on the other hand, involves directly influencing the way in which laws, rules and regulations are constructed. This is in accordance with Hellman et al. (2000) original definition of state capture where firms shape the formation of the basic rules of the game (i.e, laws, rules, decrees, and regulations). Thus, on a technical basis, state capture shifts corruption from the illegal to the legal arena due to its internal nature of bending the rules before they are already made.

Another difference between corruption and state capture that I would like to draw your attention to is the degree of structure. As highlighted by Bhorat et al (2017), corruption is often a one-man job that occurs in isolated cases and is facilitated by a loose network of corrupt players. It is informally organised, fragmented, and opportunistic and takes places at the most basic level, i.e., a drunk driver bribing an official police officer of the state. State capture on the other side of the spectrum is like a cartel network. It is tightly structured by players with established relationships. Transactions that take place are on an increasing scale, and the aim is not on low-level looting, but rather on gaining access and redirection rents away from its original goal into the hands of a small group of elites (Bhorat et al, 2017). To pull off such heists, it requires high-level political protection from multiple organs of the state (including law enforcement), un-breakable loyalty and mutual fear, and the determination to eliminate all competitors (Bhorat et al, 2017). The goal, once again, is not to bypass the rules and try to get away with illegal behavior. The aim of those involved in state capture is to legitimise the rules that they play by and then select a handful of players that are allowed to play (Bhorat et al, 2017).

2.7 THEORETICAL FRAMEWORK

This section of the literature review investigates how the Zuma-center power elite has managed to construct and bind a symbiotic affair between the constitutional state and the shadow state to conduct a silent coup (Bhorat et al, 2017). At the crux of this relationship is a small cohort of key players and firms that are linked in some form to the Zuma-Gupta network. How this network is constructed is what constitutes the shadow state, where players are strategically placed in crucial positions of state power that grant them the capability of making decisions about the activities of the constitutional state. Economic theory argues that these powerful oligarchs collude in an attempt to capture the market and share the yielded gains due to limited competition (Makube, 2019). Economic theory states that 'the fewer competitors there are in the industry, the easier it is for them to establish and maintain an efficient cartel' (Hazak et al*,* 2020, p. 203). This type of syndicate is what we have now come to identify as state capture.

The principal-agent relationship in economic theory is a useful framework for understanding the features that contribute to collusion among state officials in public procurement. The paradigm is particularly relevant in the context of public procurement regulation, as it sheds light on the dynamics between the principals (Zuma-cantered power elite) and agents (public servants or brokers that operate in public procurement) (Makube, 2019). The principal contracts the agent to perform a task on their behalf, however, there is an information asymmetry between the two parties. The agent holds an advantage due to their abilities, motivations, and knowledge about the job at hand. Makube (2019) states that by analysing how the different interests drive the behaviour of each party, it may be possible to rationalise the decisions made during the procurement process and awarding of public contracts and address the factors that contribute to collusion and other forms of corrupt behaviour.

The limitations of the principal-agent theory are however highlighted by Persson (2013) in a study that reframes systemic corruption as a problem that involves collective action. The relevance here, is that Persson (2013) challenges the framework by arguing that, where corruption manifests as a collective action problem, anti-corruption measures are inadequate as there may not be any "principled principals" who can effectively enforce anti-corruption measures when corruption is widespread. Furthermore, Soudry (2007) argues that principals are not a homogeneous group, but rather a diverse collection of interests represented by pressure groups that influence politicians and the public. In societies like South Africa where institutional corruption is widespread, there are often few individuals or institutions committed to integrity. Additionally, the perpetrators active in government may be uninterested in dismantling the corrupt network that benefits them (Williams-Elegbe, 2018). Thus, anti-corruption efforts must not be based on a system that is dependent on the political will and integrity of principals or even agents, but rather on the institutional strength and effective oversight of organisations

2.8 THE SHADOW STATE

A shadow state as defined by Madonsela refers to, “a network of relationships that bind together a group of people that secretly work together in activities that contradict their formal role in a constitutional state” (Madonsela, 2019, p. 116). In this alternative reality, key factors such as deniability and trust are upheld by mutually binding fear. Here, illegal activity is the norm and is maintained and protected by state security organs. As mentioned formally, players in this network construct and enact their own rules and regulations and rely on public officials, SOEs, and regulatory agencies to succeed (Bhorat et al, 2017). Actors in this network are not limited to ‘powerful firms’ as emphasised in Hellman et al (2000) leading definition of state capture. Actors in this network may present themselves as an individual or powerful families excessing financial influence over the state and its economy. Or political leaders and public officials who put their private interests above their duty to the state.

When dissecting the shadow state in South Africa, it is easy to identify former president Jacob Zuma as the ringmaster that linked all the key players in this criminal network.

Although the term ‘state capture’ only gained political impetus into his second term as the presidency of the Republic of South Africa, Zuma is no stranger to corrupt dealings. In 2005 President Thabo Mbeki dismissed Zuma as deputy president due to his implications in a court judgment related to corruption in a multi-million-dollar government arms purchase (Alence & Pitcher, 2019). Although the charges were dropped in 2008, they were later reinstated on appeal in consecutive months. These allegations are among the 783 counts of fraud and corruption Zuma had to his name before he was first elected as president (Alence & Pitcher, 2019). Thus, it should not have come as a surprise when further allegations of fraud and corruption emerged during his presidency.

Zuma's criminal scheme was made possible through his position as both the leader of the leading political party and the President of South Africa. His plans to capture the state commenced in 2009 when he officially took office. At this point, one can identify the importance of loyalty when Zuma appointed his most loyal comrades in different high profile positions. The most noteworthy was Siyabonga Cwele as the then Minister of Intelligence, Bheki Cele as the Commissioner of Police, and Menzi Simelani as the then National Director of Persecution (Martin & Soloman, 2016). This enabled Zuma to secure a system of command as ringmaster over exactly how resources would be accessed, exported, shared, and most importantly protected. These players formed part of what Madonsela (2019, p. 117) categorised as the "middleman or broker." And once these players were in place, they were able to transact in the political marketplace without detention, as support was traded through the provision of beneficial rents.

However, the differentiating factor from state capture in comparison to other forms of grand corruption is the focus on powerful firms and business elites influencing and negatively impacting the sovereignty of the state. Therefore, it is imperative to look at the Gupta family as the propellers of this whole economic-political plight.

If Zuma is the grand master, the Guptas are undoubtedly the Kingpins behind it all. The relationship between the two elitist families has become so intertwined that "Zupta" (a combination of the two surnames Zuma and Gupta) has been listed as an actual word in the South African dictionary (Desai & Vahed, 2017). Arriving in 1993 from Uttar Pradesh, the northern part of India, Ajay, Atul, and Rajesh Gupta have managed to create a real name for themselves in the consciousness of many South Africans. They kicked things off with a bang in April 2013 when they were granted permission to use the South African Air Force Base at Waterkloof to land a plane carrying 217 passengers from India who were attending a family wedding at the luxury Sun City holiday resort (Desai & Vahed, 2017). The affair was televised and then subsequently exposed by leaked emails, that state funds were laundered from a project in the Free State Province through Dubai (amaBhugane & Daily Maverick, 2017). The debacle was named ‘Guptagate’ and since then, a spectacle has been placed over the family’s close ties with officials of the state.

In-between 1993 and 2015, many allegations were made against the mogul family however, the most serious, and the start of the state capture chain reaction was when the then Deputy Minister of Finance, Mcebisi Jonas, stated on national television that the Gupta brothers allegedly offered him the position of Minister of Finance prior to the dismissal of the then Minister of Finance, Nhlanhla Nene on the 9th of December 2015 (Dassah, 2018). The strategic move was part of a greater scheme to secure lucrative state contracts. In a sworn statement given to Public Protector Thuli Madonsela, Jones stated that “the Gupta family offered him R600000 cash on the same day they offered him the finance minister post. He said they also offered him a total of R600-million, to be paid in installments, if he "agreed to work with us” (Sunday Times, 2016). What is more, is that Trillion (a Gupta-associated company) CEO Eric Wood briefed some of the company's top executives about Nene's sacking two months before it happened as reported by a whistleblower (Jika & Skit, 2016).

How these events unfolded is a prime example of how the state is captured. Out in the open, decisions are announced through the correct legal and administrative channels. However, the effective decision has already been agreed upon in the shadows (Desai & Vahed, 2017). Such decisions as we come to learn are solely responsive to private commercial interests, and it is the task of the executive to disguise them as necessary political action (Desai & Vahed, 2017). Nene was subsequently replaced by Des van Rooyen (Dassah, 2018). However, van Rooyen was later replaced shortly after his appointment by Pravin Gordhan due to pressure from the general disagreement with Zuma’s choice. The turnstile of appointments for the position of Minister of Finance sparked speculations that the President's sovereignty of appointing and dismissing ministries had been compromised by the Gupta brothers. Former Public Protector, Advocate Thuli Madonsela received complaints against Zuma, among which were by

Father S. Mayebe on behalf of the Dominican Order, a group of Catholic Priests, on 18 March 2016 (The First Complainant); Mr. Mmusi Maimane, the leader of the Democratic Alliance and Leader of the Opposition in Parliament on 18 March 2016 (The Second Complainant), in terms of section 4 of the Executive Members' Ethics Act, 82 of 1998 (EMEA); and a member of the public on 22 April 2016 (The third Complainant), whose name was not made public (Public Protector South Africa, 2016, p. 4-3).

2.9 CAPTURED: STATE-OWNED ENTERPRISES

Up until this point, we have discussed and defined the perimeters of state capture, we have understood the conditions that make it possible, and we have explored the kind of actors involved in this grand political heist. Now, what needs to be explored are the targets that these looters have decided to capture and hold up for ransom.

Once again, understanding state capture means recognizing the possible ways in which powerful firms and business elites can conspire with public officials to extract rents through the manipulation of state authorities (Hellman et al., 2000). Extracting rents of substantial gain is the main objective, and how this is done is through state-owned enterprises. SOEs perform the task of delivering vital goods and services to the public. They are responsible for providing the necessary infrastructure on which the economy relies, whether it be the generation of power, public transportation, water and sanitation, supply chain coordination, and/or telecommunications. As highlighted by the World Bank (2020) SOEs are great sites of corruption in comparison to private companies due to the scale of assets they manage, the monetary value of public contracts that they award, and most significantly, their proximity to government and public officials.

The reason SOEs are particularly targeted by state captors is that they operate in high value sectors that often enjoy monopoly or quasi-monopoly rights. Because these enterprises are the only player or dominant players in their industry, profits of disproportion are often reaped. SOEs by Hellman et al. (2000) definition, are what we can also identify as "influential firms." In transition economies, they were categorised as influential firms during the dissolution of the former Soviet Bloc. Eastern European countries were making the change from communism to liberal markets, these influential firms tended to be the classic incumbents inherited from the forgoing communist system. As such, these firms thus inherited a large market share in their industry, privileged property rights, and close ties with the state (Hellman et al, 2000). The World Bank (2020) adds that because of this privileged relationship, SOEs often receive substantial financial support from the state which creates further incentives for captors.

To understand the capture of some of the largest SOEs in South Africa, we must understand the ideological driving force that made it possible. At the helm of Zuma's political project was the notion of 'radical economic transformation' (February, 2019). Bhorat et al. (2017) released an inter-university report titled *Betrayal of the Promise: How South Africa is being Stolen* where they unpack how the repurposing of SOEs came about. Following the ANC's 2007 conference in Polokwane, Bhorat et al. (2017) argue that state capture has its roots in the differences in the strategy adopted by constitutional and radical reformers within the ANC. The constitutionalist on the one hand argued that to achieve substantive equality and development, state capacity had to be established first (Dassah, 2018). For radical reformers, the constitution had to be undermined in order to accelerate the achievement of an equal society. Chipkin (2016) adds that Zuma's faction wanted to transform the economy but viewed the formal 'rules of the game' as anti-progressive and in favour of an existing dominant class. Recognizing that fulfilling Nelson Mandela's promise to liberate all South Africans from socio-economic suffering was the priority mandate, the radical reformers emerged victorious and thus set the scene for Zuma's political project.

Radical economic transformation was dependent on the use of the procurement systems of SOEs. After the revision of the Preferential Procurement Regulations in December 2011, more than R200 billion in SOE expenditure was geared toward the interests of black economic empowerment (Bhorat et al., 2017). Of this, the majority share was allocated to Eskom and Transnet which comprised two-thirds (R144 billion) of the whole procurement budget (Bhorat et al., 2017).

2.10 SUMMARY

The second chapter of the report explained the concept and theories of public procurement and state capture, along with the theoretical frameworks relevant for analyses. The chapter provided context of the regulatory environment within which public and private interest operate and the institutional arrangements for state-owned enterprises as stipulated in national legislation. The chapter also highlighted the makings of the shadow state, and how its operations affects the ability of the legitimate state to perform its developmental mandate for the betterment and advancement of South African citizens.

