

THE ZONDO COMMISSION:

**KEY FINDINGS, IMPLICATIONS
AND RECOMMENDATIONS FOR
SOUTH AFRICAN BUSINESS**



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EXECUTIVE SUMMARY

The Zondo Commission will go down in history as a watershed assessment of the extent to which public governance began to falter in South Africa's young democracy. Its findings offer a textbook case of the devastating effects of systemic corruption on a country, in terms of taxpayers' money misspent and the inevitable subsequent service delivery problems.

At a more granular level, the Zondo report, released in six parts by Raymond Zondo, now South Africa's Chief Justice, reveals the complex interaction between various forms of ethical failure, including a lack of political will, weak governance, accounting failures, conflicts of interest, corrupt procurement, lobbying, donations, gifts and gratuities, all the way through to cash bribes, whistleblower intimidation, and legal failures.

Corruption was endemic in apartheid South Africa, and governance lapses and corrupt behaviours were present in democratic South Africa well before Jacob Zuma became President in 2009. However, the deterioration of ethical values dramatically intensified during the Zuma era, leading to increasingly corrupt and brazen self-enrichment. An inescapable conclusion that Zondo allows us to reach is that some of the ethical failures of the 'new' South Africa disturbingly resemble those of the old.

One of the most important messages of the Zondo Commission is that corruption is not a public sector-problem, as is often assumed. The implications from the final report will echo throughout the corporate sector too, since much of the testimony laid bare how none of the jaw-dropping corruption would have been possible without the collusion of the private sector (the supply side of the equation), which, in many cases, had no qualms in meeting the demands of compromised state officials.

The Zondo report is divided into six sections, dealing with the following:

1. South African Airways (SAA), the New Age newspaper, and the attempt to hobble the South African Revenue Service (SARS)
2. State-owned transport utility Transnet and defence company Denelcor
3. Corruption at Bosasa, owned by the Watson family
4. How JSE-listed company EOH lavished bribes on officials and the governing ANC party, dirty tricks at Eskom, and the bid to capture National Treasury
5. The abuse of the state broadcaster SABC, the systemic rot at the State Security Agency (SSA), and attempts by officials to pressurise the banks
6. Zondo's recommendations

Several well recognised formal businesses, with extensive governance oversight, were found by the Zondo Commission to have profited from gross corruption during state capture.

This report aims to answer the questions: how is it that these businesses were involved, and what can the business sector do to ensure this never happens again?

In addressing this question, we have isolated a number of key themes, and offered practical recommendations.

i.

Lobbying and donations

The interaction between business, parastatals and government is a complex matter that requires urgent attention. Although cross-sectoral interaction is needed to serve society's interests, the potential for undue influence is enormous. It is clear the existing regime is wholly deficient when it comes to transparency and in terms of outcomes. Zondo recommended tightening up lobbying and donations substantially.

- > We suggest the Companies Act be amended to require companies to disclose material donations, or amounts paid to anyone considered a politically exposed person.
- > We recommend that companies draft and publish policies on lobbying and corporate donations.
- > Guidance from the King governance committee in this respect would also be welcome.
- > In addition to policies and rules, boards also need to consider how to strengthen their values-based discretion.

ii.

Use of consultants

Companies used consultants to provide them with plausible deniability for 'facilitation payments' made in their name. Consultants can be employed to provide strategic input, supplement management capacity and enhance quality in service delivery, but the Zondo findings show that without proper procurement, vetting, supervision and governance, they may have the opposite effect.

- > It is clear that boards of directors ought to be far more demanding in requiring a comprehensive needs-based analysis for hiring external consultants, as well as justification for why this capacity cannot be filled in-house.
- > There is good reason for the well-established belief that one should 'just add sunlight' to sanitise a system prone to corruption. If, for example, expenses cannot be disclosed in the public domain, there is reason to be suspicious. A new transparency regime would also be warranted at companies where consulting contracts are in place with values exceeding, for example, more than 1% of a company's annual turnover. There's no reason why this should not be published in annual financial statements.

iii.

The role of auditors

Globally, the auditing profession has come under increased scrutiny, as this profession functions as a vital safeguard. Any auditor integrity failures or complacency can open the doors to misconduct, fraud and corruption.

While auditors may well say that their job is not to detect fraud — and this is a debate taking place globally — there is far more that could be done to flag suspect financial transactions, particularly as they relate to procurement. Auditors are key in protecting the integrity of organisations' financial procedures and records.

- > Our recommendations include adding procurement specialists to internal audit teams and a sensibility check for fraud. However, that in itself won't prevent the possibility of internal people channelling money to third parties. Corruption risks can be easily overlooked if 'disclosure' is the only criterion.
- > Auditors need to exercise discretion in understanding fair pricing and the frugal use of taxpayers' assets. A substantive rather than formulaic approach is vital. It is critical to have a deep understanding of the value of the work being done so as to detect instances of overcharging.
- > This may require procurement experts in internal audit teams to be heavily involved in all procurement activities, rather than just providing assurance.
- > Professional associations, such as the South African Institute of Chartered Accountants (SAICA) and the Independent Regulatory Board for Auditors (IRBA), ought to be more diligent in monitoring standards and acting against those who fall short.
- > The profession should play an active part in supporting its members who speak out to disclose wrong-doing. Professionals are, after all, in the service of the public, not simply hired guns for those companies that pay their salaries. The profession's public service role, as the guardian of corporate governance, needs to be ingrained in the training and functioning of all auditors.

iv.

Whistleblowers

Whistleblowers have played an instrumental role in exposing corruption, both in the private and public sector.

- > In particular, we discuss how to finance the physical protection of whistleblowers, as well as a new regime in which whistleblowers could be properly remunerated for what they do, along the lines of the Securities and Exchange Commission (SEC) in the US.

v.

Boards of directors

It is clear that many directors do not fulfil their fiduciary responsibilities, and boards have not acted as they should to ensure those directors are declared delinquent.

- > There is a need for an overhaul of conflict-of-interest policies, and supply chain processes should be revised to ensure boards have oversight over all material contracts, or those involving anyone considered a politically exposed person.
- > We of course acknowledge that we need more than policy alone to address this issue.
- > Many board members battle to see conflict of interest as a real risk when they are involved, (especially perceived and potential conflict of interest). An important part of improving governance is to make sure that directors are equipped for their roles, with a greater awareness of these potential blind spots.
- > Stronger vetting procedures are required, as well as ongoing professional education for directors. This could be achieved through business schools and professional bodies.
- > Critically, we recommend that boards consider setting up designated reputational risk committees, specifically mandated to consider the risk of dealing with those implicated in wrongdoing — including scanning media articles, court judgements, or matters where suppliers or employees are negatively referenced.

vi.

Additional recommendations

Our additional recommendations include a mechanism for the state to strike 'deferred prosecution agreements' with companies to ensure that corrupt cultures are weeded out, and that the private sector consider taking the lead in setting up an 'Open Tender Register'. Another database that would be useful would be one that collates information relating to delinquent directors and errant auditors.

Critically, the Companies and Intellectual Property Commission (CIPC) needs to prioritise the creation of a **publicly-accessible register of beneficial ownership** of companies and trusts. This will also address the concerns of the global anti-money laundering body, the Financial Action Task Force, which highlighted the lack of transparency over beneficial ownership as one of South Africa's greatest vulnerabilities when it comes to dirty money.

These are just some of the recommendations which emerge from a closer reading of the Zondo report. The good news is that if the holes in the governance architecture are patched, the prospect of recovery is real. Other countries that have sought to address corruption in any meaningful way — such as Singapore — have enjoyed higher GDP growth and higher levels of foreign investment than their peers.

Tackling corruption is only one element of growth, of course. This needs to be combined with growth-enabling policies, tax regulation, robust public private partnerships, and the creation of a 'speak-up culture' within South Africa society.

It is possible to consign the economic trauma of the state capture years to the past. However, it requires bold choices, creative decision-making and, most of all, a willingness to actually implement the existing policies to ensure accountability. Simply doing this would already change the country's trajectory for the positive.



CHAPTER

1

THE CONTEXT
AN INQUIRY LONG DUE

There are many figures cast around un seeking to put a number to the cost of state capture for the country.

The direct cost, according to testimony presented to the Zondo Commission, could be north of R50bn. That's the figure that Paul Holden, who runs the non-profit group Shadow World Investigations, said had flowed into the accounts of the Gupta family and their associates.

But in a wider sense, that discounts the true cost to South African.

President Cyril Ramaphosa, whose political party, the African National Congress (ANC), was deeply implicated in state capture, has estimated the cost exceeds R500bn. In his testimony, Ramaphosa said it may be possible to quantify the hospital beds, schools and infrastructure that could have been built with the money lost, but the intangible costs are harder to measure.

'It is difficult to measure the impact of state capture on business, investor sentiment and on the loss of investment. Investors looked at us as a country and saw a country that is mired in corruption and a state captured by a particular family, and no one wants to invest in a country like that,' he said.

Still, one could argue that in terms of lost potential investment, South Africa's poor image had more to do with the degree to which corruption was publicly exposed. In contrast to many non-democratic countries, South Africa's media freedom and freedom of speech have made it far more willing to air its dirty laundry — a level of transparency that should be applauded.

What is beyond dispute, though, is that South A's economy, which had regularly boasted GDP growth in excess of 5% in the decade preceding Zuma's inauguration, took a battering from the corruption, and concomitant credit ratings downgrades. Only twice during Zuma's tenure did GDP growth exceed 3%.

In 2018, the Stellenbosch-based Bureau of Economic Research estimated the country's GDP could have been between 10% and 30% higher, with the country creating 500,000 to 2.5-million more jobs by 2017, but for state capture.

The broad spectrum of that estimate illustrates how tricky it is to put a number on the opportunity that the country lost, and the damage that was inflicted. Yet the impact is also evident in South Africa's slide down key governance metrics.