CHAPTER 3

THE PROCURMENT CYCLE

3.1 INTRODUCTION

Fraud and corruption is not a recent occurrence in public sector organisations. In fact, fraud and corruption realistically occur in all aspects of operations and transactions in the public sector in one form or the other. However, in developing countries, corrupt practices are predominantly concentrated in procurement transactions due to the multiple avenues of manipulation and the significant rewards that can be gained (Mantzaris, 2014). Procurement activities are often plagued by various forms of corruption, such as fraud, bribery, collusion, intimidation, document manipulation, and computer fraud. Thus, it is imperative to scrutinise procurement activities meticulously in order to analyse the patterns of abuse, associated practices, and susceptibility to corruption in the public sector. This chapter will review the procurement cycle, and identify the preliminary patterns of abuse.

3.2 Planning and needs assessment

The procurement process begins with planning. This is the first step required to identify the necessary activities that the entity needs to perform. Procurement planning should derive from the procurement needs that are determined through strategic planning documents. However, the Public Affairs Research Institute (2014) states that, in South Africa, these planning documents are frequently substandard and lack factual evidence. As a result, procurement planning fails to align with the broader strategic plans of the procuring entity.

Procurement planning is a mosaic collaboration between multiple stakeholders such as senior management, financial heads, end-users and procurement officials. The process starts when financial authorities or SCM practitioners request end-users to submit a list of procurement needs (PARI, 2014). Typically, the needs identified are not based on strategic plans, but rather a response to new challenges and demands. Once the relevant parties have identified the necessary requirements, a discussion on whether the task can be performed in-house or whether it is necessary to outsource follows (PARI, 2014).

The ideological assumption at this stage of decision making is that private sector suppliers are intrinsically more efficient and effective (PARI, 2014). This premise is based on the view that the South African state is largely incapable of carrying out its essential operations. This rational acts as a catalyst for the contract state and creates a culture of out-sourcing.

The abuse of the procurement cycle usually begins at this juncture. Transparency International (Wheatland, 2015), note that both political and private interference, as well as biased decision-making in the development of bid-specifications disrupt the practice of integrity and fairness throughout the procurement cycle. A common factor that the literature notes is the incorrect needs assessment. The Judicial Commission of Inquiry into State Capture (2021), Transparency International (Wheatland, 2015), and The Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) (2019) emphasize how goods and services are contracted without sufficient cause. ESAAMLG (2019) state that planning documents either falsely justify organisational needs, inflate costs, or sabotage the organisation to create a need for a particular service. This is done in hopes that the procuring entity may hire a particular company targeted by invested interests (Wheatland, 2015).

3.3 Budgeting and costing

The primary function of the multitude of procurement regulations previously mentioned is to achieve value for money. This is firstly owed to the excessive amount of state funds that are channelled through public procurement. As previously mentioned, during the plight of the state capture saga in 2017, the South African Reserve Bank reported that the government spent R967 billion through public procurement, which is equivalent to 19.5% of the GDP (Brunette, Klaaren & Nqaba, 2019). Secondly, the multitude of public procurement policies aims to fulfil the post-1994 socio-economic objectives of democracy. The voice that echoes throughout the legislation is firstly one of good governance, and secondly a preference system aimed at uplifting previously disadvantaged persons (Fourie & Malan, 2020).

As noted by the South African Auditor-General South African (2022), SOEs repeatedly fail to meet the objectives set out in procurement regulations. The recent phenomena of state capture has resulted in irregular expenditure and the failure of SOEs to meet their priority mandate of providing goods and/or services to the country's citizens. On a yearly basis, the Auditor-General reports irregular expenditure within public enterprises, specifically in relation to the procurement of goods and services. The PFMA (Act, Act 1 of 1999) and the MFMA (Act 56 of 2003) define irregular expenditure as an unauthorised expenditure that is incurred in violation of what is not acceptable with the requirement of the legislations of any applicable legislation. In the 2021-22 Auditor-General report, auditees disclosed R51,22 billion in irregular expenditure. The audit office, however, stated that this amount is realistically much higher, as 25% of auditees failed to disclose all irregular expenditures (Auditor-General South Africa, 2022).

The Auditor-General (2022) has attributed the reoccurrence of irregular expenditure to non-compliance with procurement and contract management policies. Fourie and Malan (2020) highlight that during the budgeting and costing phase of the procurement cycle, it is of great significance that the budget plans align with the needs and objectives of the organisation. Strategic plans that fail to align with the business of the organisation often leave room for unrealistic or poor-quality purchasing procedures. This results in inflated prices and greater opportunities for abuse as an outcome of inadequate specifications and inaccurate costing by public procurement officials. Above this point, the goods and services procured are often subpar or as previously mentioned, unnecessary.

3.4 Bid specification and requirements

Before SOEs contract for goods and services, every item that is intended to be procured needs to have a specification that outlines the requirements for the product or service. However, it is noted that the process of creating these specifications is often inadequately performed (PARI, 2014). When private contractors are not explicitly approached, and where procuring entities fail to properly identify their own requirements, the outcome is often under-specification (PARI, 2014). In this instance, requirements fail to sufficiently address the basic needs of the outsourcing entity.

Under-specification benefits state captors as they often lack the necessary capabilities to carry out government contracts. Part of the *Modius Operandi* is to tender against other bidders purely based on cost, resorting to providing low-quality services or using inferior, inexpensive, or illegitimate materials (PARI, 2014). Under-specification diminishes quality standards and good practices, evidently affecting the government's ability to provide goods and services efficiently.

Specifications play a crucial role in contracts between the government and end-users as they establish the requirements and expectations for the goods or services being procured. When specifications are inadequate, it becomes more challenging to enforce oversight and regulate service providers, which in turn makes it more difficult to hold parties accountable for subpar performance. To minimize the negative impacts of inadequate specifications, bid specification committees and similar groups are established. In the case of competitive tenders, such committees are typically required and are formed on contract demand. The purchasing model set out by the National Treasury categorises different purchasing models for different thresholds. At the highest threshold, contracts above R 500 000 require a competitive tender. Underneath this level are different quotation-based procedures down to petty cash purchases. Naturally, contracts that are greater in value require stricter purchasing procedures.

According to the regulations set forth by the National Treasury, bid specification committees should consist of members from various departments, including technical and operational staff, financial heads, and at least one person from supply chain management (PARI, 2014). This is done in an effort to prevent conflicts of interest, and promotes fairness, transparency, and impartiality in the evaluation process. However, this research notes that there are no procurement regulations that explicitly detail and enforce the separation of these powers. Thus, it is characteristic to find bid specification committees that consist of political and senior management authorities with vested interests (PARI, 2014).

When the requirements of the bid are compiled, the committee must evaluate that the specifications are clear and unbiased. However, the previously existing factors that yielded insufficient specifications at the genesis may continue to exist within the specification committee. Once transgressions of abuse manifest themselves within the procurement cycle, a perpetual cycle of corruption occurs. Moreover, specification committees are at liberty to modify the specifications under the disguise of discretion and end-users are either not timelessly informed, or not informed at all, rendering the rest of the procurement process biased and uncompetitive.

3.5 Bid evaluation

The role of the bid evaluation committee is to evaluate the capabilities of the bidders in relation to the tasks being procured (PARI, 2014). Bid evaluation committees, like bid specification committees, are constituted on demand and should be multi-departmental. The assessment of bidders is limited to the criteria specified in the bid pack, where the requirements drawn up by the specification committee have been stated. However, similar to how bid specification committees can change the requirements, bid evaluation committees have also been reported to do so. By Hellman et al, (2000, p. 3). definition of state capture, this is 'shaping the formation of the basic rules of the game'.

The next step is for the bid evaluation committee to compile a list of bidders that meet the functional requirements and tally scores out of one hundred based on price and BEE preference (PARI, 2014). However, it's important to acknowledge that the practice of bid manipulation may already be present. In a study conducted by the ESAAMLG (2019) on procurement corruption in the region, respondents noted that politically exposed persons (PEPs) were the main perpetrators of tender corruption. Common practices identified was information-sharing on budget and costs to specific bidders, and allowing the same service providers to submit bids under different companies where they were either directors, shareholders or held some form of ownership (ESAMMLG, 2019). These transgressions where a result of collusion between PEPs and procurement officials.

3.6 Bid adjudication

After completing their evaluation, the evaluation committee submits its recommendations to the Bid Adjudication Committee (BAC). While it is understood that schedule 2 SOEs, like Eskom and Transnet are exempt from National Treasury prescripts, the example is set by the requirements set for schedule 3A and 3C entities. Under the prescripts the BAC must consist of at least four senior managers, including the CFO, at least one SCM practitioner, and the relevant technical expert. Additionally, any member that formed part of the bid evaluation or specification committee may not constitute part of the bid adjudication committee (Van Vyl, 2006). The members of the BAC are selected within the organisation, however it is not impossible that members could be appointed by politically exposed persons. In this instance, the compromised committee member acts as a ‘broker’ between the state and private interests (Bhorat et al, 2017).

The purpose of the BAC is to review the evaluation process to confirm that it was conducted appropriately and to make the final decision on the tender award. The committee may make a decision that goes against the recommendations of the BEC, however, in this case, a detailed explanation of its reasoning may be submitted to the relevant treasury and the Auditor-General (PARI, 2014). Similar to the other stages of the procurement cycle, bid adjudication is particularly vulnerable to abuse. PARI (2014) states how in some cases, recommendations for the chosen bidder may be produced by a single committee member. This creates a risk of bias if the individual submits their recommendations with the intent to favour a particular contractor. Furthermore, members of the BIC may present their results or provide summaries to the BAC, who may make their decision based solely on the report or general overview provided. This further leaves room for abuse as the BAC have no further information to cross-reference and confirm the legitimacy of the information provided.

At the end of the process and depending on the regulatory frameworks of the procuring entity, the decision of the BAC may require approval from the accounting officer, where the successful bidder along with the winning price and broad-based black economic empowerment (BBBEE) score will be published in the Government tender Bulletin (PARI, 2014).

3.7 Monitoring and evaluation

At this point the procurement cycle has been concluded, however a vital step that is often overlooked in contract management is monitoring and evaluation. Poor monitoring and evaluation are connected to the lack or inadequacy of control systems, making it challenging for SOEs and other state institutions to execute procurement management in accordance with the public regulations. As a result, any deviations or non-compliance often goes unnoticed and unaddressed. State institutions continue to spend public funds in a manner that violates procurement laws and regulations (Ambe & Badenhorst-Weiss, 2012). Unacceptable amounts of irregular, unauthorised and fruitless, and wasteful expenditure is reported yearly by the Auditor-General South Africa.

The Auditor-General, continues to scrutinise supply chain management and public procurement as a result of malpractices (Fourie & Malan, 2020). The main areas of concerns is the non-compliance with the 'fair' and 'transparent' aspects of public procurement practice set out in Section 217 the Constitution (1996). Fourie and Malan (2020) state that the repeated findings in the reports of the Auditor-General in relation to poor contract management are:

- Bid documents were not made public, only advertisements were published.
- Bid committee meeting minutes were unavailable
- Bids were not published publicly (good governance requires announcing the bidders and their prices to the public during the bid opening)
- The evaluation process was not open to scrutiny, which is essential for maintaining the integrity of public sector procurement by promoting cooperation between the public and private sectors, civil society, and other stakeholders.
- Reports on progress and contract implementation were not available to the public
  The National Treasury has emphasised the importance of effective monitoring and evaluation, stating that “transparent or open contracting is a powerful tool that can be used to combat corruption and ensure good governance, value for money and good quality service delivery” (National Treasury, 2015, p. 17). When effective monitoring and evaluation is absent, corrupt practices such as price inflation, double payments, contract splitting, unjustified delays, substandard work or

materials, and/or in several instances, the good or service that was initially procured is never completed (PARI, 2014).

CHAPTER 4

METHODOLOGY AND RESEARCH METHODS

4.1 INTRODUCTION

This chapter introduces and describes the research approach, procedures, and methods used throughout collecting, processing, and analysing the data that will be gathered. The research approach, tools, and design shall be illustrated and justified. Additionally, a brief discussion will follow on the research's validity, reliability, and dependability.

4.2 RESEARCH PARADIGM

This research aims to analyse state-owned enterprises in South Africa and assess how the weakness in procurement policies has aided the phenomenon of state capture as uncovered by the Judicial Commission of Inquiry into State Capture. To achieve the objectives of this study, a qualitative case study approach through a constructivist lens shall be adopted.

Postpositivism as explained by Creswell (2009), is based on the idea that causes or actions lead to or effect a particular outcome. Therefore, postpositivists focus their research on identifying and analysing the causes that influence outcomes. This research paradigm is commonly seen in quantitative research as postpositivist break-up complex ideas into a small and discrete set of variables that are then tested (Creswell, 2009). This reductionistic approach is used to develop numeric measures of observations and study the behaviour of individuals in the objective reality of the world.

Postpositivist believe that there are laws or theories that govern the world, and these need to be tested, verified, and refined to gain a better understanding. Thus, they follow the scientific method, beginning with a theory and collecting data that either supports or refutes it (Creswell, 2009). As per the title of this research study, the theory or assumption that is being studied is the weakness in the public procurement system in South Africa and how these weaknesses have aided phenomenon of state capture, particularly the capture of SOEs.

Postpositivist seek to control for or remove subjective influences on knowledge production where necessary in order to achieve the highest level of objectivity (Creswell, 2009). The paradigm is thus in contrast with the ontological assumption of the interpretive/constructivist perspective which is commonly seen in qualitative research. Constructivist/Interpretivist believe that reality consists of multiple interpretations instead of a single objective reality (Teddlie & Tashakkori, 2009). The paradigm asserts that knowledge is created by understanding individual beliefs, values, intentions, and self-understanding within the social context (Henning, 2004).

4.3 RESEARCH APPROACH

The primary focus of this research is analysing the weaknesses in South African public procurement. It was decided that this is best demonstrated through state-owned enterprises which are responsible for providing the bulk of goods and services to citizens across the country. A qualitative case study approach is best suited to carry out this study because, unlike a narrative or phenomenology approach which treats individuals as the subject of the study, a case study analyses allows for a range of different subjects to be treated as the focus of the study (Creswell et al., 2007).

Case study research focuses on in-depth investigation of a single unit or system in order to gain an understanding of a phenomenon (Hancock & Algozzine, 2006). The method is commonly used in fields such as psychology, sociology, healthcare, as well as business, and as noted by Merriam (2001) can provide valuable knowledge that may impact policy, procedures, and future studies. Case study analyses allows for an empirical investigation of new and emerging phenomena within the given context (Hancock & Algozzine, 2006). The researcher may also use triangulation, which involves collecting data from multiple sources to increase the validity of the findings. State capture is considered a relatively new type of corruption with little research available on its relationship to public procurement. The Judicial Commission of Inquiry investigated several different accusations of state capture, and explored evidence not only in the form of testimonies but bank account statements, email correspondence, court orders, written complaints, company polices, reports, bid applications, phone records, and so on.

There are several different types of case study approaches, including explanatory, exploratory, descriptive, and intrinsic case studies. Explanatory case studies aim to test a theory by investigating a particular case. Exploratory case studies are used to generate new ideas or hypotheses about a phenomenon. Descriptive case studies provide a detailed description of a particular case, often for the purpose of documenting a unique or interesting phenomenon. Intrinsic case studies focus on a single case for its own sake, without the need for generalisation to other cases (Hancock & Algozzine, 2006). For the relevance of this research, the explanatory method shall be implored due to the focus on investigating the direct connection between public procurement and the capture of SOEs.

4.4 CASE SELECTION

Within a qualitative case study approach, sampling is generally defined as the selection of cases and data sources that best address the research objectives (Gentles et al., 2015). Case study sampling deviates slightly from the widely understood concept of sampling, as Yin (2014) explains that the term 'sample' implies the representation of an overall population. Instead, it is suggested that in case study research, the term 'selection' is more appropriate as it involves selecting cases and data sources that best help understands the cause study (Gentles et al., 2015).

Thus, purposive selection will be the selection method adopted, as purposive selection involves selecting data cases on the basis that they will be able to provide 'information rich' data to analyze and interpret (Braun & Clarke, 2013). The Judicial Commission of Inquiry interviewed over 300 witnesses from 21 August 2018 to 15 June 2022. Among several state-owned enterprises, Alexkor, a Schedule 2 public entity engaged in mining diamonds through various methods, including land, riverbeds, and marine mining, was selected as the first and primary case study. This decision was made, as the transcripts pertaining to Alexkor provided a comprehensive examination of the entire procurement cycle. This included an evaluation of the needs assessment, bid criteria, bid committees, tender proposals, bid award, an evaluation of the successful bidder's performance post tender, and, importantly, an investigation of the shadow network that fabricated the capture.

Additionally, Alexkor was one of the smaller and less publicised state-owned entities examined by the judicial commission. This allowed for an in-depth examination of the transcripts, which would have otherwise been difficult due to the extensive scope of information evidence for larger entities. While data saturation was achieved from only the case of Alexkor, Eskom was subsequently selected as the second case study due to its ties with Alexkor. The power utility was directly linked to the capture and repurpose of Alexkor. While Eskom only features as a supporting case study, the data available on the SOEs is rich in abundance due to the widespread coverage the state utility experienced and provided supporting evidence for the points drawn from the primary case.

All hearings were transcribed and made available for public access. The choice to use the transcripts as the primary data point are obvious, with the issue of access being the main catalyst. The Zondo Commission had access to different stakeholders on a multilevel, some of which were only accessible by court subpoena. Due to the sensitivity and confidentiality of the subject matter, gaining access to different stakeholders, as well as permission to publicly write on the provided information would of proven near impossible.

Additionally, the transcripts were transcribed by Gauteng Transcribers, a professional recording and transcription service specialising in virtual recordings, arbitrations, inquiries, and disciplinary hearings. Using professionally transcribed transcripts offers several benefits, including:

1. Accuracy: Professional transcribers have the expertise and experience to produce highly accurate transcripts. They can accurately capture speech, including technical terminology, accents, and multiple speakers, ensuring the transcript reflects the original content with precision.
2. Timesaving: Transcribing audio or video content manually can be time-consuming. Using already transcribed data allowed for more time afforded to the actual task of analysis and interpretation.

3. Search engine optimisation (SEO): Selecting which hearings to use became easier as specific keywords were entered in the search bar of the provided transcripts. Each hearing ran an average of three hours. Utilising the search engine function allowed for better discoverability of information pertaining specifically to the procurement cycle.
4. Legal and research purposes: In legal proceedings or research projects, accurate transcripts are crucial for documentation, reference, and analysis. Professional transcribers follow specific guidelines to ensure the integrity of the transcripts, making them reliable for these purposes.

4.5 PROFILE OF ORGANISATIONS

4.5.1 Alexkor

Alexkor is a state-owned entity that was established in terms of the Alexkor Limited Act, No.116 of 1992, and amended by the Alexkor Amendment Act, No, 29 of 2001 (Alexkor, 2018). It is a schedule 2 public entity, with the Minister of Public Enterprises being the shareholder and representative. The company name derives from the area where diamond mining was meant to occur, Alexander Bay, Northern Cape. The main business of Alexkor is mining diamonds on land, across riverbeds, and marine mining.

In 2007 there was a land claim made by the improvised community of Richtersveld that was allocated to Alexkor for mining. A Deed of Settlement between Alexkor, the government, and the community of Richtersveld was made an order of the court. Thus, a Pooling and Sharing Joint Venture (PSJV) was established to ultimately represent the interests of the community and that of Alexkor. Part of the agreement was that Alexkor would have 51% interest and the community would have 49%. The issues surrounding this case arose from the fact that a third-party entity was contracted out and tasked with marketing and selling all the diamonds that the PSJV minded. This entity would market and sell the diamonds and split the proceeds in accordance with the agreement. However, neither the miners nor the Joint Venture would value the diamonds before handing them over to the third party. Thus, there was no way to determine whether the diamonds sold were, in fact, their actual value. To make matters worse, no proper documentation was available to show whom the diamonds were sold and for how much. A whistle-blower came forward with allegations that the contracted entity Scarlet Sky Investments (SSI) was a Gupta-linked entity. These factors prompted an investigation commissioned by the Department of Public Enterprises.

4.5.2 Scarlet Sky Investments 60

Scarlet Sky Investments 60 has come under the spotlight due to its investigation by the State Capture Commission. Starting off as a shelf company with no prior track record, the Gupta-linked entity was outsourced by the PSJV to value, market, and auction all the diamonds mined under the state-owned entity. As the evidence shall uncover, SSI was awarded the tender despite multiple irregularities, such as a misrepresentation of who the directors were and not possessing a diamond license. As mentioned, SSI was the only entity responsible for evaluating the diamonds. This ultimately made it possible for them to undersell the diamonds at auction with no question.

A key witness in the inquiry uncovered that the diamonds were being undervalued by as much as 47 per cent. Put into figures; the diamonds were valued at 783 million Rand (US$61 million) and sold for just 414 million Rand ($32 million) (Smith, 2021). It was also uncovered that some of these diamonds sold at auction were sold to a company owned by one of the very shareholders of SSI, Daniel Nathan (Smith, 2021). These efforts to defraud the state resulted in severe losses for the state treasury and, subsequently, a significant blow for the small-scale miners contracted by Alexkor and the improvised community of Richtersveld at large.

4.5.3 Eskom

Eskom is South Africa’s primary electricity supplier and largest state-owned enterprise. The organisation was established in 1923 and has since become the largest producer of electricity in Africa by generating roughly ninety per cent of the electricity consumed in South Africa and about thirty per cent of the electricity consumed across the African continent. Despite such a large generating capacity, South Africans, for well over the past decade, have continuously found themselves sitting in the dark as the power utility fails to supply its customers.

While Eskom prominently features in the state capture saga, the SOE's relation to this study is directly related to the grand scheme of Alexkor's capture. It was uncovered that the board of the PSJV had decided to venture into coal mining to be a coal supplier to Eskom. As testified by Gavin Craythorne, former Public Enterprises Minister Malusi Gigaba laid the roots for this vision during his term from 2010 to 2014, as his department was the shareholder of Alexkor and was responsible for the decision. Although the grand scheme was never executed, information on how Eskom awarded a fraudulent tender to another Gupta-linked company reiterates the patterns of weakness found in the procurement system.

4.6 PROFILE OF RESPONDANTS

4.6.1 Mr Torres

Full Name: Mr. Albert Torres
Gender: Male
Position at time of hearing: Former executive director of Gobodo Forensics.

Albert Torres of Gobodo Forensic Investigation Audit testifies before the Judicial Commission of Inquiry on January 08, 2021 in Johannesburg, South Africa (Morake, 2021).

Mr. Torres is a Certified Fraud Examiner and Commercial Forensic Practitioner who holds twenty-three years of experience in the forensic accounting industry and thirty-eight years general accounting, auditing and consulting experience (GFIA, 2022).

He appeared before the commission on the 8th of January to give evidence related to the investigation, he and his team conducted into the matters of Alexkor. The investigation was ordered by the Department of Public Enterprises to:
Investigate the validity of the decisions taken by the Alexkor RMC PSJV

- To investigate the procurement process in the appointment of the contractors in particular the appointment of a diamond marketing and sales company.
- To investigate the process followed in the evolution of the diamonds from the mine site to the diamond marketing and sales company officer
- To obtain and review the prices of diamonds realised since the appointment of the diamond marketing and sales company
- Investigate the alleged failure to comply with the contractual arrangement given access to the information relating to sales and marketing of the diamonds to the contractors
- To investigate the legality of the Coffer-dam Operations which allegedly has caused adverse and damage.
- To review all contracts entered between the PSJV and the marine mining contractors, as well as any other contract forming related to the subject matter of the dispute between the parties
- To determine the contract awarding processes and systems are fair, transparent, equitable with the focus on mining contracting for both land and marine mining contracting, including the appointment of the diamond marketing and sales company (Torres, 2021, p. 27-28)

4.6.2 Mr Craythorne

Full name: Gavin John Craythorne

Gender: Male

Position at time of hearing: Ex-Alexkor marine diamond contractor

Gavin Craythorne testifies at the Zondo Commission on January 11, 2021 in Johannesburg (Morake, 2021).

Mr. Craythorne is a founding member of the Equitable Access Campaign, an organization founded in 2010 by veteran diamond divers to advocate for the dramatic decline in weather patterns due to climate change. Craythorne is a veteran diamond diver with over 35 years of experience in the industry. He has been involved in diamond diving and the production of mining vessels for Alexkor for the past twenty years.

Craythorne appeared before the commission as a whistleblower on the Alexkor case. This follows years of the previous action to draw attention to Scarlet Sky Investments (SSI), a marketing company appointed to sell and market the diamonds produced for Alexkor. Craythorne initially drew attention to the poor performance of Alexkor's diamond prices with the market. The point of interest of his investigation was "who were the individuals behind Scarlet Sky because nobody knew" (Craythorne, 2021, p. 145). In his search for answers, he was subsequently denied access to the mines, and his contract was further terminated. These hostile events only persuaded Craythorne to dig deeper by submitting several specific questions to Parliament via Veronica Van Dyk that interrogated the validity, capability, and reliability of SSI. The questions asked were:

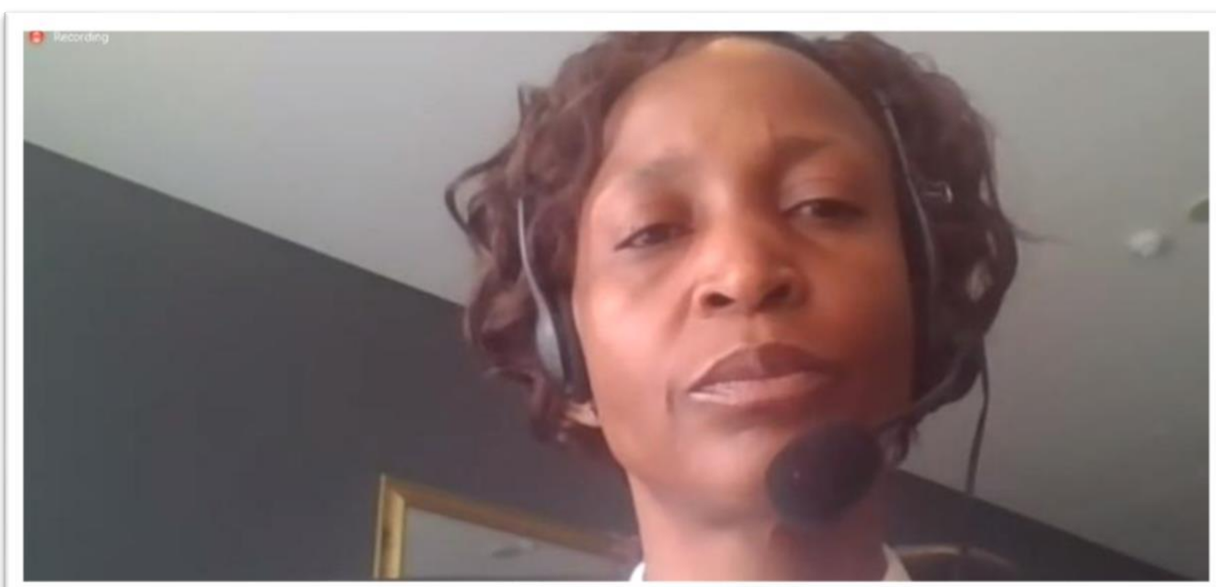
- Was there a track record for Scarlet Sky Investments prior to them being appointed by Alexkor?
- Why has no beneficiation for the community taken place since the appointment of the specified company by Alexkor and what are the details of how transferring the sale of diamonds to the company has impacted on the value return to Alexkor and the miners.
- What basis was the company SSI again awarded the contract in November 2016
- Why is there no longer an independent valuator model included in the company's contracts?
- Who made the decision?
- Is the specialized company a licensed diamond trader?