For example, on the World Bank's governance indicators, the trajectory is clear. When it comes to control of corruption, South Africa fell from being in the 76th percentile in 2000 to the 54th percentile by 2014; on government effectiveness, it slipped from the 76th percentile in 2000 to the 65th percentile by 2018, when Zuma left office.

On the Fragile States Index, where a higher score indicates greater vulnerability, South Africa moved from 55 points in 2006 to 72.9 points in 2018. By December 2021, South Africa had improved slightly, to 70 points.

On the ground, the consequences of widespread corruption and ineffective political governance have been keenly felt. The historically high unemployment rate had been improving until 2008, when it hit the lowest post-democracy level of 22.4%, before plunging to 27% in 2017, and in 2022, reaching 34.5% (partly due to Covid-19).

As a result, the Zuma era has been dubbed the 'nine lost years' — a description that many in the governing ANC (understandably) take issue with. However, Zuma himself has dismissed the idea of state capture as 'political propaganda'.

But the true cost of those years goes far beyond the numbers.

Mcebisi Jonas, South Africa's former deputy finance minister who refused a R600m bribe from the Gupta family, wrote in his 2019 book, 'After Dawn', of the disorientation he felt when he realised that the rumours of a parallel state robbing the country's future were true.

Jonas argued there was still hope. He said that this moment of crisis presented an opportunity to 'create a system that is able to move the country from dependence on a political elite to one that promotes innovation and administrative independence'.

To prescribe the right medicine, however, we need to diagnose the problems correctly.

Diagnosis, stage 1: establishing the Zondo Commission

The genesis of the ‘Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector’ — known as the Zondo Commission after its commissioner — began with a report published by former Public Protector Thuli Madonsela on 2 November 2016.

Madonsela’s report, titled ‘State of Capture’, focused on the relationship between Zuma and the Gupta family, and the impact this had on the functioning of the state. In her recommendations, Madonsela ordered that a commission of inquiry be set up to investigate this.

As Zuma was implicated, Madonsela instructed that he should not decide who chaired the commission, but leave that to Chief Justice Mogoeng Mogoeng.

In what would become a common *modus operandi*, Zuma immediately turned to the Gauteng North High Court to argue that his presidential power to appoint commissions of inquiry had been unduly usurped. On 14 December 2017, however, the court ruled that Madonsela had been correct. The compelling evidence of an improper relationship between Zuma and the Guptas meant that the president was indeed an interested party, and shouldn’t appoint the commissioner.

In the end, Mogoeng selected his deputy, Raymond Zondo, as chair, and the commission was formally established (by Zuma, ironically) in January 2018.

Hearings, which were public and broadcast on television, began seven months later on 21 August 2018. The testimony was often riveting, influencing public opinion.

After nearly four years of testimony — and a cost exceeding R1bn — the Zondo Commission published its findings in six volumes, the final one released in June 2022.

Zondo, it is clear from a reading of the reports, took great care in his findings.

For example, he examined the different views of state capture before even coming up with a definition. In the end, he settled for:

“State capture includes legal and illegal activities by private actors and enterprises intent on their own enrichment by capturing state processes, regulatory functions and procurement with the assistance of corrupt state functionaries. It is often criminal in nature and may include the offences of corruption, fraud, money laundering and racketeering.”

To investigate that phenomenon, Zondo focused on the impact of the Gupta family on Cabinet appointments and interactions between the family and state-owned enterprises (SOEs). This revealed many irregularities, undue influence, corruption and enrichment in the awarding of contracts, mining licenses, and services.

As expected, Zuma came under intense scrutiny. His role in the Guptas’ offer of a Cabinet position to Mcebisi Jonas, for example, occupied much of the testimony, as did the Guptas’ involvement in the appointment of other officials on the boards of SOEs.

The goal, upfront, was to determine whether Zuma and members of his Cabinet acted improperly and in violation of the Executive Ethics Code. The Zondo Commission reached a firm conclusion of ‘yes’ on this score.

While Zondo’s reports are filled with insights and recommendations to prevent state capture from happening again, we should be mindful of the Commission’s limitations, and that it may still be challenged in court. It is likely that some of the findings will be tested in the Constitutional Court.

Nevertheless, the lessons to be learnt from the commission will remain intact.

GOVERNANCE IMPLICATIONS AND RECOMMENDATIONS

- i. **Lobbying and donations:** a better regime needed
- ii. **Consultants:** transparency and disclosure missing
- iii. **Auditors:** The forgotten internal auditors
- iv. **Whistleblowers:** Compensation Overdue
- v. **Boards of Directors:** act against delinquents
- vi. **Other measures to bolster governance**



i. Lobbying and donations: A better regime needed

The Zondo Report illustrated that the existing guidelines on corporate lobbying as a means to influence government policy are wholly deficient.

This issue arose repeatedly during the state capture inquiry, in relation to Bosasa, technology company EOH, and in claims that the JSE-listed MultiChoice had unethically, or corruptly, lobbied government to alter its policy on set-top box encryption.

The term ‘lobbying’ describes direct and indirect engagements between the state and private parties with the aim of influencing legislation, policy or administrative decisions. However, the practice of lobbying is universally accepted, and Zondo reiterated that there are no laws preventing it. In fact, he noted, it is important that stakeholders have a say regarding the regulation of their business by the state, and that cross-sectoral partnerships can be useful in advancing society’s interests.

There is, however, a fine line between lobbying legitimately to influence policy, and lobbying with the view to essentially ‘buying’ an unlawful advantage. Staying on the right side of that line is critical.

Here, ‘donations’ — either to an individual or his or her organisation — play a critical role in lobbying. The case of Bosasa highlighted how deficient the regime is in governing ‘donations’ to politicians, or those in a position of influence.

The relationship between Bosasa and the ANC was solidified through various donations, gifts, and other gratuities. This was a business calculation because, as Zondo wrote, ‘its business model was based on its ability to influence public office bearers’.

When it came to EOH, the technology company made numerous ‘donations’ to the ANC — evidently in return for contracts it hoped to secure. In the end, it secured two contracts from the City of Johannesburg, worth R109m and R404m, in dubious circumstances.

The practice of lobbying can take different guises, Zondo said, including ‘organisational sponsorships’, as well as ‘excessive entertainment amounts’ paid to officials.

Critically, none of these donations were disclosed in the financial statements of the companies. How can shareholders hold companies to account — or even consider the perverse incentives — of donations if they’re not disclosed?

The problem, we believe, is that South Africa’s Companies Act, unlike UK law, does not require companies to disclose donations in its financial statements. This is why companies, such as British American Tobacco, whose primary listing is in London, are compelled to disclose donations. Yet companies like EOH don’t do so.

In March 2022, the South African Law Journal recommended that a new regime be introduced to govern the 'effective disclosure of corporate political donations and expenditure to shareholders under the Companies Act'.¹

While more robust guidelines are necessary for the corporate sector to govern the 'supply side' of this equation, there are already some rules (though deficient) that govern the demand side — that is, how public officials should react.

The Executive Members Ethics Act and the Parliamentary Code of Ethics prohibit Members of Parliament (MPs) from receiving payments, gifts or benefits from a third party, to influence them. This is reinforced through the Corruption Act (the Prevention and Combating of Corrupt Activities Act), which makes it a crime to accept an inducement to alter policy.

The Political Party Funding Act has also narrowed the scope for donations to take place without public scrutiny. The Act requires political parties to disclose all donations above R100,000 to the Independent Electoral Commission (IEC), and bars them from accepting any donation above R15m per year. There is a loophole, however, as any number of relatives or entities can donate up to R99,999 per year without it being recorded.²

The IEC is then meant to present a report to Parliament each year, which would theoretically ensure public access to those donation records.

This isn't fool-proof for various reasons. For one thing, the problem with strict monetary limits is that patterns of influence can be perpetuated, and objectivity undermined, despite having 'played by the rules'. A better system would be for office-bearers to have a stronger values-based discretion when it comes to donations, sensitising them to potential risks to the fairness of the system.

Zondo's report does not make any direct recommendations regarding companies' obligations around lobbying, although it does recommend that government seriously consider the absence of guidelines for the public sector.

In light of this, companies may want to consider drafting similar guidelines around lobbying.

Recommendations:

- i. Public companies, and those that do business with the state, should individually draft and publicise, policies on lobbying and corporate donations on their website or in their financial statements.
- ii. The King Governance Committee ought to consider incorporating specific rules on lobbying and donations in its practice notes, as well as in further iterations of the governance code. In the interim, there is nothing to prevent companies from implementing their own rules to achieve the same purpose.
- iii. Consideration should be given as to whether the Companies Act ought to be amended to require companies to disclose donations made in their financial statements annually where they are material (with a threshold to define such), or to anyone in a position of influence, or anyone considered a politically exposed person.
- iv. Donations and the regulation of lobbying is a deep and complex issue and many countries are grappling with it. While the UK has mandated compulsory disclosure for public companies, South Africa has yet to take that step. The business sector should commission more research, as a precursor to a more extensive and thorough set of rules around this subject.

¹ 'Disclosure of Corporate Political Donations and Expenditure to Shareholders: Why South Africa Should Follow the United Kingdom's Legislative Approach', by Vela Madlela, published in the South African Law Journal, March 2022. Accessible at <https://journals.co.za/doi/10.47348/SALJ/v139/i1a4>

² 'Private Funding of Political Parties', taken from the Independent Electoral Commission website, accessible on <https://www.elections.org.za/pw/Party-Funding/Private-Funding-Of-Political-Parties>



ii. Consultants: Transparency and disclosure

South Africa's government has been seen as a soft target for global consulting companies

South Africa's government has been seen as a soft target for global consulting companies, many of which were significantly exposed during the state capture era. In particular, McKinsey, Bain & Co, Regiments Capital and Trillian were the subject of scathing findings from Chief Justice Zondo.

The Zondo Report highlighted cases of employing third-party 'consultants', to implicitly provide them with plausible deniability for wrongdoing. This includes:

Flawed appointment of consultants at SAA:

- > While the airline's staff were well-qualified and competent, especially the legal personnel, SAA's chair Dudu Myeni brought in her own external 'consultant', employed without following proper procurement processes.
- > As Zondo noted, the SAA's board couldn't give a satisfactory answer as to why SAA needed an outsider to give legal advice when it had well-qualified lawyers available in-house.

Sub-contracting of consultants at Transnet:

- > One of the flawed consultancy contracts involved McKinsey & Co, contracted by Transnet in May 2012 to validate its market demand strategy and provide advisory services about these transactions. This was a rubber-stamping exercise, as Transnet's board had already decided to buy new locomotives in three transactions.
- > McKinsey wasn't an impressive bidder: it was non-responsive, and refused to share its financial statements. Despite this, it began 'work' at Transnet in 2012, even though it didn't have a contract with Transnet until August 2014. Effectively, it was appointed unlawfully.
- > McKinsey brought in Regiments Capital as its 'development partner', on the condition that it share with Gupta-linked individuals the money paid to it by Transnet. In the end, half of the money that Regiments received under the Transnet contracts was redirected to Gupta-linked shelf company, Homix.

Eskom's R1.6bn spend on consultants:

- > Zondo reported that there had been 'rampant corruption' in Eskom's award of contracts to McKinsey and its black empowerment partner, Trillian. Eskom paid R1.6bn to McKinsey and Trillian 'unlawfully and irregularly'. Zondo said that former Eskom executives Matshela Koko and Anoj Singh should be investigated for possible prosecution.
- > Zondo said that the Eskom executives, including former CEO Brian Molefe, Singh, and Koko, 'used their positions of authority and power within Eskom to benefit Trillian; a corrupt activity under the Prevention and Combating of Corrupt Activities Act'.

Bain and SARS:

- > When SARS appointed Bain & Co in January 2015, not only was the process irregular, but it wasn't clear there was a need. SARS was well-functioning and highly effective.
- > Bain was involved in the drafting of the request for proposals for the tender it would bid for — setting the rules of the game in which it was also a participant. It had access to confidential information before signing a contract with SARS. Furthermore, Bain had no tax authority experience, and wasn't qualified to do any work.

Bosasa and EOH

- > The practice of offering gifts and gratuities was well-established practice between Bosasa and the ANC. Bosasa routinely used consultants as middle-men to pay bribes, providing plausible deniability. These consultants included Sesinyi Seopela, a former ANC Youth League leader, whose role was to 'get involved with politicians' for Bosasa, making payments to public officials, ranging from R500,000 to R750,000 per month.
- > Besides flouting the Prevention and Combating of Corrupt Activities Act, this also flew in the face of the King Code requirement to be open, honest and transparent.
- > This practice was equally evident at EOH, where Zondo reported that the technology company employed 'politically connected intermediaries and sub-contractors, apparently as conduits for kickbacks'. EOH also paid 'introduction commissions' for anyone who introduced public sector business, opening the door for millions in dubious payments.

Discussion:

It may seem that well-run companies have nothing to learn from the above examples, other than the axiomatic statement: 'don't be corrupt'. But there is, in fact, much to learn, not least of which is how to best allocate resources in a fair and efficient way. Zondo's findings highlight that companies should more rigorously assess the need for hiring consulting companies, as well as the risks and challenges in doing so.

There is extensive literature about how companies ought to ensure value for money from consultancies, but less about what to do when a consulting company itself turns out to be a source of corruption. In the case of Bain, for example, the UK government has now banned the company from tendering for state contracts for three years as a result of its 'grave professional misconduct' in South Africa. This has led to a call for all the companies implicated in extorting the state to be banned in South Africa.

The question is, how should a company that, for example, has a contract with McKinsey, respond? Should all such contracts be terminated?

Another implication is the need for a governance overhaul at consulting companies. How is it that the boards of McKinsey and Bain allowed these numerous governance failures? How did McKinsey's board allow it to partner with Trillian, which provided no value on the projects? It would seem that in these instances, a desire for revenue trumped all sound governance practices.

As a guide for companies, it is instructive to examine what happened with German-based multinational Siemens, which in 2006 was revealed to have paid €1.3bn in bribes to secure contracts around the world during the 1990s.

Besides re-training staff in anti-corruption practices, Siemens introduced tighter rules around consultants, particularly around monitoring and transparency. One specific change was that consulting contracts could only be approved if signed by more than one person. In South Africa, this would not necessarily provide any immunity from corruption. However, there is certainly scope to demand that an independent party — such as an independent board member — be required to sign off on large consulting contracts.

Recommendations:

- i. One significant issue is what a company should do when one of its consultants is exposed for its poor governance on an unrelated project. Should it be fired, as the UK government decided with Bain? This is complicated as this is most likely to happen mid-project. However, the reputational risk of continuing to work with such a consultancy is substantial. Companies ought to have a policy on this eventuality, and be **more proactive about responding to allegations involving their suppliers**. The best practice is to be transparent in itemising for shareholders what work that particular consultancy is doing, what extra oversight is being introduced in response, and whether a sunset clause on work with that consultancy is warranted for a set period.
- ii. Often, weak management hires consultants to reaffirm their decision making, giving them plausible deniability for inertia. Given this, boards ought to be more alert to the possibility of consultants being hired when there is no specific need as a red flag for deeper management problems at a company. **Boards need to be reappraised of best governance when it comes to consultants.**
- iii. **Companies should require that large consultancy contracts are overseen by the board** as part of routine risk management. Since boards obviously cannot be involved in every contractual decision, there needs to be a delegation of authority framework whereby the board reserves approvals of contracts above a certain amount for itself. If the procurement process works as it should, a needs assessment is conducted before any request for proposals (RFP) is sent out and should form part of the information the board considers when deciding on contracts.
- iv. In addition to exercising oversight for large contracts, **the board should also demand reporting on the overall picture for consulting services** used. High risk areas (for example where state entities are involved) should be specifically flagged. This reporting would include the total spend on consultants and the spend per supplier above a specified amount. Here, a strong internal audit team is invaluable.
- v. On occasion, consultants are hired to fill a genuine gap. The hollowing out of the capacity of SOEs means that rebuilding will take time, and they will continue to require external capacity to fulfil their mandates. However, where there is a capacity gap, boards should be more alert to whether it is long-term in nature, as hiring consultants often introduces greater risk.
- vi. Boards ought to **require extensive justification when consultants are hired to perform services where there is already internal capacity**. The need for extensive oversight is obviously heightened when two advisors are hired for the same job — such as McKinsey and Regiments were at Transnet.
- vii. The focus should be on boosting internal capacity, so that external consultants are brought in only as the exception, rather than the norm. But where it does happen, **boards should consider the following:**
 - a. Does the consultancy have strong governance structures in place, such an independent board that receives assurance from its own internal auditors that projects are devoid of corruption?
 - b. Does the contract include a sufficient commitment around the transfer of skills, which is proactively monitored within the organisation?
- viii. Boards need to be sufficiently skilled to detect and prevent the possible misuse of external consultants. Ongoing director training — to prepare directors for emerging risks, as well as new legislative and governance developments — should also focus on the appropriate oversight mechanisms for external consultants.
- ix. Transparency over consulting contracts is notoriously poor. The King committee should investigate whether disclosure requirement should be codified, encouraging companies to publish details of large consulting contracts equal to, for example, more than 1% of its annual turnover. Alternatively, representative business organisations should encourage companies to voluntarily publish details, including total spending on consulting services, as well as the identity and amounts for the largest three contracts.



iii. Auditors: The primacy of internal auditors

The era of state capture put the spotlight on South Africa's auditors, and the professional services they provide, in a way previously unprecedented in the modern era.

This was exacerbated by the pressure auditors faced over revelations that they had failed to detect fraud in the cases of retailer Steinhoff and sugar company Tongaat Hulett. In the case of VBS Mutual Bank, where R2bn was stolen, KPMG's audit partner Sipho Malaba also allegedly received kickbacks to sign off false accounts.

Although these instances are not detailed in the Zondo Report, the examples of EOH, SAA, Transnet and Eskom deal directly with auditors, and governance and point to a wider issue.

Zondo found that the auditors appointed to provide assurance failed to detect fraud and corruption

Audit failure at SAA

- > Zondo found that the auditors appointed to provide assurance on SAA's financial statements between 2012 and 2016 — PwC and its joint audit partner Nkonki Inc — failed to detect fraud and corruption.
- > In the 2016/2017 year, the Auditor General (AG) took over the audit. The AG immediately identified a host of red flags that should have been picked up, labelling SAA's record-keeping and accounting practices 'dismal', and noted serious shortcomings in the PwC–Nkonki joint audits. PwC, the AG said, was not equipped to assess the peculiar requirements of a public entity.
- > This deficiency is clear from the fact that in the five years that PwC and Nkonki audited the airline, SAA was given a clean audit, but as soon as the AG took over, the string of problems it identified warranted a qualified audit opinion. In 2016, PwC and Nkonki flagged R5m in irregular expenditure; the next year, the AG pegged this at R125m.
- > During PwC and Nkonki's tenure, critical documents were missing. There was no proper documentation for procurement and no way to hold suppliers accountable. Even the appointment of PwC was irregular from the second year onwards.
- > As Zondo said: 'SAA was also very unstable in that more than 40% of the positions were filled in an acting capacity. The Board was under-capacitated; it did not have any aviation experts. The key executive management positions of CEO, CFO, Chief Commercial Officer and Chief Strategy Officer were all vacant at the time, and the Chief Procurement Officer was on suspension.' Officials lacked 'appropriate competencies'.
- > PwC's auditor Pule Mothibe conceded to Zondo that while the audit firm was obliged to consider matters of legal compliance, it was 'preoccupied' with whether SAA was a going concern. As such, it missed non-compliance when it came to tenders that were issued without the SAA board's approval. The internal audit function was hopelessly ineffective — SAA's staff just didn't have that competence.