4.6.3 Dr Nteta

Full name: Dr Ayanda Komotso Lindiwe Nteta

Gender: Female

Position at time of hearing: Former Acting Senior Manager of Fuel Resources at Eskom



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Dr. Ayanda Nteta, was called to the hearing to detail Eskom's R659 million re-payments to Gupta-owned Tegeta Resources. During her testimony at the State Capture Inquiry. Nteta revealed that she was approached with an unsolicited proposal by Tegata for the supply of coal to Eskom. As shall be evidenced, Nteta experienced unnecessary pressure and undue interest from certain higher-ups over the conclusion of contact. Subsequently, R659 million was paid to Tegata in advance without the delivery of any coal, which ultimately facilitated the Gupta-entity to purchase Glencore's Optimum Coal Mine.

4.7 DATA ANALYSIS AND INTERPRETATION

Data analysis is described as a method used to arrange data in a structural and comprehensive manner. As stated by Holloway and Wheeler (2002), data analysis begins during the first interview, simultaneously with data collection. Creswell (2009) believes that data analysis encompasses several phases, including preparing and organising the data for analysis, obtaining an overall understanding of the information and its implications, and finally interpreting the data's greater significance.

Due to the nature of the research, thematic analysis was best suited. One of the strengths of thematic analysis is that it is flexible in nature, meaning that a wide range of data sources can be analysed (Braun & Clarke, 2013). Braun and Clarke also advocate for thematic analysis in qualitative research because it allows greater analytical flexibility (Braun and Clarke, 2006). This is appropriate for the nature of this research as the secondary data reviewed included several different sources, such as policy documents, reports, investigative media reports, legislative polices, etc. In thematic analysis "themes can be identified in a data-driven, 'bottom-up' way, based on what is in the data; alternatively, they can be identified in a more 'top-down' fashion, where the researcher uses the data to explore theoretical ideas" (Braun & Clarke, 2013, p. 133). Following the initial literature review, the research utilised the top-down method, as several themes began to emerge pertaining to the procurement cycle and the broader patterns of state capture. The theme of a centralised procurement system, lack of capacity, complex legislative polices, and political interference were all initial topics that first occurred.

When it comes to reporting qualitative data, it can be asserted that pattern recognition is the most critical aspect to consider as a researcher (Luker, 2008). Pattern recognition is a collection of operations that begins with synthesising, summarising, and cleansing data to provide the essentials, significant trends, and representative examples (Hansen & Machin, 2018).

The next in the analysis process was to begin coding the data. Data coding is a process where the researcher picks out parts of the data that is relevant to the research question (Braun & Clarke, 2013). A code in particular may be a word, or short phrase that groups information in the data with similar properties. The researcher systematically works their way through the entire dataset looking for information that is relevant (Braun & Clarke, 2013). A good code should be as precise as possible, embodying the essence of that particular subject matter. Coding can be done in a hard-copy format or performed by different computer-assisted qualitative data analysis software (CAQDAS) (Braun & Clarke, 2013). Nvivo is a CAQDAS that was used to code the transcripts of the state capture hearings.

The process began with an open coding stage where the data was separated into smaller, more descriptive themes. Some of the codes that were initially generated at this stage were, misrepresentation, manipulation, due diligence, minimum requirements, expertise, procurement regulations, board of directors, and non-compliance. This was followed by the axial coding stage, which grouped similar codes together like non-compliance with procurement regulations. Laslty, selective coding was utilised to integrate theories that were previously identified from the data such as bid-rigging and political interference (Wagner, Kawulich & Garner, 2012). The research eventually evaluated and interpreted the findings across the different themes to draw conclusions and generate recommendations.

4.8 VALIDITY AND RELIABILTY

Validity may be achieved through triangulation. This is where the researcher uses several data sources to gather information and can be performed throughout the data collection process (Mays & Pope, 1995). In the case of secondary research, specific facts may vary across various sources. To ensure validity, the evidence presented must be consistent across several verified sources.

Reliability of secondary data analysis is primarily concerned with who collected the data. Published documents and policies from a government department are considered more reliable than data provided by newspaper articles that could contain certain biases. The transcripts evidenced in this research report can be considered reliable as they were transcribed by Gauteng Transcribers, a professional recording and transcription service specialising in virtual recordings, arbitrations, inquiries, and disciplinary hearings.

4.9 ETHICS

The University of the Witwatersrand requires all research undertaken by university members to obtain ethics approval from the Human Research Ethics Committee (NonMedical) to proceed with their research. Due to the nature of this study, this research report falls under the 'No Risk' category. Since all data collected is secondary, and is derived from publicly accessible transcripts made available by the Judicial Commission of Inquiry.

4.10 SUMMARY

This chapter explained the rationale behind the selection of the research methodology used in the study. It started by discussing the philosophical perspectives that influenced the research and the use of qualitative research methods to examine the data through a secondary-data case study approach. The interpretivist paradigm shaped the understanding of the study's nature of reality, knowledge, and values. Despite the limitations identified, sufficient information was collected to address the research question and provide recommendations.

CHAPTER 5
PRESENTATION OF FINDINGS

5.1 INTRODUCTION

This chapter presents the findings of the hearings conducted by the Judicial Commission of Inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of the State, also known as the Zondo Commission or State Capture Commission.

The primary piece of literature as well as evidence that this research report draws aid from, is the State Capture Report. This is because, South Africans has, for the very first time, an empirical, thorough record of how the capitalist interests of a small minority of elite stakeholders were able to emerge victorious over the public good. While it is understood that corruption is by no means a new phenomenon, up until this point, comprehending the nature and scope of how a corrupt network infiltrates institutions through unlawful procurement practices has been quite near impossible.

One could deem the work committed by the Zondo Commission as revolutionary as it was able to shed light on the severity of corruption within public procurement, the perpetrators by name, how much has been looted and give a detailed analysis of what happened. It is indeed one thing to acknowledge the existence of a corrupt network; it is quite another to say how it operates (Judicial Commission of Inquiry into State Capture, 2022). Exposing the roots of the procurement predicament South Africa currently finds itself in involves an entire audit of the procurement cycle. This attempts to identify the pressure points that make the system vulnerable to corruption.

The data is in the form of transcripts from the hearings held at the City of Johannesburg Old Council Chamber on the 8th and 11th of January 2021, which are days 324 and 325 of the Commission of Inquiry into State Capture. The hearings deal with the alleged capture of Alexkor, a state-owned entity that deals with the mining of diamonds in South

Africa and how Alexkor was repurposed towards the coal mining industry in a grand scheme to supply Eskom with coal. The transcripts can be considered reliable as they were transcribed by Gauteng Transcribers, a professional recording and transcription service specialising in virtual recordings, arbitrations, inquiries, and disciplinary hearings.

The aim of this research study is to analyse how state-owned enterprises have been captured in South Africa through the manipulation of the public procurement system. More specifically this study aimed to:

- Establish the relationship between public procurement and state capture.
- Identify the patterns of corruption that occur in each stage of the procurement process
- Highlight the inherent weakness in both the theoretical and practical execution of public procurement policies
- Formulate recommendations on how to overcome identified challenges.

5.2 THEMES

Several issues and irregularities regarding the procurement cycle emerged. This section shall aim to highlight what happened in the given context and then in the following chapter aim to critically interpret the patterns and behaviour of abuse and provide a rational, aided by the linkage of existing literature.

The commission dealt with five central pressure points that lead to the capture and premeditated repurposing of Alexkor:

- How did SSI win the tender for permanent marketing and sales service provider?
- How were the diamonds evaluated?
- What were the attempts made at repurposing Alexkor towards coal?
- How was Mr Matthews removed as the sole director?
- The appointment of SSI through Korabie.

5.2.1 PRE-TENDER

5.2.1.1 Incorrect needs assessment

The general findings of the State Capture Commission revealed that, in the case of stateowned enterprises, tenders are being issued for the incorrect needs or work that has already been performed and completed, resulting in unnecessary and wasteful expenditure (Judicial Commission of Inquiry into State Capture, 2022).

Mr Craythone is asked to give his explanation of why SSI was hired to be the marketer of the diamonds mined. He explains that prior to SSI, there was another valuator that was dismissed by Mr Carstens (the chief executive officer of Alexkor). This was because the prices of the diamonds mined at Alexkor "deteriorated dramatically in relation to the international benchmarks" (Craythone, 2021, p. 140)

Alexkor's initial move to rectify the fall was to go onto the open market in 2006. This saw a dramatic increase in price performance; however, in 2012 the prices dramatically worsened again. Adv Sibiya (2021, p. 140) asks Mr Craythone, "What changed in 2012?" to understand the reason behind the price drop. Craythone explains that the price drop resulted from the change in legislation in 2011. Section 20A of the Diamond Act prohibited local licensed buyers from being accompanied by international buyers. In essence, this removed international competitiveness from South Africa's local auction system.

As reiterated by Mr Craythone (2021, p. 142) the 30.2% price drop was a result of the change in legislation; however, "[PSJV] analysis of the situation was that there was a problem with the current service provider doing the marketing" It was then the technical committee of the PSJV that recommended to the board that the marketing and sales service provider be changed. Following this, a new service provider, Fusion Alternatives was brought in. Adv Sibiya asks whether the prices improved after the change; however, Craythone (2021, p. 143) replies that "in some instances, they actually deteriorated further." Instead of doing a further assessment to uncover the apparent reason behind the price drop, “it was at that point that the PSJV advertised their tender that resulted in the award to SSI” (Sibiya, 2021, p. 143)

5.2.1.2 Non-compliance with legislative policy

South Africa’s procurement system comprises an extensive network of Acts and Regulations to protect public funds from the abuse and misuse of individuals. The data has found that public procurement personnel do not comply with legislative policy due to the complexity of the frameworks, but also a lack of personal will.

Dr Ayanda Nteta, former Senior General Manager for the Primary Energy Division at Eskom, testifies on the prepayment submission made to Tegeta in April 2015 of R659 million. The centrality of the matter, as Adv Seleka (2021, p. 123) points out, pertains to “an unsolicited approach made by Tegeta.” From the evidence presented, Adv Seleka posits that the procurement process was not followed with regards to the offer made by the Gupta-owned company.

Dr Nteta’s (2021, p.124) argument for the fact that Eskom did not go out on a tender for the supply of coal was that “in terms of our engagement within Eskom at the time, we engaged with suppliers based on unsolicited offers.” To Chairperson Zondo’s dissatisfaction, he questions the procurement procedures at Eskom. He leans towards the assumption that although Dr Nteta is not within the procurement division, “at senior management level you – one should expect that you would know… what Eskom’s justification was for not going out on a tender in such cases” (Zondo, 2021, p. 126).

Dr Nteta (2021, p. 126) explains that concerning the procurement of coal, a *“medium term mandate”* was entered into in 2008 which allowed them to engage with supplies before confronting the tender committee with feedback. Chairperson Zondo (2021, p. 126-127) responds by explaining that even if a supplier has made an unsolicited offer to supply coal before the agreement is concluded, “there is no reason why as Eskom you cannot go out on tender to let somebody else who might have – who might be able to tender or put in a bid.” Going out on tender allows Eskom to get the most competitive supplier. Dr Nteta explains the parameters of the medium-term mandate to justify why Eskom could deviate from standard procurement practices. However, furthermore to the Chairperson's dissatisfaction, he responds by saying, "it seems to me that the mandate that you talk about could not authorize Eskom officials to do something that is unlawful. If the law requires that you go out on tender that is the law" (Zondo, 2021, p. 128).

5.2.1.3 Misrepresentation

A theme that emerged within the data is a misrepresentation of both who the directors were of SSI, the history/track record of the company, as well as whether the company owned a diamond license.

The evidence suggests that the capture of Alexkor was in motion before the start of the tender process. Both Mr Torres and Mr Craythone explain how SSI was a shelf company before they submitted their bid. Mr Torres explains that his suspicions first arose when he reviewed SSI's expression of interest. The documents stated that the directors were Hazel Ammann, Daniel Nathan and Kubentheran Moodley. However, it was revealed upon investigation that Nathan and Moodley were only appointed weeks later. Meaning that "at the time when they submitted their expression of interest the supporting documents misrepresented Nathan and Moodley as directors." (Torres, 2021, p. 47).