Bosasa – where auditors provided cover for a criminal organisation

- > Bosasa was audited by little-known firms (Maseng Viljoen from 2010 to 2012, then D'Arcy Herrman & Co, which had offices in Tzaneen, Hoedspruit and Krugersdorp).
- > Not only was between R4m and R6m withdrawn from the company every month to pay bribes (a material amount of its R88m in monthly revenue); this was then written off as 'expenses' to allow the company to pay less tax. This was signed off by the auditors.
- > It wasn't just cash: the auditors missed a range of illegal behaviours — buying furniture, cars, and groceries for politicians. To achieve this, death benefit fund documents were doctored, invoices were fabricated, and 'ghost employees' were kept on the books.
- > One of D'Arcy Herrman's former employees signed an affidavit in 2017 saying that when he worked with Bosasa, former CEO Gavin Watson 'kept on making illegal demands, and I just couldn't take it anymore'.
- > However, it would seem no 'reportable irregularities' were lodged with the audit regulator, the Independent Regulatory Board for Auditors (IRBA).

Transnet, and a spotlight on internal auditors

- > Transnet highlighted the failure of internal auditors. Typically, internal auditors provide independent confirmation that a company's governance, internal processes and risk control are working as they should. Unlike an external auditor, which focuses on the financial records (usually twice a year), internal auditors continually monitor internal practices and risks.
- > The internal auditors should have detected and flagged many of the risks at Eskom, SAA and others. Even in the private sector, immense instances of fraud, such as Steinhoff, Tongaat Hulett and EOH, were a failure, in the first instance, of internal auditors.
- > Zondo's report described how, at Transnet, the utility completely outsourced its internal audit function to external audit firms, some of which were complicit in the corruption. This shouldn't have happened, as Transnet had auditing expertise internally that would have provided a better outcome.

Where the auditors worked – but the regulators didn't

- > While there were instances where auditors failed, there were also instances where they did detect irregularities — and the regulators failed to act promptly.
- > At Transnet, KPMG reported an irregularity to the IRBA when Transnet misrepresented the cost of the China North Rail rolling stock purchase. Deloitte also reported Neotel's payments to the shelf company Homix to IRBA as an 'irregularity', and breaches of the Companies Act by Neotel directors.
- > In some instances, the IRBA reported these cases to investigating authorities, such as the Hawks, or the Financial Intelligence Centre, where the cases died. It illustrates that for true audit accountability, all pillars in the system need to function. When law enforcement fails to act, the entire system has failed.
- > In the absence of action from law enforcement authorities, other sanctions must be considered. For example, the IRBA needs to be far more proactive about naming and shaming errant auditors — something it has been reluctant to do for years.

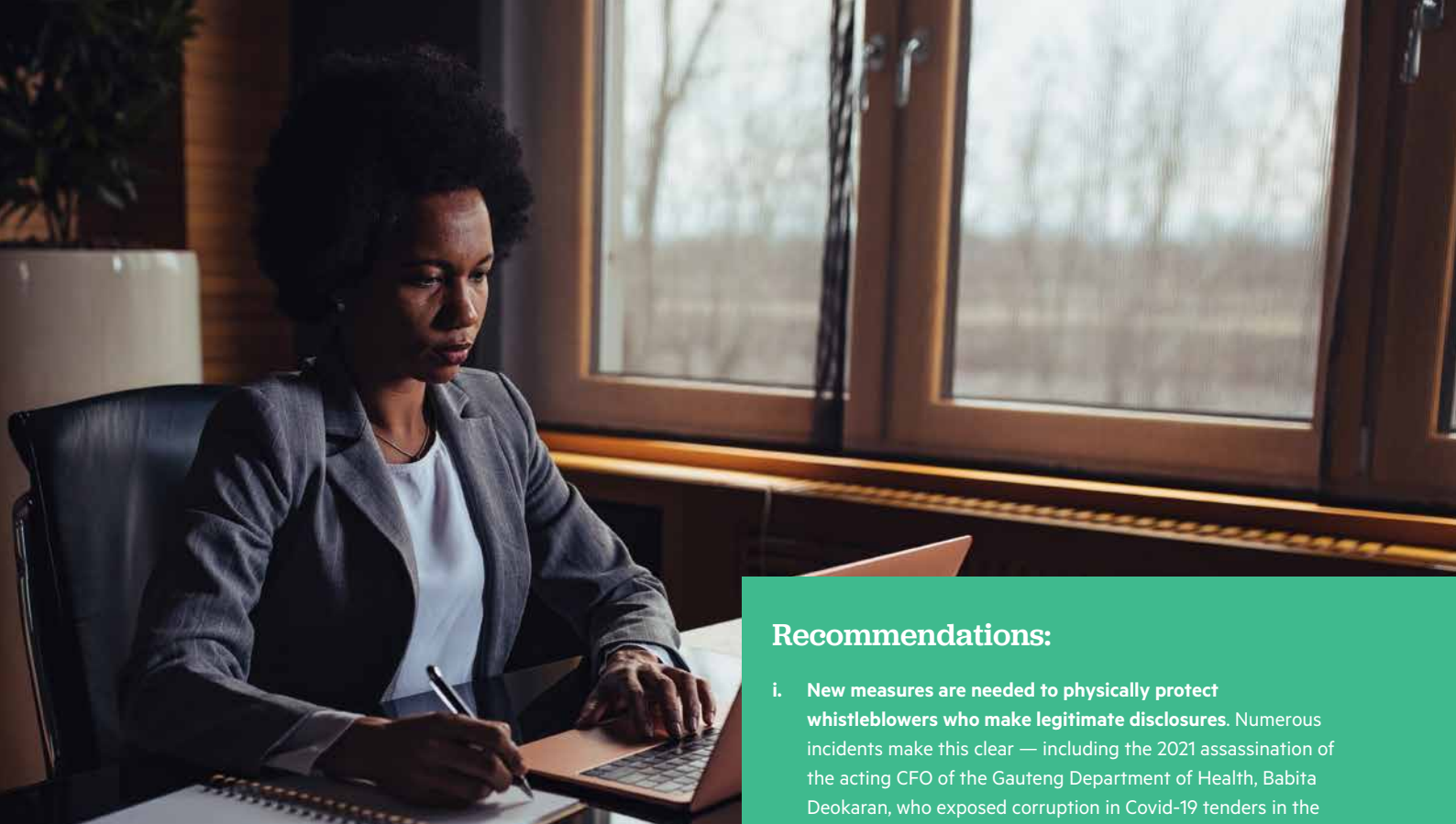
Recommendations

The audit industry is in flux globally and the profession is debating to what extent it needs to consider the imperative (raised by Sir Donald Brydon in a 2019 review of the UK's audit profession) to extend its ambit when it comes to fraud.

While Brydon, and South African experts, are clear that auditors' remit cannot be extended to specifically detect fraud (without a redesign of the system), they are also clear that more should be done. The question is, how should this practically be done? We have several recommendations in this regard:

- i. Internal and external audit teams need to apply more rigour broadly, and greater professional scepticism, to ensure that state capture is not repeated. As a practical step, **companies should consider adding a specialist in procurement processes to their internal audit teams. External auditors also need to bolster their expertise when it comes to procurement.** For companies that do business with the state, audit teams need experts in state procurement rules, including the Public Finance Management Act (PFMA), the Preferential Procurement Policy Framework Act (PPPFA) and Supply Chain Management policies.
- ii. The regulator, the IRBA, is grappling with how to implement a more robust way of doing a preliminary scan for fraud. There are other processes underway to find a mechanism to do this, but there is a strong case for some form of **preliminary scan — or prima facie 'sanity check'** — to become a more routine part of audits. Simply assessing accounts along the narrow lines of cash flow, and going concern issues — as happened at SAA — doesn't go far enough. The mechanics of how to do this are beyond the scope of this report, aside from urging greater professional scepticism.
- iii. In the context of SOEs, greater attention must be given to the debate over whether they should use external auditors at all, or rather defer audits to the **office of the AG**. The answer isn't clear, as that office also has capacity issues, and is busy fulfilling its mandate to audit all public sector institutions. Nonetheless, it is vital that the office of the AG remains well-resourced, independent, and capable. Accountability for ensuring that lies with Parliament.
- iv. Many of the errant finance chiefs, whose inaction allowed state capture to happen, were registered as Chartered Accountants (Cas). Yet the professional body, SAICA, only responded belatedly to their obvious delinquency. **Professional bodies need to become more proactive** if they intend to provide comfort to the public that their designation is an assurance of quality. Zondo, for example, highlighted how Yakhe Kwinana, at SAA Technical, either had 'no clue about some of the basic obligations that she should know as a Chartered Accountant, or she knew those obligations but dishonestly pretended that she did not know them'. He recommended SAICA investigate whether she should retain the CA designation. Other bodies, such as the CFA Institute, should be equally proactive.
- v. Thought must be given to whether the **funding model for regulators and professional bodies is sufficiently robust** to allow them to do their job. A 2013 World Bank Report on Observance of Standards and Codes for Accounting and Auditing (the Rosc report)³ recommended that these bodies be strengthened — including through increasing their funding to allow them to hire staff of sufficient competence.
- vi. Most professional bodies — such as SAICA or the Institute of Directors (IoDSA) — are voluntary bodies, so they cannot hold non-members accountable. It would improve accountability if **professionals in key governance positions were mandated to be members of the related professional body**. The advantage here is that if a person is expelled from membership, they could also be barred from being on the board of any company that is a member of that body. This may be a faster route for accountability than going to court to declare a director delinquent.
- vii. The AG was awarded additional powers through the 2019 Public Audit Act Amendment, which gives it more legislative power to compel compliance. This will hopefully prevent a repeat of instances where public entities were able to ignore the AG's findings. However, **the impact of this legislation should be examined in the next two years to ensure these changes are driving the right behaviours.**
- viii. **Internal audit** is a critical pillar of governance. There are, however, factors contributing to instances of ineffective internal auditing. These include competence, the low barriers to entry, and lack of regulation in the internal auditing profession. Anyone can be an internal auditor, irrespective of qualifications, skills, or experience, and they need not be members of any professional body. Internal auditors are also not trained as fraud examiners, even though their role is to identify risk. Often, internal audit's primary role is seen as assisting a company to prepare for external auditors, as opposed to providing a combined assurance model with external auditors. The best way to capacitate internal auditors would be to **mandate a company's audit committee to approve and monitor the internal audit plan.**
- ix. When a **head of internal audit is appointed, that individual should be registered with a professional body**. Companies ought to publish far more detail about their internal audit skills. Furthermore, internal audit units should undergo an external quality assessment at least once every five years, and ongoing peer reviews.
- x. **Fraud/forensic units.** Depending on its size and complexity, a company should ideally have a fraud or forensic unit, which may either report to the head of internal audit or to the audit committee. In the absence of such a unit, the internal audit unit should be empowered to source fraud examiners and investigators to fill the gap

³ World Bank: South Africa report on the observance of standards and codes accounting and auditing



iv. Whistleblowers Compensation overdue

Whistleblowers have played an instrumental role in exposing corruption, both in the private and public sector — as was evident at the Zondo Commission. However, whistleblowing is often discouraged in the cases where it is most needed — environments where executives might be implicated.