Moreover, Mr Craythorne's own investigation revealed that neither Nathan and Moodley were directors even after the bid submission had closed. On the 6th of November 2014, when they sent their expression of interest, Nathan and Moodley were stated as directors. However, they were only officially appointed as directors on the 4th of December 2014 after the bid submission had closed. Adv Sibiya probes the irregularity and questions whether SSI should have been appointed based on this misrepresentation alone. Mr Craythorne (2021, p. 182) says, "no because this is a false representation, they represented themselves as being directors of a company that was bidding when it is not true."

One of the requirements of the tender (which will be discussed later) was that the bidder had to have prior experience in order to bid. A Representative of Alexkor answered that

“that the company has no track record until Mr Daniel Nathan with 20 years’ experience within the diamond industry was appointed as a director of SSI in 2014” (Sibiya, 2021, p. 151). Not only was that an unacceptable answer, but it was also a blatant misrepresentation of information because Nathan was not even an appointed director at the time of the bid.

On the second day of the hearing, Mr Craythorne deals with “how the board of the Ritchtersveldt mining company was unlawfully constituted” (Sibiya, 2021, p. 5). Adv Sibiya highlights that the relevance of this matter is directly related to all the decisions taken leading up to, and ultimately the tender award for a new diamond marketer. Mr Craythorne (2021, p. 5) details how Mr Craig Matthews, the sole director of Ritchtersveldt Mining Company, was removed as director and in his place, “three other directors who were then the directors that formed the representation on the PSJV for Ritchtersveldt Mining Company” were appointed. The significance here rests in the fact that Matthews was “in fact the only lawfully appointed director. So, the three Ritchtersveldt Mining Company representatives that were instrumental in on-boarding Scarlet Sky were not lawfully [appointed]” (Craythorne, 2021, p. 6).

Matthews communicated the judgment passed on the matter in a letter addressed to the directors of Alexkor, the CEO of the PSJV, as well as the board secretary of the PSJV, where he explained that the representatives appointed had “no authority to take decisions on behalf of the company and the PSJV board” (Craythorne, 2021, p. 9). Craythorne (2021, p. 10) further reads to the commission that in the same letter, Matthews states that the “that RMC may review all decisions taken by the PSJV board since November 2013.”

Because all decisions taken by an unlawful board are rightfully considered null and void. In another letter communicated through email, representatives of Alexkor dismissed the judgment because “neither the company nor the PSJV were parties to the court” (Craythorne, 2021, p. 10). Adv Sibiya asks for Mr Craythorne’s (2021, p. 11) thoughts on the company’s response to Matthews, where he says, “I think it is a reckless disregard for good governance and for the high court.” Moreover, it was communicated to Alexkor by Matthews’ attorneys Adams and Adams to “hold over all further decisions of the PSJV until a properly constituted board of the PSJV” (Craythorne, 2021, p. 23). This was blatantly ignored as two days later, it was uncovered that SSI was informed that they were the successful bidders, and the tender was awarded to them. Mr Craythorne (2021, p. 25) emphasised how this “was an absolutely total disregard for due process, for honesty, for good governance and that was typical of what I understood to be a state capture at play.”

5.2.2 TENDERING

5.2.2.1 Advisory services

A reoccurring theme that the State Capture commission discovered was the outsourcing of advisory services. Consultancy agencies such as McKinsey, Regiments and Trillian (all Gupta link entities) were outsourced by SOEs like Transnet and Eskom to perform work even when they possessed the internal capacity to do so (Judicial Commission of Inquiry into State Capture, 2022).

Gamiro Advisory Services is an external service provider that was outsourced by the PSJV to perform the bid evaluation and shortlisting of the tender process that led to the award of SSI. The PSJV is a schedule 2 entity; thus, it is exempted from the rules set out by the Public Finance Management Act for Supply Chain Management (SCM). This means they were at liberty to formulate their policies specifically for SCM; however, they did not; therefore, the Treasury prescripts automatically applied. Under the treasury prescripts, Mr Torres (2021, p. 48) highlighted how “you need to have a properly appointed BEC made up of staff members and management, you cannot have an external party doing the evaluation and short list.” Gamiro Advisory Services responded to the allegation stating that they only put in the scores but did not state which companies should be shortlisted. Mr Torres (2021, p. 61) argues that “when you do the scoring it is also an automatic shortlisting process”, regardless of whether they state that a company should or should not be disqualified.

Adv Sibiya (2021, p. 61) probes the irregularity further by highlighting that “by employing Gamiro they had to have a certain expertise”, implying that external consultancy agencies are supposed to be brought in because they offer capabilities that the contractor does not possess. Mr Torres (2021, p. 62) concurs, stating that it would not make sense to employ an external service provider “if they do not have the skills and capabilities to do the job because you have skills in house” therefore, they should have known that SSI should have been automatically disqualified for not possessing a license. What is more, there were only seven tenders to be evaluated. So, the argument that Gamiro was not tasked to shortlist fell short, as there would be no need to call in an advisory service to evaluate just seven tenders as this could be performed in-house.

Chairperson Zondo asked Mr Torres whether he was given an explanation as to why Gamiro was outsourced, to which he responded that Carsten took the decision as “they have the technical ability in terms of the industry” (Torres, 2021, p. 65). The whole situation to Mr Torres (2021, p. 65) “did not make sense” because the only technical issue was that of the license, and even one could argue that that is not even a technical issue. Everything regarding decisions that needed to be taken pertaining to the tender process was “have you met the requirement” or not, making the decision to outsource “fruitless and wasteful expenditure”, according to Mr Torres (2021, p. 61).

5.2.2.2 Requirements not met

Requirements are specified to ensure that the individual or entity awarded the tender is capable, at the very least, of performing the work required adequately. The evidence revealed that it is far too easy for bid evaluators and adjudicators to simply bypass the procurement regulations and award points for specific requirements at their discretion due to the lack of centrality of the procurement process.

Mr Torres draws attention to the fact that SSI should never have been awarded the contract since it failed to meet the minimum requirements. As mentioned previously, the tender that Alexkor put out for a new service provider for the marketing and sales of their diamonds originally stemmed from the drop in diamond prices in 2013. Great significance was placed on a capable and reliable service provider, as Alexkor and the contract marine miners played no role in evaluating the diamonds and determining the price given.

The tender for a new permanent service provider was advertised with the minimum requirement for the bid. Mr Torres (2021, p. 47) clarified to the court that “a minimum requirement for the bidder was you needed to have a license to sell rough diamonds. It is a statutory requirement in terms of the Diamond Act.” Mr Torres brought to the fore the fact that, although Alexkor is its own entity that is permitted to formulate its requirements at its legal discretion, as an entity operating in the diamond mining industry, they are automatically governed by the laws of the Diamond Act (56 of 1986) which form the bases upon which their requirements should be drafted. Therefore, even though the bid requirements did not stipulate that a license was required, as per the laws that govern South Africa, one should be informed that a license to sell rough diamonds is required, nonetheless.

Mr Torres (2021, p. 47) provides evidence that “Scarlet Sky Investments did not have a license, so they should have been disqualified right at the beginning” In the opinion of Chairperson Zondo (2021, p. 48), the blatant “noncompliance” by SSI with one of the minimum requirements could not have been an oversight blunder but rather the intentional disregard on the part of the appointed authority not to disqualify SSI from the very start. The information on the appointment of SSI was not available to the contract marine divers or the public, for that matter. Even the profile of SSI and its shareholders was not available. The drastic decline in diamond prices under SSI as the service provider prompted Mr Craythorne (2021, p. 145) to investigate “who were the individuals behind Scarlet Sky because nobody knew.” Mr Craythorne submitted his question to Parliament, which included the inquiry around the validity of SSI’s license. It was revealed then that SSI did indeed not have a license. It was confirmed by both the diamond regulator and the Department of Public Enterprises that “Scarlet Sky did not have the minimum requirements of licenses” (Torres, 2021, p. 56).

Moreover, when asked in Parliament whether SSI had a license to trade diamonds, the representatives responded that “Mr Daniel Nathan is the holder of the required diamond deal license” (Sibiya, 2021, p. 160). Mr Craythorne (2021, p. 212) explained how this was simply a breach of “statutory provisions” as you cannot conduct business under the pretence that the license you are using is your own, even if that license belonged to the company’s CEO in question. Advocate Sibiya (2021, p. 212) added that it was “in fact unlawful for SSI to then having been appointed [to do] what it was appointed to do.”

Mr Craythorne, on the suspicions that SSI did not have a license to market and sell raw diamonds, questioned the company’s track record and history prior to them being awarded the contract by Alexkor. That was another specification of the tender issued that the bidder must have prior experience to bid. When asked in Parliament, representatives of Alexkor answered: “that the company has no track record until Mr Daniel Nathan with 20 years’ experience within the diamond industry was appointed as a director of SSI in 2014” (Sibiya, 2021, p. 151). Chairperson Zondo (2021, p. 151) was quick to interject, claiming that must be “inaccurate” because the personal track record of an individual does not qualify as a company's track record.

5.2.2.3 Manipulation of results

There was evidence of manipulation at each stage of the procurement cycle. In essence, all transgressions made were to manipulate the process in favour of SSI.

As mentioned earlier, the PSJV hired Gamiro Advisory Services for the bid evaluation and shortlisting. Mr Torres (2021, p. 48) mentioned that “you cannot have an external party doing the evaluation and a short list.” They are only allowed to offer technical advice on technical issues. Thus, he states that the outsourcing of Gamiro Advisory Services “was an irregularity that we uncovered” (Torres, 2021, p. 48)

However, the point of interest here is that Gamiro Advisory Services “actually allocated zero points to Scarlet Sky for not having a license” (Torres, 2021, p. 49) Chairperson Zondo questioned whether the tender committee of Alexkor was responsible for moderating the scores given, and Mr Torres (2021, p. 48) drew attention to the fact that it was “disregarded by the tender committee” and that “they gave them the full five points, and so this is where the discrepancies came about.” Chairperson Zondo probed Mr Torres further, questioning whether he got a reasonable explanation from the tender committee as to why there was such a visible discrepancy in the points allocated. However, Mr Torres said that during the time of his investigation, most members of the committee had retired or resigned. To his dissatisfaction, Chairperson Zondo (2021, p. 51) highlights the significance of his findings to the state capture inquiry, expressing that it is unacceptable that not one member from the committee could be contacted to explain how “they could not have seen that the SSI did not have a license because their job would have been to find out do you meet these minimum requirements.” He adds that, to his understanding, whoever allocated SSI full points manipulated the system because they knew SSI did not possess a license; therefore they “must have been acting fraudulently” (Zondo, 2021, p. 55).

5.2.2.4 Change to bid criteria

The tender process was further manipulated to favour SSI as Mr Torres recalls how SSI originally submitted a bid which proposed an outright purchasing model. This model was used previously by the former service provider, which was unsatisfactory to the Alexkor marine contractors and management. For that reason, all other bidders proposed an auction sale pricing model when they submitted their bids. Mr Torres (2021, p. 57) uncovered in the investigation that when SSI presented their bid to the tender committee, “it was changed to the auction sale pricing model.” This once again pointed a finger to the fact that the tender process had been manipulated because there was a ninety-day bid validity period where “you cannot make changes to the bid or if you do make changes all other bidders must be informed” (Torres, 2021, p. 57). Mr Torres confirmed with Alexkor’s company secretary that they did not inform the other bidders of the changes. Mr Torres (2021, p. 57) stated, in essence, that “allowing SSI to make a crucial change to the bid submission is an unfair and uncompetitive practice, and it is a contravention of the constitution section 217.”

In addition, Mr Torres (2021, p. 66) also discovered “basic discrepancies” in scoring the three shortlisted service providers. Such as, all three competitors “proposed a commission of 1.5%, but two of the service providers were given three points and there other one was given four points” (Torres, 2021, p. 66). It is blatant instances such as these that lead Mr Torres (2021, p. 66) to believe the procurement process was manipulated as "they were just giving points to ensure SSI got the highest points."

5.2.2.5 No records

As discussed earlier, state capture takes place within the quietly constructed shadow state, were inter-linked individuals secretly work together to reap the gains from their illegal activities. Their syndicate is only made possible through key factors such as deniability and mutually biding fear. Thus, a common feature in instances of state capture involving organs of the state is a lack of records or any form of paper trial that may lead to the exposure for their corrupt dealings.

SSI originally won the first tender in 2015, which was a three-year contract to sell and market the diamonds on behalf of PSJV. However, sometime during the first contract in 2016 a new procurement process was started for the exact same service. Mr Torres (2021, p. 40) states "nobody can explain why because the term had not expired yet." What is more, is that SSI were again appointed, however the contract this time had a few vital changes. Such as the duration period "was extended to five years which was quite a long time" Mr Torres (2021, p. 41) says. Additionally, the clause that stated that 5% of the diamonds mined had to be sold locally was excluded from the agreement.

Mr Torres (2021, p. 70) explains that the findings of their investigation revealed that the procurement process for the second appoint of SSI was "fatally flawed." This time around, instead of hiring an external advisory service provider as they did before, the Bid Evaluation Committee (BEC) "comprised the executive team managers" (Torres, 2021, p. 71). Mr Torres requested the minutes of the meeting where the scoring was done by the BEC however, it was at this point that the company secretary (who was also part of the BEC) "admitted to us that they did no evaluation at all" (Torres, 2021, p. 71). Torres (2021, p. 71) explains how he believes the BEC was "a hoax in itself" because their responsibility or the responsibility for any BEC for that matter, is to do an evaluation which was not done. He explains further that, "they had no records that an evaluation had been done and that is why it was a problem even to get minutes" (Torres, 2021, p. 72). In the report submitted to the Department of Public Enterprises, it was also stated that "the committee did not do any scoring for the evaluation purposes only checked compliance to minimum requirements" (Torres, 2021, p. 75).

5.2.3 POST-TENDER

5.2.3.1 Due diligence

Due diligence ensures that all the steps in the procurement process have been adhered to. It acts as a safety net by allowing procurement officials to verify that the information provided by potential vendors is accurate and that the vendors meet all the requirements set out in the bid specification. The irregularities experienced during the procurement process are often detected once due diligence is performed.

Mr Torres (2021, p. 57) testified that during his investigation into the first appointment of SSI, he uncovered that when the tender committee recommended SSI as the successful bidder, it was on the condition that "a due diligence is conducted by the CEO, Carstens." Mr Torres revealed that Carstens had informed the board that he had conducted a due diligence report.

Mr Torres (2021, p. 52) explains that if a due diligence report was indeed conducted, "[this] would have entailed also confirming the legality of the license." As previously evidenced, SSI did not possess a diamond license; therefore, Carstens misrepresented to the board that due diligence was conducted. The significance of this misrepresentation rests in the fact that the due diligence report served as the basis for SSI's appointment. To the chairperson's dissatisfaction, he raised his concerns over how the board could "just accept his word" as it is the duty of the board to ask for the report so that "they could evaluate it themselves and see what it says" (Zondo, 2021, p. 67). Mr Torres (2021, p. 67) explained that he requested the due diligence report for months; however, "eventually right at the end they confessed… no due diligence was done."

Further along at the hearing, as previously detailed, Mr Craythorne highlighted the irregularities regarding the directorship of SSI. Adv Sibiya (2021, p. 182) concluded that as an isolated issue, SSI should not have been awarded the tender as it was “a false representation” of the company’s directors. Adv Sibiya (2021, p. 184) brought to the fore that “if a due diligence had been conducted, which we have heard in the evidence of Mr Torres that it was not, it would have showed these things and SSI should not have been appointed.” Adv Sibiya (2021, p. 184) explains that the irregularities uncovered “were things that were easy to find”, further emphasising that had a due diligence report been conducted, it would have been blatantly clear that SSI should not have been appointed and would, in fact pose a detrimental risk to the company’s performance.

The importance of the missing due diligence report was further emphasised in the hearing. Under the instructions of former Minister Lynn Brown, the Audit and Risk Committee (ARC) conducted a report on Alexkor concerning the appointment of SSI. Mr Korabie, a member of the tender committee, had awarded SSI a score of 100. In the ARC report, it was noted that “Mr Korabie resigned around the time that the due diligence was not being done and Mr Korabie had raised quite a lot of objections to the award without a proper due diligence” (Craythorne, 2021, p. 201).

In the next hearing, evidence was drawn from a complaint made to the public protector by “Duncan Korabie on behalf of the Richtersveldt community, objecting to the absence of a due diligence” (Craythorne, 2021, p. 27). The correspondence was sent to several top executives within Alexkor and the PSJV, including Mr Percy Khoza, who was the CEO of Alexkor at the time. In the email evidence between Korabie and Khoza presented, Korabie expresses his regrets that the matter had to be escalated to such levels due to the lack of cooperation of the Executive Committee. In the complaint, Korabie states that “there could not have been much due diligence. SSI was previously owned by a Legal Frontiers Corporate Services which is a company that trade in shelf companies” (Sibiya, 2021, p. 36).

The Audit and Risk Committee responded by saying, “the CEO of the PSJV did a proper due diligence on all the technical aspects and submitted the report.” Adv Sibiya probes the validity of this statement questioning whether, based on the evidence presented, “could a due diligence on the technical aspects resulted in the continued appointment of SSI?” Mr Craythonrne replies, “No, it could not have.” Chairperson Zondo speculates whether the ARC included in their report that due diligence was conducted, whether they “acted in good faith or whether they included in the report false information knowing it to be false.”

5.2.3.2 Shadow network

Dr Nteta (2021, p. 135) explains how “there was a lot of interest” regarding the Tegata contract, particularly from her “superiors up until board level.” Nteta expresses how the undue pressure brought on her led to her resignation. She recalls several instances that she felt were “inappropriate” by certain executives (Nteta, 2021, p. 138). One was where her department (Primary Energy) was the only department called into a meeting with the Chairperson of the board of Eskom to discuss the engagement with their suppliers. Nteta (2021, p. 139) explains that the person she reports to is her immediate manager Mr Bester, so the interest from the top was “not necessary”.

Evidence is read from Mr Bester’s affidavit where he notes that during the period when the Tegata Brakfontein negotiations were taking place, Dr Nteta was requested to report to persons like Mr Mboweni (Senior General Manager of Primary Energy at the time), Mr Amabeleni and Mr Matshela Koko (CEO of Eskom at the time). Dr Nteta (2021, p. 142) corroborates his claim by stating that she had to “provide weekly feedback in terms of the transaction.” Mr Bester states, “I always knew that there was interest in Tegata Platform contract from higher up” (Seleka, 2021, p. 143).

The Tegata contract was signed and concluded on the 10th of March 2015, and Matshela Koko was suspended the following day on the 11th. Bester alludes to how “few have joined the dots” as to what had unfolded (Seleka, 2021, p. 145). On review of the procurement procedure that unfolded, both Dr Nteta and Mr Bester argue that the medium mandate had served Eskom well up until this point. He argues that the Brakfontein contract was valid and properly negotiated. He states Eskom was only “compromised when Mr Koko suspended those trying to implement the conditions of the contract” (Seleka, 2021, p. 147).

5.3 SUMMARY

This chapter presented the findings identified in the transcripts of the hearings conducted by the Judicial Commission of Inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of the State, also known as the Zondo Commission or State Capture Commission. The study's objective was to evaluate the patterns of weakness within the public procurement system and identify how these patterns of abuse have facilitated the capture of state-owned enterprises in South Africa.

Through the data analysis and interpretation method of thematic analysis, using the three steps in data analysis for qualitative studies being; open coding, axial coding, and selective coding, several significant themes/patterns from the data emerged and were presented. Based on the findings, the research has found that the procurement system, as an institution and structure, cannot withstand the transgressions made by illegitimate procurement personnel and external parties. The next chapter shall interpret the findings and discuss the patterns of abuse identified concerning the research question and existing literature.

CHAPTER 6
INTERPRETATION OF FINDINGS

6.1 INTRODUCTION

Chapter six discusses the findings presented in chapter four and provides an interpretation substantiated by existing knowledge from the literature review. This chapter aims to discuss the violations of the procurement process and the factors that lead to the transgression. The analysis draws from the responses from witness testimonies and other hard evidence submitted to the court, such as affidavits, investigative reports and email communication.

6.2 PRE-TENDER

6.2.1 Lack of expertise and capacity leads to poor planning

The patterns of abuse which occurred at all stages of the procurement cycle provide cause for the proliferation of state capture. It has been observed that central to the problems in public procurement in South Africa is the lack of capacity, skills and expertise within regulatory authorities and procuring entities (Brunette & Klaaren, 2020). Mr Craythone's testimony on the deterioration of the diamond prices substantiates this claim. The evidence reveals that instead of identifying the aetiology of the price drop, the technical committee of PSJV recommended that the marketing and sales service provider be substituted. This further saw a decline in diamond prices. It can be argued that the technical committee's ill assessment of the matter and the needs of the business are attributed to the lack of expertise or understanding on matters relating to diamond trading. Mr Craythone (2021, p. 143) states, "the PSJV should have realised that we were dealing with a problem totally unrelated to the marketing and sales."

The research argues that shortcomings in knowledge and expertise negatively impact adequate planning. The procurement cycle begins with strategic planning. Commonly, procurement is a reactive response to an unexpected problem that has developed, i.e., the collapse in diamond pricing. Before any tender is advertised, the technical committee's job is to compile a strategic planning document that identifies the needs and objectives of the business that is evidence-based (PARI, 2014). The literature has found that this step is often neglected or poorly performed. The next step would be to discern whether the problems identified can be pursued in-house or whether it is necessary to outsource. It is at this stage that the appropriate technical expertise is consulted, and an informed decision is made.

The shortage of skills in the public procurement sector has become a reoccurring critique and has been identified by Ambe and Badenhorst-Weiss (2012, p. 454) as "the single greatest impediment to the success of public procurement in South Africa." Predictably, a deficit in technical skills increases the likelihood that the outcome of contracts with the incorrect needs will result in fruitless and wasteful expenditure of public resources, as seen in the case of Alexkor. Not only were SSI paid to perform an unnecessary service, but the poor performance of SSI also saw a R369 million loss in diamond sales which is money owed to the public purse.

The Word Bank (2018), in their procurement guide for contract management, highlight the significance of contract managers possessing the appropriate range of qualifications, expertise and experience in their relevant field to exercise good practice. Technical skills, which can be defined as "thorough knowledge and understanding of the subject matter and all aspects of the contract", are provided (World Bank, 2018, p. 6). Amongst the skills identified 'analytics and reporting' is listed (World Bank, 2018, p. 6). The technical committee of the PSJV should have the capability to assess the performance of the former contract diamond marketers critically and concluded based on analytical evidence that the decline in prices is attributed to specific factors.

6.2.2 Non-compliance to legal policy

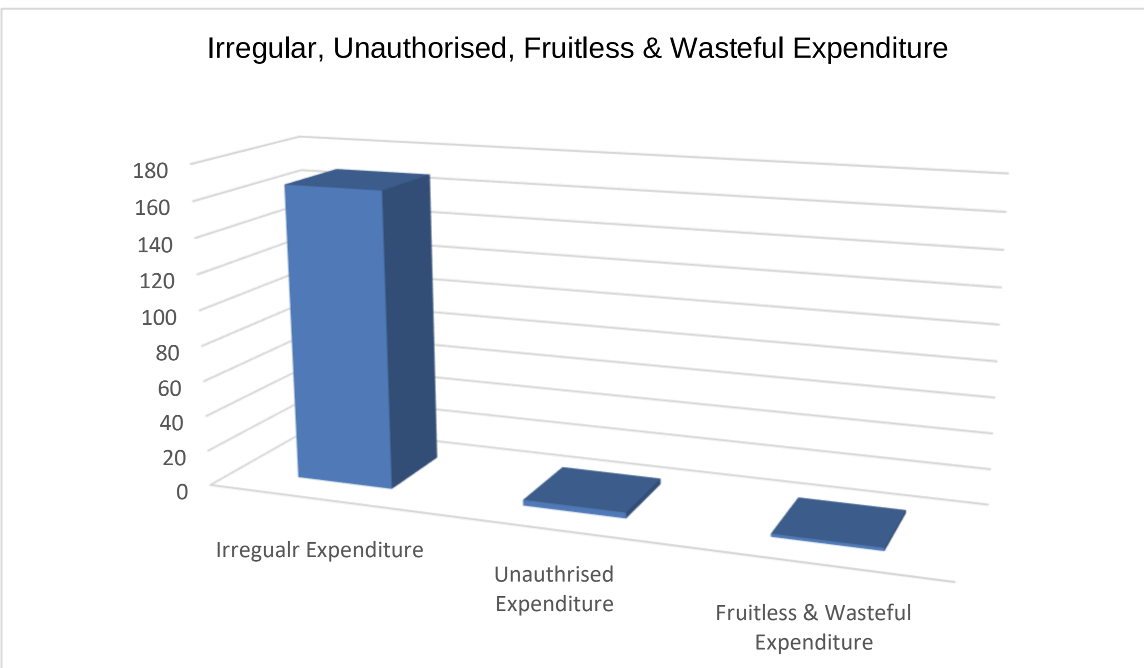
The research argues that the shortcomings of expertise are the genesis of many systemic issues observed within the procurement system, including non-compliance with government legislation. The South African government have made provisions for the education of officials on proper public procurement practices per legalisation and other regulating framework such as the PFMA and the MFMA. The PFMA stipulates that all government departments, trading entities, and constitutional institutions, both on national and provincial levels, must have an accounting officer (Section 36, PFMA). The mandate of the accounting officer is to ensure that their organisation has and upholds an appropriate procurement procedure which is in accordance with the constitutional principles of fairness, equitability, transparency, competition, and cost-effectiveness (Section 38 (1)(a)(iii), PFMA). Schedule 2 state-owned entities have the jurisdiction to formulate their procurement procedures in line with the framework created by the National Treasury. Accounting officers and accounting authorities are also accountable for the education, training and development of relevant personnel in line with national regulations (Section 36, PFMA).