The existing regime governing whistleblowers is codified in the **Protected Disclosures Act of 2000**, which aims to protect those who report misconduct. But this has clearly proven to be inadequate in protecting people who face victimisation for speaking out. Aside from the threat of victimisation, there is also a lack of incentives for people to report wrongdoing. Whistleblowing is also tacitly discouraged because organisations often do nothing in response to the reports of those who bravely expose misconduct, with the culprits remaining in positions of authority.

Recommendations:

- i. **New measures are needed to physically protect whistleblowers who make legitimate disclosures.** Numerous incidents make this clear — including the 2021 assassination of the acting CFO of the Gauteng Department of Health, Babita Deokaran, who exposed corruption in Covid-19 tenders in the province.⁴ The private sector, through bodies such as Business Unity SA (BUSA) and Business Leadership South Africa (BLSA), should consider setting up a fund to finance the protection of whistleblowers. Alternatively, the state could use the proceeds of civil claims to finance their protection. Whistleblowing must be encouraged; whistleblowers must be protected and they must be kept informed of progress in the cases concerned.
- ii. The Open Democracy Advice Centre (ODAC) has recommended that a **'code of good practice'** be established to cover whistleblowers, guiding private and public companies on how to implement the laws and policies.⁵ Such a code would be a useful addition to the wider jurisprudence around whistleblowing, and the King Committee could play a role in encouraging companies to adopt it. There is, however, no need for companies to wait for the King Committee: they can take the initiative, and act on their own accord in the interim.
- iii. Suggestions have been made that a **'whistleblower organisation' be established**, to deal exclusively with disclosures, make recommendations about payments to whistleblowers, arbitrate, and draw up legislation and policies around this issue. This organisation could be given the status of a chapter 9 institution, like the SA Human Rights Commission. **This body would also handle the reintegration of whistleblowers into society** — an urgent priority, as they are often ostracised and cannot find employment afterwards. There is an alternative view, however, that the existing framework is sufficient, and no oversight body is needed. A further study examining this issue is needed to determine which route to take.

⁴ 'Faces of assassination: Babita Deokaran', Global Initiative on Transnational Crime, accessed in June 2022, <https://assassination.globalinitiative.net/face/babita-deokaran/>

⁵ 'Overview: Protected Disclosures Amendment Bill', an overview presented to Parliament, provided by the Parliamentary Monitoring Group. Accessible on <https://static.pmg.org.za/160301Overview.pdf>

- iv. When it comes to incentives, the National Prosecuting Authority (NPA) should investigate whether whistleblowers who provide a legitimate protected disclosure can be **indemnified from criminal liability**, where their information is complete, provided in good faith, and leads to prosecution.
- v. Zondo has recommended properly remunerating whistleblowers. In the case of state capture, some whistleblowers were left destitute, crippled by legal fees and unable to find employment. There are perverse incentive issues to be considered — in particular, to what extent incentives might motivate people to blow the whistle fraudulently or needlessly. There are also concerns that if financial rewards for whistleblowers are introduced, the moral basis of whistleblowing could be eroded and people might only report wrongdoing when they are paid to do so.

But there are successful precedents. In the US, the SEC offers whistleblowers who ‘voluntarily provide the SEC with original, timely and credible information that leads to a successful enforcement action’ between 10% and 30% of the money collected, where the sanction exceeds \$1m.⁶ This model has been effective in encouraging whistleblowing in the US, and should be considered in South Africa, subject to the caveat that not all whistleblowers raise legitimate concerns and careful vetting is required.

There is an even stronger case to offer whistleblowers reimbursement to cover specified costs, which is clearly different from a ‘reward’. These might include:

- > The cost associated with the psychological impact where the individual suffered victimisation, threats and the like
- > Actual costs incurred in the whistleblowing process, such as legal fees
- > Potential income loss if the individual lost his or her job as a result of reporting misconduct
- > Damages in the case of character assassination affecting whistleblowers' employability

Nonetheless, research carried out by the GIBS Ethics Barometer, the Institute of Internal Auditors SA (IIASA) and the Anti-intimidation & Ethical Practices Forum (AEPF), shows that most people who do not blow the whistle refrain out of fear — not because they will not be compensated. It is, therefore, more important to strengthen protection and provide support for what can be a very dangerous, stressful and traumatic process.

- vi. The **protection of internal auditors under the whistleblower umbrella is crucial**. In recent years, an increased number of internal auditors have reported that they are constantly living in fear of victimisation. Some have been 'redeployed' and fear for the security of their jobs, and others have lost their lives. Their work often puts them in spaces where they detect signs of wrongdoing first, but there is clearly not enough protection for them, particularly in the public sector. **The government should consider providing funding for the AEPF** — an umbrella organisation listed in the Protected Disclosures Act — to strengthen its ability to effectively deal with cases reported to it. The role of the internal audit profession in supporting members who become whistleblowers should be investigated further.

One of the standout themes of the Zondo Report is that the capture of SOEs was facilitated through the weakening of boards of directors, the dilution of the independence of non-executive directors, and the intentional appointment of people who had little regard for their fiduciary responsibilities.

While this was a theme of state-owned boards, appointed by a compromised single shareholder in the government, commercial enterprises with boards elected by shareholders can still learn from this experience. This is especially true because some of the issues the Commission shone a spotlight on, such as the quality and size of board packs, as well as ethical dilemmas faced by board members, are prevalent in the private sector too.

Delinquency of directors – an ignored remedy

- > Dudu Myeni, the chair of SAA, and Yakhe Kwinana, the chair of SAA Technical, bulldozed their boards and acted in flagrant violation of their duties to the company. Their decision-making revolved around the benefits that would accrue to individuals, rather than what was in SAA's best interests. This, Zondo said, was ‘unlawful conduct’.
- > There are already Companies Act clauses which speak to this. Specifically, section 76(3) codifies this fiduciary responsibility, requiring directors to do what's best for a company. Section 76(4) requires directors to have no material personal financial interest when they take board decisions. They must have no knowledge of any related person with a personal financial interest in the matter either.

⁶ ‘SEC issues more than \$17m award to a whistleblower’, Securities and Exchange Commission press statement, July 19 2022, <https://www.sec.gov/news/press-release/2022-125>

V. Boards of Directors Need to act against delinquents



- > If directors fail, Section 162 of the Act provides for them to be held liable for breaching their fiduciary duty. It allows a company, shareholder, director, a prescribed offer, a registered trade union, CIPC, or Takeover Panel, to apply to court to declare directors delinquent.
- > A court must declare a person a delinquent director if they satisfy any of a number of tests — for example, if they have ‘grossly abused’ their position, ‘took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company’, acted in a manner that amounts to ‘gross negligence, wilful misconduct or breach of trust’ (for example, fraud.) A delinquency order then bars that person from being a director for a specified period.
- > However, it is clear that the Companies Act has not been implemented as it should. Only Myeni has been declared a delinquent director in court — despite evidence that many, from the boards of SAA to Eskom, EOH and others, would also qualify.

If directors fail, Section 162 of the Act provides for them to be held liable for breaching their fiduciary duty

Unacknowledged conflicts – the case of Eskom

- > In the case of Eskom, the members of its 2014 board routinely flouted their fiduciary duties and governance obligations (see Appendix for details on how the board rubber-stamped the suspension of executives who resisted corrupt transactions, how it covered up political interference, and appointed non-executive directors with clear conflicts of interest, such as Mark Pamensky).
- > As a result, Zondo recommends a criminal investigation be undertaken, aimed at the possible prosecution of the entire Eskom board of 2014.

When the wrong people are hired as directors: Transnet and Denel

- > At Transnet, the board had no insight into what happened in the various divisions. This was because after Siyabonga Gama became CEO in 2016, the heads of the different business units were no longer part of the Transnet executive committee. As a result, non-executive directors had no line of sight into procurement.
- > At Denel, the 2015 board was led by a lawyer who had been struck off the roll for misconduct. That board removed the CEO and CFO, who were achieving outstanding financial performance. Zondo said the board failed to carry out its fiduciary duties when it suspended those executives, which showed, on a prima facie basis, that they were unfit to be directors of a company in terms of Section 162 of the Companies Act. Yet no delinquency actions have been launched.
- > The failure to bring delinquency actions would appear to be a result of successor boards either eager to avoid bad publicity, or being apathetic.