The research found that even senior members of the largest state-owned entities are not adequately educated in the rules and regulations of procurement. In the case of Eskom, the Senior General Manager for Primary Energy Division at Eskom, Dr Ayanda Nteta accepted an unsolicited offer for the supply of coal from Gupta affiliated company Tegata. The contract was concluded without going out on tender and resulted in a substantial payment to the Gupta-affiliated company of R659 million; one of the largest sums attributed to state capture. As discussed previously, Dr Nteta's (2021, p. 131) argument about the medium-term mandate was that "it was the practice within Eskom", suggesting that there is a culture of non-compliance in the SOE. Evidence leader Adv Seleka (2021, p. 131) clarified the purpose of the mandate explaining that "[it] does not have the deviation from a procurement process" and that "the mandate did not envisage unsolicited offers." Chairperson Zondo provides a precise take on the situation:

> You may not be a procurement person; you might not be qualified in procurement in terms of paper, and so on, I do not know. But I would imagine that senior managers in any institution, including Eskom would at least have some understanding of the basics of procurement so that even if they might not have deep knowledge of procurement procedures and so on, they would know at least is that before you conclude a contract with a supplier, generally you are supposed

– Eskom is supposed to go out on tender unless the situation falls within certain exceptions (Zondo, 2021, p. 126).

Undeniably, the non-compliance with SCM policies and regulations has facilitated the capture of state-owned enterprises. End-users take advantage of the fact that in competitive tenders, government officials tend to deviate from regulating policies to get the job done. This, coupled with the high levels of discretion, allows SCM practitioners to illegitimately favour specific bidders (PARI, 2014). The Auditor-General found that for the 2020/21 financial year, 69% of auditees materially did not comply with legislation resulting in ghastly blows to the state purse (Auditor-General, 2021). A staggering R166,85 billion was due to irregular expenditure, R3,21 billion to unauthorised expenditure, and R1,72 billion to fruitless and wasteful expenditure. Contracts like Tegata and SSI contribute to the depletion of the national treasury and the inability of SOEs to fulfil their priority mandate of serving South African citizens.



Source: Auditor General South Africa Integrated Annual Report 2021-22

6.3 TENDERING

6.3.1 Advisory services

The research has found non-compliance with the rules and national regulatory frameworks at all stages of the procurement process. Van Zyl (2006) highlights how there is a lack of appropriate bid committees. The role of the bid evaluation committee is to evaluate the capabilities of the bidders in relation to the tasks being procured (PARI, 2014). Bid evaluation committees, like bid specification committees, are constituted ad hoc. As per National Treasury prescripts, committee members should be multidepartmental, generally comprising technical and operational staff, financial staff and at least one SCM personnel (PARI, 2014). The separation of entities is aimed at preventing conflicts of interest and ensuring that the evaluation process is fair, transparent and unbiased.

During the tendering phase of the procurement cycle, Mr Torres discovered that an external service provider, Gamiro Advisory Services, was outsourced to do the bid evaluation and shortlisting, which flaunts a clear violation of regulatory procedure set out by the Public Finance Management Act for Supply Chain Management. The decision was taken at the discretion of the Chief Executive Officer of Alekor, Marvin Carstens, with no adequate justification. The research argues that the senior executive's lack of transparency and accountability paves pathways to state capture, as it allows individuals with vested interests to influence the procurement process.

The argument that Gamiro was outsourced due to their technical abilities falls short due to the nature and scope of the tender. The scoring criteria were requirements-based, which is relatively uncomplicated. As highlighted by the Public Affairs Research Institute (2014), bidders can only be evaluated on the criteria set out in the original bid packs given to all bidders. Furthermore, there were just seven tenders to evaluate. It is, therefore, evident that Alexkor possessed the in-house expertise to evaluate the tenders internally. Chairperson Zondo (2021, p. 64) adds that "outsourcing in circumstances where there is in-house expertise may be an indication of something else." The employment of Gamiro was undoubtedly fruitless and wasteful expenditure, which is a common consequence of state capture.

To absolve themselves from being implicated, Gamiro disputed that they did any shortlisting and argued that they only put in the scores but did not explicitly state which companies should be shortlisted. Mr Torres explains that this is nonsensical as the scoring is an automatic shortlisting because there is a scoring threshold, and any company that meets the threshold will be automatically shortlisted. Additionally, their argument further substantiates the argument that the employment of Gamiro was fruitless and wasteful expenditure, seeing that if the advisory service was contracted to perform an evaluation and shortlisting, and they argue that they did not, ultimately, they failed to perform their duties.

Regardless of the foregoing argument, the bid evaluation committee, after compiling a list of functionally compliant bidders, will score each bid out of a hundred based on pricing and BBBEE compliance (PARI, 2014). The literature argues that it is commonly at this point where bid manipulation begins to distort the outcome. The scoring of the three shortlisted bidders displayed blatant discrepancies. All three service providers proposed a commission of 1.5 per cent; however, it was uncovered that two of the bidders were awarded three points for this, and the other bidder, SSI, scored four. Mr Torres (2021, p. 66) said, “we got the impression that is why we say we think it was manipulated, they were just giving points to ensure that SSI got the highest points.”

The case of Gamiro Advisory Services is not unique. As evidenced by the State Capture commission, the outsourcing of advisory and consultancy services such as McKinsey, Regiments and Trillian (all Gupta link entities) were procured by SOEs like Transnet and Eskom to perform work even when they possessed the internal capacity to do so resulting in unnecessary expenditure. This is a recurring theme that was discovered by the State Capture commission and highlights the need for strict adherence to procurement laws and regulations to prevent state capture.

6.3.2 Bid-rigging

Within the framework of public procurement regulations, it is considered standard practice for procuring entities only to consider tenders that are in conformity, compliant, or responsive. Such tenders must adhere to all elements of the invitation to tender and fulfil any additional specifications established by the procuring entity within the tender documents

As evidenced in chapter four and shall further be elaborated on, the capture of Alexkor was deliberately planned and set into motion long before the tender for a new sales and diamond marketer was advertised. At the core of state capture is a shadow network of coconspirators who strategically position themselves in the most important centers of state power and conspire on what should happen on the surface of the constitutional state (Bhorat et al., 2017). As previously evidenced, a procurement system is only as strong as its weakest player. Not only is it dependent on the skills and expertise of officials, but this research argues that, more importantly, it is dependent on the integrity and moral conduct of officials, which aid and play a role in decision-making.

A competitive public procurement system is not only a constitutional mandate in South Africa; it is paramount for the efficient and successful delivery of essential goods and services necessary for the developmental progression of society. Makube (2019) deposits that the regulatory rules and policy frameworks that govern public procurement in South Africa are not robust enough to detect and withstand corrupt behaviour like bid-rigging and other uncompetitive dealings. Bid rigging, also referred to as collusive tendering, is a form of anti-competitive behaviour in which business entities that would typically be expected to engage in fair competition instead secretly conspire to manipulate the outcome of a bidding process (OECD, 2021).

What the research has discovered is that, beyond the conventional practice of bidders colluding amongst themselves, bidders collude with SCM partitioners and other wellpositioned members of the mafia state to rig the outcome of the tender from the very top down. This, by definition, is the makings of state capture. Following the shortlisting done by Gamiro Advisory Services, The Alexkor Bid Adjudication Committee (BAC) allocated five points to SSI for a diamond license they did not have. As discussed previously, The PFMA makes provisions for schedule 2 entities to formulate their procurement procedures (Section 86(1)(b), PFMA). However, the Diamond Act of 1986 requires that diamond dealers, manufacturers, and exporters obtain a license from the Diamond Board of South Africa to operate legally within the industry (Section 4, Diamond Act of 1986). SSI did not possess a license and should have been immediately disqualified for not meeting the minimum requirements. Chairperson Zondo stated:

> Anybody who awarded SSI, which is awarded five points, which is as I understand from what you are saying with full points, knew that there was no license…and awarding the full points must have been acting fraudulently because they would not have seen the license…either the entity has a license or it does not have. It cannot be given 60% of the 100 points because if you have it, it is full points. If you do not have it, it is no point (Zondo, 2021, p. 65).

Compliance with minimum requirements in tenders ensures that successful bidders possess the necessary qualifications and capabilities to carry out the specified work in an efficient and cost-effective manner. In the case of SSI, the lack of compliance with the minimum requirement poses a significant obstacle. As stipulated in the Diamond Act, it is mandatory for entities to possess a license in order to operate in the diamond industry. Therefore, SSI's failure to meet this requirement makes them unable to perform the very work for which they were contracted to do.

6.3.3 International standards

The UNCITRAL Model Law on Public Procurement (2011) serves as a paradigm for the reform and development of regulatory systems pertaining to public procurement. It has been met with considerable success and has been implemented as the foundation of procurement legislation in over 30 nations globally.

The UNCITRAL Model Law on Public Procurement deals with the evaluations and vetting of tenders in Article 43, and provides as follows:

- “(a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article 10 of this Law. (b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders.
- 2. The procuring entity shall reject a tender:
- (c) If the tender is not responsive.

Public procurements laws in the United States also make statutory provisions that require contracts to be awarded to the individual or entity who submits a bid that follows the requirements outlined in the official solicitation document (Bolton, 2014).

The Federal Acquisition Regulations (US FAR) stipulates ‘responsiveness of bids’ as:

“[t]o be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system” (Bolton, 2014, p. 2317).

In the case of South Africa, public procurement is broadly regulated. Legislation and public policy issued by the government of South Africa place a significant emphasis on adhering to the requirements specified in tenders. In general, the terminology used within these documents refers to ‘acceptable’ tenders as opposed to terms such as ‘conforming’, ‘compliant’, or ‘responsive’, which are commonly employed in international regulations (Bolton, 2014). The PPPFA states that tenders should only be examined by procuring entities if the tender is acceptable. An acceptable tender, in turn, is defined in section 1(i) of the Act as:

"... any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document."

Additionally, there are number of other South African procurement legislation that aims to clarify the definition of an 'acceptable' tender in accordance with the country's legal system. The National Treasury (2005) in one of its Circulars notes that a tender will be 'acceptable' if:

- [I]t complies in all respects with the specification[s] and conditions of the [tender];
- the bidder completed and signed all the prescribed [tender] forms to enable the principal to evaluate the submitted [tender];
- the bidder submitted the required original tax clearance certificate and other clearance / registration forms as prescribed by various acts and / or in the [tender] documentation; and
- the bidder has the necessary capacity and ability to execute the contract.

As it is seen, the term 'acceptable tender' in South African procurement regulations diverges significantly from the definitions employed in other international frameworks. International regimes require only 'material' or 'substantial' compliance with tender conditions, while South African procurement law demands compliance 'in all respects' (Bolton, 2014). Additionally, the PPPFA does not permit the renunciation of 'minor informalities' or ;minor deviations' as is permitted by the other organisations. Blatantly put, South African procuring entities must irrevocably reject tenders that fail to fully comply with the requirements outlined in the tender conditions (Bolton, 2014).

The emphasis placed on meeting the minimum requirements for tenders in legislative laws across the globe is rooted in practical considerations. This emphasis is intended to ensure that procuring entities select the most qualified and capable providers. This is done to prevent several economic and social impediments. In the case study, Mr Torres' investigation revealed that there were complaints that the diamonds "were being undervalued and that no proper evaluation process was being done" by SSI (Torres, 2021, p. 92). It was requested that SSI provide a certificate of evaluation for each diamond that was sold as per procedure, but Mr Torres (2021, p. 93) noted that "they could not give us any certificates." Furthermore, "there was no compliance with the contractual terms for the agreement" as noted by Mr Torres (2021, p. 94). The contractual terms of the agreement stated that 5% of the diamonds must be sold to local buyers, 10% to the State Diamond Treasure, and then the remaining 85% must be sold through an auction sale. When asked to provide the names of all the buyers at the auction sales, SSI could not provide that information. With regards the other 10% and 5%, it was discovered that the diamonds were being valued based on carat quantities and not sales value as stipulated in the contract. As a result, it was found that "[SSI] under sold to the state diamond trader by sixty million. And they also under sold the 5% locally by thirty-eight million" (Torres, 2021, p. 95).

The fall in diamond sales promoted Mr Craythorne to question who SSI were. He questioned the experience and track record of the company prior to their appointment. He stated that "it was one of the minimum requirements or rather it was part of the tender specifications that had been issued when the PSJV sent out their RFP" (Craythorne, 2021, p. 149). The response that was given was that "the company had no track record until Mr Daniel Nathan with 20 years' experience within the diamond industry was appointed as a director of SSI in 2014" (Sibiya, 2021, p. 151). As highlighted by Chairperson Zondo, that explanation is inaccurate as the track record of an individual cannot constitute the track record of an entire company. What is more, and shall be discussed further on, is that at the time of SSI's bid, Nathans directorship was not yet in effect.

The lack of oversight and adherence to policy regulations ultimately allowed for the manipulation of the auction process. Linking back to the former section; the in-substantive regulatory rules in South Africa, coupled with a lack of centralised oversight allowed for the successful bidder to colluded with key stakeholders within the business, to rig the auction with the intent to decease the price of the goods sold for the benefit of the invested individuals. Mr Craythorne examples the classic case of collusive tendering. He explains that the reason why the diamonds were being sold at auction for significantly less than usual was because “collusion was taking place during auctions” (Craythorne, 2021, p. 136). He explains that the problem was that the same company that was conducting the auction was also the same company that was doing the evaluation, so there were no safety measures in place to prevent this. What is more, is that the 5% that was required to be sold locally was being sold to Daniel Nathan, one of the directors and CEO of SSI.