Recommendations:

- i. In many instances of state capture, potential reputational risks were ignored by boards. To obviate this, **boards should consider establishing a reputational risk committee, which would have a wide brief** to receive credible reports that have come from the whistleblower line, as well as from the media or other sources. Certain companies have already done this, and the King Committee should examine whether such an approach should be included in guidance notes.
- ii. **Boards of directors, as well as the CIPC, need to be reminded of their duty to hold liable directors who fail to perform.** If a director ought to be subject to a delinquency application, it is the board who should proceed with that. If there has been a public court action, the CIPC should be obliged to apply for a delinquency order.
- iii. Boards should have **policies to specifically identify delinquency on their boards**, and they should act where this has been found. The King Committee ought to consider providing guidance — either to compel or encourage companies to take action against delinquency — where it is warranted, as well as exploring how to require more transparency from boards on how this is dealt with, when there is reason to suspect there has been delinquent behaviour.
- iv. **Shareholders — particularly institutional investors — should be more active in declaring directors delinquent.** Institutional investors could incorporate the notion of director delinquency into their policies governing active custodianship.
- v. **SOEs should be obliged to bring delinquency applications if there is any court order** that reflects negatively on the integrity, or competence, of individual board members, given that public money is involved.
- vi. Conflict of interest policies were incorrectly applied at Eskom. The laws are in place governing minimum disclosure, but the example of Mark Pamensky — ratifying a contract without having sight of it — illustrates that many directors have little clue about basic governance. **Directors ought to be obliged to have minimum training on governance, and annual refresher courses**, including on conflicts of interest and ethical duties.
- vii. Many instances of corruption are due to a flawed company culture. Boards should prioritise determining the blueprint of an ethical culture, and ensure that their company's **internal audit team provides assurance on the degree to which the organisation has cultivated that ethical culture.** This should then be reported on in the annual financial statements.
- viii. **Company secretaries** play an important role in the governance ecosystem. As the custodians of governance compliance, they should advise the board effectively. To do that, they need to be empowered to a greater extent and their role should be given more prominence. A company secretary is in a prime position to spot when governance goes wrong because, unlike auditors, they are in board rooms when decisions are made. They also have special powers under the Companies Act, for example, to launch a delinquent director application. But this has not happened. This suggests that either company secretaries are not aware of their responsibility, or are not acting for fear of losing their jobs. As such, **annual refresher courses are warranted for company secretaries too.**
- ix. Supply chain processes ought to be revised to ensure the **entire board has oversight over contracts that are material, or involve external public sector officials or people able to exercise influence over the company.** The case of EOH illustrates the downside of getting this wrong. There, new CEO Stephen van Coller revealed that many of the corrupt contracts approved by EOH were a result of “opaque delegations of authority, with significant responsibilities granted to a few executives”, in which some people were given a free hand, with no oversight. This is a task that could potentially be mandated to a new reputational risk committee.
- x. A company's head of risk function has become even more important in an era of increased complexity. Since risk management is an important second line of defence in organisations, it should be adequately staffed and its risk registers are a crucial warning sign for internal auditors. As a result, **audit committees ought to report on the capacity and effectiveness of risk management** in the organisation. Ideally, there should be a risk committee that reports directly to the board.
- xi. **Audit committees** have escaped scrutiny for recent auditing scandals, with most of the attention on external auditors and boards. But audit committees, as the final destination for internal audit reports, have a crucial role in preventing corruption. An inherent weakness is that audit committees are appointed by, and report to, the accounting authority itself in the public sector. As such, some members do not want to rock the boat for fear that they may not be re-appointed. **In public entities, National Treasury should rethink the audit committee's status**, which is currently that of an advisory committee. This could provide the committee with more ‘teeth’.
- xii. A frequent complaint is that directors do not adequately prepare for board meetings due to over-commitment. Many companies pay large amounts of money to board members who do not have sufficient capacity. This problem is compounded when companies compile board packs with insufficient quality to help external directors make informed decisions, or large board packs that are distributed too late. But at other times, the directors do not have a deep enough understanding about the ethical implications, or dilemmas, implied in specific scenarios. **Shareholders, especially institutional shareholders, ought to pay far closer attention to an individual's capacity when they are nominated for a board seat** — including their skills, experience, and available time. The remuneration paid to them should compensate for the time taken to prepare for meetings.



vi. Other proposals to boost governance

Stronger commercial prosecutions needed

The Zondo report made several recommendations that could be applied in the private as well as public sector. This needn't necessarily speak to state capture, but rather 'capture' in the wider sense — of regulators, oversight bodies, and standards authorities. These are also recommendations which should be considered to bolster accountability in the private sector, improve governance and ultimately provide better price transparency to investors, making the country more 'investable'.

i.

Deferred prosecution agreements with companies

- > Prosecuting authorities could consider using ‘deferred prosecution agreements’ to encourage better behaviour. Here, the NPA and the company that admits criminal liability could agree that the verdict be ‘deferred’ in exchange for committing to engage in specific anti-corruption behaviour. Ultimately, the corrupt behaviour would cease, and ethical behaviour would be encouraged.
- > The aim is to **incentivise self-reporting**, while ensuring offenders fully comply in future. In this way, companies are held liable for the culture that bred the conduct.
- > This would not affect the prosecution of individual employees — which would still happen — but rather would encourage the company to address the underlying culture of corruption, rather than embarking on a protracted legal process.
- > Glencore reached a similar ‘negotiated plea’ with authorities in the UK, US and Brazil in May 2022, which saw it agree to pay \$1.18bn to resolve bribery and market manipulation investigations. Glencore agreed to appoint an ‘independent compliance monitor’ for three years, and pledged to continue investing in an ‘ethics and compliance programme’. This provides a template for how companies could be incentivised to act proactively against corruption.⁷
- > However, any ‘deferred prosecution agreement’ mechanism would have to be initiated by the government. Here organised business would need to engage with the justice department to develop proposals to amend the legislation.
- > If deferred prosecution agreements are not **accompanied by tough conditions**, they can become a soft rap over the knuckles and may even push costs up, as firms increase prices to make up for potentially lost gains. This emerged as a risk of the US Federal Sentencing Guidelines, which caused US companies to see ethics and compliance programmes as cheap insurance policies against legal liability. It has since proven crucial to insist on the ongoing improvement of ethical organisational cultures as the necessary backdrop to ethics and compliance programmes.

Conditions should include:

- a. that the company undergoes **an external investigation**, paid for by the company, and its report must be made available to prosecutors directly by that investigator.
- b. that the company must be **forthright and honest about all the individuals involved** in the corruption, and seek to ensure they are prosecuted.
- c. that the company undertakes an **external culture assessment** and reports on the progress made against remedial actions recommended. It must show authentic rehabilitation.

ii.

A new regime of commercial criminal prosecution

- > In 1999, South Africa launched its first court designed to deal specifically with commercial issues — the Specialised Commercial Crimes Court. Investigations were to be done by a Specialised Commercial Crimes Unit, and commercially-trained prosecutors were to try the case in front of judges well-versed in corporate matters. This has fallen apart — partly because of the well-detailed collapse of capacity at the Directorate for Priority Crimes Investigation (the Hawks) and the National Prosecuting Authority, which began prior to the era of state capture. The demise of South Africa’s corruption-fighting bodies during the Zuma years is in desperate need of redress. Political will is required to re-establish this capacity.
- > In his report, Chief Justice Zondo recommends an Anti-Corruption Agency be established that would be independent of politicians. The business sector, through groups such as BLSA and BUSA, ought to impress upon the executive the need to **create a specialised arm** of any new Anti-Corruption Agency, tasked specifically with investigating and prosecuting corporate crimes — including insider trading, fraud, breaches of the Companies Act or market manipulation.
- > Organised business should **examine the advisability of funding additional skills into the investigating and prosecuting authorities**, as well as how this should be structured. Steinhoff has taken a decision to provide funding to the NPA for the prosecution of directors responsible for its R106bn fraud, by subsidising the amount to be paid to forensic accountants. There are potential downsides to this — for example, it raises the risk of companies ‘guiding’ criminal investigations, or of investigations into companies unwilling to fund investigations terminating as a result. However, a deeper investigation of these incentives, and such a plan, would be warranted.

⁷ ‘Glencore reaches coordinated resolutions with US, UK and Brazilian Authorities’, Glencore press statement, 24 May 2022, <https://www.glencore.com/media-and-insights/news/glencore-reaches-coordinated-resolutions-with-us-uk-and-brazilian-authorities>

Recommendations

iii.

An Open Tender Register for public procurement

- > For companies that do business with the state, a publicly-available ‘Open Tender Register’ ought to be established. This has been discussed for years, as a project of the state, but has failed to launch.
- > Such a register would provide details from pre-tender phase — where companies are obliged to provide all bidding details — through the procurement cycle, including the delivery of the last scheduled service under that contract. This will add an important element of transparency and oversight to public spending.
- > This would also address the excessive decentralisation of the procurement system, where individual departments handle tenders, often with very different approaches to transparency. It would provide a more cohesive and consistent platform, which could be placed under the auspices of a specialised procurement oversight body.
- > To make this happen, the business sector should engage National Treasury, and its head of procurement in particular. Business could potentially assist in designing such a system for government, based on international best practice, if the lack of capacity is the reason why it has failed to launch. Business could also then apply such measures internally, ensuring the private sector is also adhering to these principles in its supply chains, and in its engagements with small businesses within its sphere of influence.
- > Once such a system is in place, business organisations will be critical in ensuring their members do not bid on any tenders that are not published through the system.

iv.

Greater transparency around delinquent directors, professionals

- > **A publicly accessible database is needed**, detailing professionals who have been debarred, declared delinquent, or have had their honesty impugned in court. As it stands, there is no such central register. This provides convenient cover for boards such as Denel’s to appoint a chair who had been struck off the roll of attorneys. The right to name and shame is legally complicated, but it sends an important message of zero-tolerance for unethical behaviour, and will go a long way to restore social trust.
- > In testimony to Zondo, Lord Peter Hain referred to the Extractive Industry’s Transparency Initiative, which established global standards in transparency, accountability, and governance within the mining industry. He proposed this model be replicated in the financial and industrial sectors. Cross-sectoral cooperation will be required to design and implement such comprehensive reforms.
- > Professional organisations also have a role in this. **SAICA should publish and maintain a list of all CAs who are subject to disciplinary procedures** together with the outcomes of those procedures.
- > **The JSE, which is a quasi-regulatory body, should end the practice of allowing non-public settlements with companies.** This plays a key role in keeping the corporate sector honest, but the secrecy around settlements has mitigated against this.
- > **The IRBA should publish and name errant auditors to a greater degree.** While it is moving towards a regime of greater disclosure, it has often redacted the names of individuals, or companies, from rulings made. It should be more forceful and transparent about its decisions.
- > **The Financial Sector Conduct Authority (FSCA) should publish and maintain a list of all companies and individuals who are fined or otherwise disciplined.**

Recommendations

V.

Greater oversight of minutes and record-taking

- > In Zondo's findings regarding several state institutions — the Passenger Rail Agency of SA (Prasa), the SSA, the ANC's deployment committee, and others — a common theme was the lack of proper minutes, agendas and record keeping.
- > This has been a common theme of corporate collapses too. Tongaat Hulett, for example, held no executive committee meetings during the final year of Peter Staude's tenure as CEO, during which time fraudulent accounting decisions were taken.
- > This is obviously a basic control in high-risk areas, which should be checked by internal auditors and, to a degree, by external auditors. This is, first and foremost, the board's responsibility. In addition, it is worth considering how to implement greater oversight — perhaps publishing a 'documentation checklist' in the annual financial statements is one remedy, but this may be too prescriptive. At the very least, the board ought to be held accountable for these control failures.



vi.

Prioritising public access to beneficial ownership registers

- > The CIPC is the state agency mandated to establish, and maintain, the register of company information. The Companies Act stipulates that this information should be accessible to the public, including access to registration documents and annual financial statements of companies, even if they're not listed on the JSE. Transparency is an important antidote to corruption. But greater public education around where this information is housed, and how it could be accessed, is urgently needed.
- > In practice, this information is hard to obtain — partly since the CIPC does not ensure these records are up to date, and partly because of logistical difficulties in actually obtaining these records. It can take weeks to get this information, if possible at all.
- > The Department of Trade & Industry (dtic) ought to prioritise ensuring the CIPC meets its legal obligations of public transparency. It should prioritise digitising company records, and make these publicly available online, as Companies House does in the UK. Private sector technology companies could play a role in streamlining the process of information collection and accessibility.
- > An obvious problem of state capture and corporate corruption is the ease with which people were able to avoid disclosing **true beneficial ownership**. The use of proxies or trusts to hide links to the Gupta family was widespread. Lord Peter Hain recommended closing this gap as one avenue to stamp out corruption. Given the pressure from anti-money laundering authorities to remedy precisely this issue, this needs to be prioritised. These records should also be easily available to the public.
- > To this end, the business sector should:
 - a. engage with the dtic, as well as Parliament's standing committee on company law to **discuss legislative amendments required to ensure beneficial ownership can be publicly disclosed**. In particular, they would need to examine mechanisms on how to do this when a trust is involved, which is a more complicated process than with companies.
 - b. engage with members of BUSA, BLSA and other representative business groups to **publicise and promote the importance of disclosure, suggesting that companies implement voluntary disclosure now** on this score. Since share registers are already in the public domain (in theory), this would not be hard to implement.

vii.

New body needed for regulation of company directors

- > In the UK, there is a proposal to establish an Audit, Reporting and Governance Authority (ARGA) as an oversight body responsible for regulating accountants, auditors and directors of large companies. This would replace the Financial Reporting Council, and be the first time that directors on large company boards would be subject to regulation. This plan is expected to be implemented from 2023.
- > **Organised business ought to investigate the desirability of adopting a similar plan in South Africa, governing directors of large companies.** As it stands, no qualifications or experience are necessary to be a director in South Africa. Nor do directors answer to any professional body, other than the Institute of Directors (IoDSA), and membership is not a requirement for acting as a director. The professionalisation of directors has therefore not been properly institutionalised, nor is there sufficient support and oversight.
- > In the UK, the idea is for all CEOs, CFOs, chairs and audit committee chairs of large companies to be subject to this new board. They would also be responsible for certifying the material accuracy of the financial statements. This is an intervention that many believe would have been useful in averting some of the larger governance failures in South Africa, such as Steinhoff and Tongaat.
- > Such a regulatory body would enforce standards, require minimum qualifications, and hold directors accountable for failures. This, in itself, would have averted many of the issues cited in the Zondo report.

viii.

Bolstering accountability in black empowerment deals

- > At the heart of much of the corruption identified by Zondo lies the abuse of Broad-Based Black Economic Empowerment (BBBEE) principles. While the policy, and sectoral charters across industries, has legitimate and critically important aims, these have often been subverted for unlawful gain.
- > In Zondo's final report, he refers to the Department of Public Enterprises' policy on governance of SOEs, which aims to regulate the approach when it comes to BBBEE. This should be adapted for the private sector.
- > The commission highlights how SOEs were captured because people in senior positions did not have integrity, skills and experience. Quality leadership is imperative — and Zondo recommends putting in place a transparent process in which appointments are the result of a merit-based system. For the public sector, the Zondo Commission recommends the establishment of a Standing Appointment and Oversight Committee tasked to ensure, through public hearings, that any person nominated for a board appointment, or as CEO, CFO or Chief Procurement Officer, meets certain reputational and eligibility requirements.
- > The King Committee, BUSA, BLSA and other representative business organisations, should re-examine what new measures will be needed to bolster accountability when it comes to black empowerment deals or appointments.

Recommendations

ix.

A renewed focus on the 'soft' controls

While hard controls, such as those prescribed by legislation, regulations and standards, are necessary, we also need to focus on 'soft' controls and assurance around them. The building of an ethical culture within organisations should be a process owned and monitored by the board.

As mentioned in our recommendations around directors, the board should approve the blueprint of the culture needed in the organisation and proactively exercise its oversight role, implementing interventions, where necessary, to create and maintain an ethical culture and shared values in the company.

When everyone understands the 'why' behind the hard controls, it makes it a little easier to navigate ethical dilemmas. Attention to the elements that protect organisational integrity and strengthen ethical organisational cultures is needed.



x.

Political will

Many South Africans have come to believe that there is no political will to address the non-enforcement, non-correction and non-sanctioning that lies at the heart of the perpetuation of systemic corruption.

Consider the findings as they related to Prasa, the SSA and the evidence of President Cyril Ramaphosa. When it came to Prasa, corruption was reported to the authorities, including Parliament, by board chair, Popo Molefe. Yet the ANC members of the parliamentary portfolio committee on transport, instead of fulfilling their oversight role, attacked Prasa's board for raising this. Worse: Ramaphosa then appointed that committee's chair, Dikeledi Magadzi, as Deputy Minister of Transport.

In 2018, a panel convened to investigate the SSA, led by Dr Sydney Mufamadi, made a number of far-reaching findings in a report it submitted to Ramaphosa.

Questioned at the Commission, Ramaphosa initially claimed that implementation of that panel's recommendations was at 'an advanced stage'. But on cross-examination, he admitted this was not so — and that the process would have to begin anew.

During Ramaphosa's own evidence before Zondo, a disturbing trend emerged where many of his answers were found to be counter-factual. Serious findings were also made regarding several serving Cabinet members and deputy ministers, whom the President has the sole prerogative to dismiss. He has, to date, chosen not to do so. This raises the question of whether his power to do so is real or perceived.

The Commission was also critical of Ramaphosa's evidence as ANC President. The report said he should have spoken out against state capture more often and more volubly. Perhaps most critically of all, Zondo is unconvinced that the ANC has drawn a line in the sand against corruption.

In a wider social sense, questions regarding political will have to be urgently addressed, if the trust in government's capacity to assist in stamping out corruption is to be re-instilled. Speed and efficacy are required.

The private sector has a role to play in ensuring this happens, both in terms of holding the state's feet to the fire, and in supporting positive progress where it happens. Political will, in other words, has a private sector element to it.



CHAPTER

3

THE GLOBAL CONTEXT

HOW HAVE OTHER COUNTRIES RECOVERED FROM A CORRUPTION CRISIS, AND WHAT ARE THE IMPLICATIONS FOR SOUTH AFRICA?

There are several countries that have been where South Africa is now, in the wake of the corruption of state capture. It is revealing to see how they recovered, and what happened to their corporate environments afterwards.

We've decided to focus on three countries as examples: Indonesia, Rwanda and Singapore.

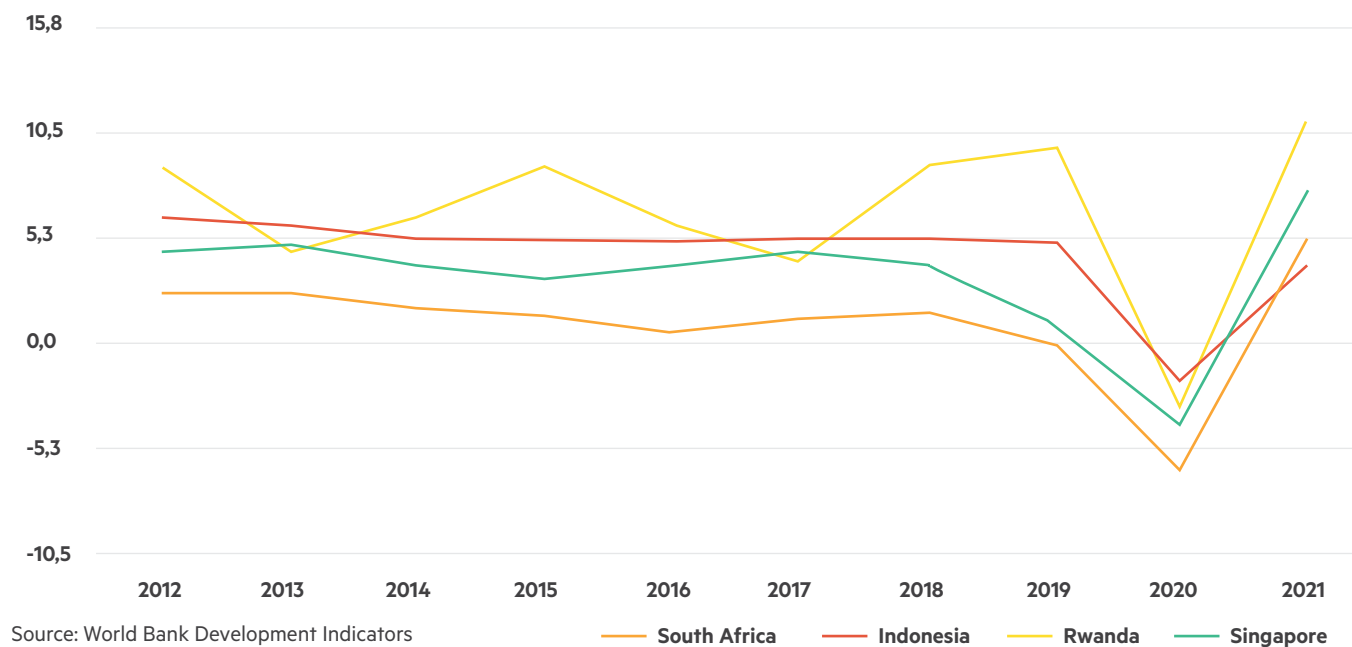
Like South Africa, these countries have had their fair share of governance problems and corruption that hindered their economic growth in the past decade. The comparison with these three is also apt, given that they are all democratic economies to one extent or another, even though they may be flawed or deficient.⁸