The intention behind bidding is so that private and public organisations achieve the best quality and best value for money (OECD, 2021). Not only did SSI rob funds from taxpayers, but they also sold poor quality diamonds to local South African organisations and buyers. These sort of State Capture dealings undermines public trust and confidence in institutions responsible for procuring goods and services in an economically sustainable manner, and simultaneously serves as a disincentive for local public participation in the marketplace.

6.3.4 Due diligence

The research has evidenced a lack of adequate due diligence at every stage of the procurement cycle. Due diligence in public procurement is a critical aspect that serves to ensure compliance with legal and regulatory requirements. The importance of due diligence cannot be overstated, as it identifies potential risks associated with all tendering parties and demonstrates compliance with national regulating policies. Furthermore, the implementation of effective due diligence practices serves to mitigate penalties that may be imposed in the event of allegations of misconduct arising from the actions of contractors, as clearly evidenced by the various cases of state capture.

The directors of the boards of SOEs are generally responsible for ensuring that there is due diligence, not just concerning procurement but in all dealings that may impact the organisation as a whole. It is imperative that both the board of directors and senior management play their role in maintaining good governance within SOEs (Judicial Commission of Inquiry into State Capture, 2022). Board members have significant responsibilities and must always act in the organisation’s best interest to achieve consistent sustainability and compliance. They must uphold a culture of sound ethics and efficiency as partial representatives of government shareholders.

The research demonstrates that the Boards of the SOEs in both case studies have failed to fulfil their responsibilities; beyond that, they have abused their position to corrupt the institutions they are meant to serve. As explained, SSI was recommended as the successful bidder, however, the tender committee made the recommendation on the condition that due diligence is conducted by the CEO Norman Carsten, who also formed part of the board of directors. Through the investigation, Torres discovered:

> Carstens then informed the board that he had conducted the due diligence. A due diligence would have entailed also confirming the legality of the license, okay? Now Carstens misrepresented to the board that he had conducted a due diligence and on that basis they were appointed. So we had interviewed Carstens about the due diligence, he says he has done it. However, the company secretary informed us that no due diligence was done and he wrote on email saying that he has done a due diligence (Torres, 2021, p. 52).

The research argues that Carsten was able to abuse his powers as senior management and ultimately manipulate the procurement process in his interest by not conducting due diligence as a result of the centralised structure of procurement. It was previously noted in the literature review that prior to 1994, South Africa operated a highly centralised procurement system. The argument was that the practice of centralisation allowed for strong central control over government expenditure and, subsequently, the limitation of corruption (PARI, 2014). However, it was recognised that the high level of political control that the oppressive ruling party held allowed for the advancement of the Afrikaner economic agenda, which has come to be understood as white monopoly capital. Accordingly, after the dawn of democracy, the State Tender Board Act 1968 (Act 86 of 1968) was amended, and procurement was decentralised down to provincial and local levels.

While there are valid arguments for both systems of control as explored, this research argues that the current decentralisation system has simply multiplied the previous centralisation system by creating multiple central control points with inadequate oversight mechanisms. Congruently argued by Fourie and Malan (2020, p. 16), the authors state that “the existence of numerous public procurement sites provides a breeding ground for fraud and corruption.” This effect is the extreme opposite of procurement reform’s original intent. The Procurement Forum, established in 1995; backed by the World Bank, favoured the decentralisation of procurement authorities to separate high-value contracts and dissolve the power of a single entity of control (Brunette, Klaaren & Nqaba, 2019). The task of decentralisation was due to be followed by extensive central regulation taken up by a National Procurement Compliance Office (Brunette, Klaaren & Nqaba, 2019). The office would have been accountable for devising a range of monitoring functions, such as standardised procurement documentation, information systems and investigative functions. However, the entity never came to fruition, and the mass decentralisation was not paired with an adequate central authority.

This has created a precarious situation where decentralisation in South Africa has become so extensive that it now presents obstacles to proper monitoring and oversight. There is no designated oversight entity with the sole responsibility to address corruption in all aspects of procurement (Judicial Commission of Inquiry into State Capture, 2022). In particular, the ineffective oversight over executives and members of boards has allowed them to act without constraint. The lack of oversight over Carsten made it possible for him to collude with parties outside of the organisation in the award of both contracts related to SSI. Consequently, substantial public funds were redirected into private hands, as seen by how SSI sold diamonds to Carsten, which displayed a clear conflict of interest. In this instance, it would be expected for the board to exercise regulatory authority; however, even that was absent. Chairperson Zondo (2021, p. 68) commented on the negligence of the board members of SOEs and asked, “how can you simply be told a due diligence has been conducted and you make a decision without seeing the due diligence report?”

While it is expected for the executive to act in a manner that is integral and has the institution's best interest at heart, this research argues that beyond political will, effective oversight requires institutional strength. As put by the Parliamentary Monitoring Group (Doyle, Rault-Smith & Alli, 2022), institutional strength is defined as an institution's ability to not rely on people or politics but, rather, is robust in its fundamental systems of effective oversight. These variables form the genesis of institutional memory, enabling freedom from political entities within the institution (Doyle, Rault-Smith & Alli, 2022).

6.4 POST-TENDER

6.4.1 Political interference

Political interference in public procurement is customarily enabled through the strategic reshuffling of key personnel in procurement operations (Brunette & Klaaren, 2020). SOEs are particularly vulnerable to abuse, as the Ministers of the relevant departments individually appoint the boards of directors. As the research has evidenced, the composition of the boards and senior management reveals how individuals are strategically placed in influential positions. These individuals facilitate the allocation of lucrative contracts while simultaneously redirecting the purpose of SOEs.

Both Bhorat et al. (2017) and the Judicial Commission of Inquiry into State Capture (2022) note a discernible "pattern" concerning large contract deals topically characterised by external influence from the private sector onto government. Four steps have been identified as a kind of 'repurposing modus operandi':
Firstly, a major cabinet reshuffle is announced whereby legitimate Ministers are booted to replace compromised individuals. In the case study of Alexkor, former Minster of Public Enterprises, Ms Barbara Hogan was replaced by Malusi Gigaba in 2010. In a separate testimony by Ms Barbara Hogan, she states that she was pulled as Minister for resisting the persistent interference from former President Jacob Zuma (Judicial Commission of Inquiry into State Capture, 2022). She claims that his advances were an attempt to ensure that the SOE boards and executives were individuals of his preference. She also stated that her dismissal resulted from declining inappropriate requests from the Gupta brothers

(Judicial Commission of Inquiry into State Capture, 2022). Following this, Mr Craythorne (2021, p. 191) notes, “Malusi Gigaba was instrumental in repurposing the board for the purpose of taking Alexkor ultimately out of diamond mining and into coal mining.” Gigaba’s successor, Lynne Brown, was subsequently vital in fulfilling this vision.

Following this, Bhorate et al., (2017, p. 47) note that the “new minister changes the board composition of an SOE”, and the Judicial Commission of Inquiry into State Capture (2022, p. 757) explains that “from these vantage points, they are then able to manipulate people, processes and systems to their ends and for the advancement of the agenda of looting.” This is evidenced during the appointment of SSI, where Craythorne (2021, p. 197) states that “[Rafique] Bagus was both the Chairman of Alexkor and of the RMC Alexkor Joint Venture… he was appointed the Chairman of Alexkor by Gigaba in September 2012. When Bagus was appointed, all the directors of the board of Alexkor resigned, and six new directors were appointed” (Sibiya, 2021, p. 197) Additionally, it was revealed that Mr Craig Matthews, the sole director of Ritchtersveldt Mining Company was removed as director and in his place, “three other directors who were then the directors that formed the representation on the PSJV for Ritchtersveldt Mining Company” were appointed (Craythorne, 2021, p. 5). In the case of Eskom, former Public Protector Thuli Madonsela reported that Brown subsequently changed the board of Eskom, whereby almost all new appointees had direct or indirect links to the Gupta family (Public Protector South Africa, 2016). Dr Nteta corroborates this statement by explaining how there was substantial interest in the Tegata transaction from her superiors up until the board level, and all this transpired as a new board of directors entered Eskom. She states, “I had noted in terms of the new board that came in there still seemed to be the same interest in terms of the coal transactions” (Nteta, 2021, p. 135).

In the last two steps, Bhorat et al., (2017, p. 47) state, “the SOE announces a major new acquisition or build project,” whereby Gigaba announced that he intended on “redirecting Alexkor out of diamonds and into coal” (Craythorne, 2021, p. 198). And any contract concerning the capture at hand “is awarded in circumstances where there is a clear conflict of interest,” which has been clearly evidenced throughout chapters four and five (Bhorat et al, 2017, p. 47).

It is assumed that because the government selects the senior management of SOEs, there would be complete oversight and scrutinised levels of monitoring. However, on the contrary, the research has evidenced that it is quite the opposite. The selection of the board of directors, CEOs and other top executives is highly discrete and lacks methodological clarity. Often government appoints these key positions without a competitive or transparent selection process, which is deviant from the good practice of rationalised hiring and firing that boards of private organisations follow (World Bank, 2020). This erodes the board's oversight role and increases the risk of corruption. As the 'repurposing modus operandi' has set out, executives are thus able to exploit this weakness and use personal networks to engage in state capture

6.5 SUMMARY

This chapter presented the analysis and interpretation of research results from the transcripts and documents analysed. The thematic areas were broken up into pre-tender, tendering and post-tender groups, where the codes previously identified formed thematic areas of discussion. The following chapter will present recommendations based on the findings and concluded this research report.

CHAPTER 7

CONCLUSION

This research report aimed to understand the inherent weaknesses of the public procurement system in South Africa and uncover how these weaknesses have been exploited by a small group of economic elitists. It has been demonstrated that, the aim of these state bandits is to repurpose state-owned enterprises for the benefit of personal enrichment. These pre-mediated and structurally coordinated attacks on the state's apparatus are made possible through the collusive relationship between state personnel and private interests. A postulation was made that the lack of substantive integrity among public procurement personnel, combined with the absence of institutional strength within procurement institutions, have enabled the capture of state-owned entities by these illicit actors.

The findings of the study established that; a lack of expertise and capacity, noncompliance to legal policy, bid-rigging and collusive tendering, due diligence, and political interference are major challenges that the South African public procurement system face. However, the research has concluded that the genesis of these challenges can be deduced to a lack of oversight and ineffective monitoring. The significance of effective monitoring and oversight cannot be overstated. It functions to safeguard the procurement system from abuse. The literature has deduced that this function has become fragmented as a result of two reasons: excessive decentralisation and the complex structure of legislative laws and policies. The power to procure goods and services have been decentraised down to basically all branches of government including national government departments; provincial government departments; all municipalities; major state-owned enterprises; and all constitutional entities.

As the Judicial Commission of Inquiry into State Capture (2022) noted, decentralisation on the scale that exists in South Africa has incapacitated adequate monitoring and effective oversight. What exists now is a divided procurement system that exceeds the capacity that is available. As evidenced by the strategic reshuffling and hiring of Ministers, board of directors, CEOs, and senior executives of Alexkor and Eskom; the procurement system has allowed those in positions of power to rule without any checks. Decisions are made in the shadow state and are implemented in the constitutional state without recourse or accountable measures. Undoubtably, effective oversight and monitoring is an area that needs serious reform. Attention to this factor will in turn impact the extent and severity of other challenges experienced in the procurement system.

Now there is no extensive central regulating body that is responsible for enforcing uniform compliance in all facets of public procurement. While there were good reasons to move away from the initial centralised system of procurement, this research argues that, for public procurement to be protected against continuous abuse, a central oversight system, one that does not rely on the integrity and political will of its personnel needs to be established. The OECD has continuously suggested the utilisation of e-procurement. "[Eprocurement] is the term used to describe the use of electronic methods, typically over the internet to conduct transactions between awarding authorities and suppliers" (OECD, 2006, p. 3). E-procurement covers every stage of the procurement cycle and requires little human interference. The positive outcomes identified with e-procurement is cost effectiveness; time saving; betterment of the labour productivity of the public sector; organisational efficiency; transparency; accountability; enhanced policy effectiveness, increased democratic participation; and GDP growth (OECD, 2006).

The National Treasury has developed an e-tender publication portal and central supplier database where all government departments publish their procurement needs (Anthony, 2018). The Office of the Chief Procurement Officer is responsible for overseeing the portal to centralise procurement and mitigate the risk of corruption. However, the portal is just a point of entry and does not provide for the bid-evaluation and bid-adjudication functions, which as evidenced are the most vulnerable points of the procurement cycle.

The e-tender portal is viewed as an initial effort to digitise the communication between the South African government and businesses, and creates the opportunities for foreign contracts (Anthony, 2018). Its purpose is to decrease and ultimately remove duplicate expenses and administrative complexity, while also providing State departments, businesses, and the public with free access to tender information and opportunities. It is in the best interest of the South African government to develop the information technology infrastructure of the e-tender portal to encompass all steps in the procurement cycle. This will firstly, reduce the costs of procurement in South Africa by controlling factors such as irregular, unauthorised, and fruitless and wasteful expenditure; and by improving the transparency and competition elements encompassed in section 217 of the Constitution.

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