Being democracies, these countries faced a similar constitutional straitjacket to South Africa when it came to implementing changes to their economic, judicial and social landscape. Unlike autocratic regimes, such as China, the United Arab Emirates or Saudi Arabia, they couldn't simply dictate what needs to happen and enforce this to change the trajectory.

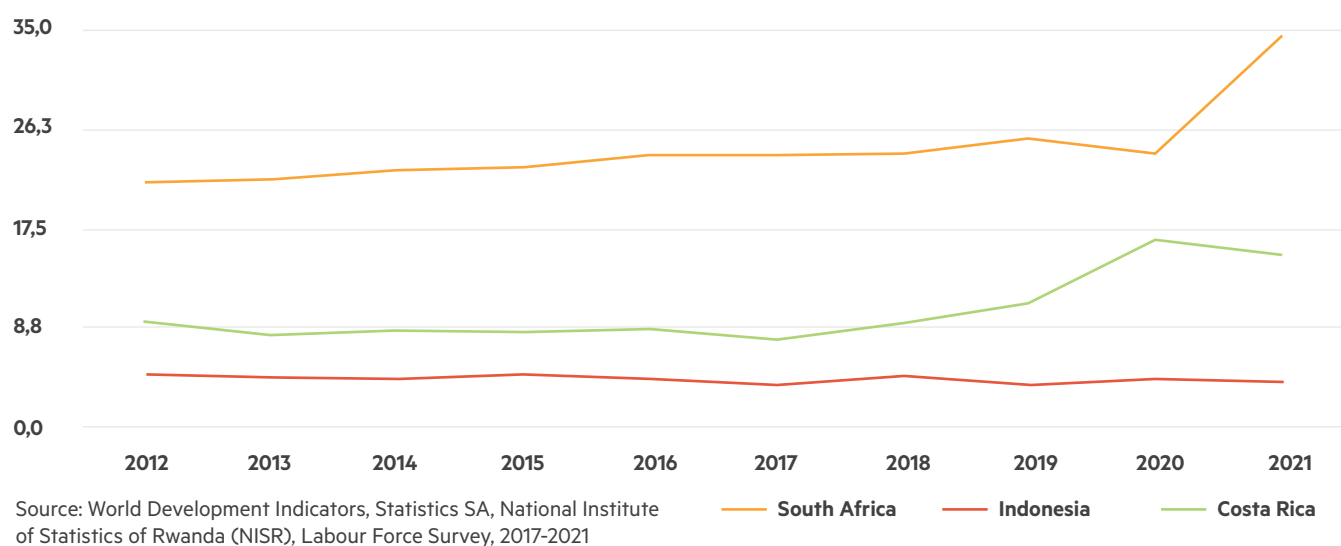
Today, the economies of those countries are growing faster than South Africa's, while their unemployment rates are lower. Fighting corruption and implementing policies to kickstart their economies when they were on their knees was the catalyst.

⁸ Democracy Matrix

Annual GDP Growth

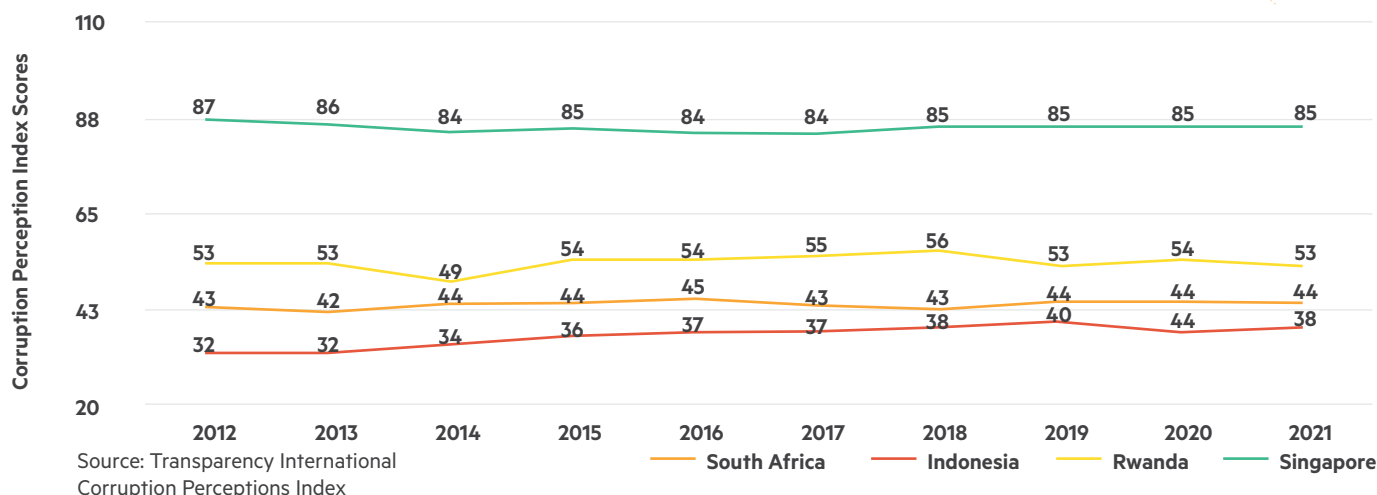
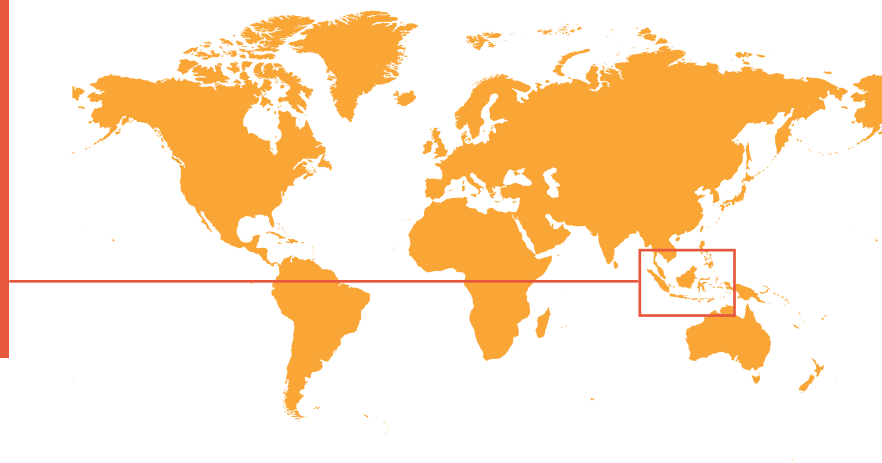


Unemployment rate



Indonesia

In 2012, Indonesia was perceived to be the 58th most corrupt country in the world. Transparency International put its Corruption Perception Index (CPI)⁹ score at just 32 — parlous when one considers that the perfect score for an ethically upright country is 100.



Today, Indonesia's corruption perception score is still worse than South Africa's, but it has registered a notable improvement since 2012.

From the mid-1960s to the late 2000s, corruption, collusion and nepotism were part and parcel of every regime in Indonesia.¹⁰ A few presidents promised to eradicate this post-1998, after the long-serving dictator, Suharto, resigned. But it wasn't until the current President, Joko Widodo, took office in 2014 that Indonesia took concrete steps.

Critically, Indonesia didn't just wish away corruption through grandstanding statements.

Instead, it established a Corruption Eradication Commission, KPK, in 2003 which was dedicated to investigating and prosecuting corrupt public officials, and which was made an independent institution. At the same time, the government established 34 Anti-corruption Courts, one in each province.

The KPK had problems, but it brought a handful of powerful politicians to book. This included the sentencing of former social affairs minister Juliari Batubara to 12 years in prison over Covid-19 procurement corruption¹¹, while the former deputy speaker of the House of Representatives, Azis Syamsuddin, got 3.5 years in jail for bribery¹².

The private sector hasn't been spared either. In January, two insurance

executives were sentenced to 20 years in jail for corruption¹³ — an indication of how seriously the country has taken this scourge.

As far as corporate governance is concerned, Indonesia used to be considered one of the standard settings for poor governance, according to the Organisation for Economic Co-operation and Development (OECD) and the International Finance Corporation (IFC), dating back to the country's 1997 economic crisis.¹⁴

As recently as 2014, Indonesia was ranked 17th of 25 countries for its corporate governance in a study by KPMG and the Association of Chartered Certified Accountants (ACCA)¹⁵. It also fared poorly against its ASEAN Economic Community peers, such as the Philippines, Singapore, Malaysia and Thailand.

In 2014, Indonesia's financial services regulator released a plan to bolster corporate governance at publicly-listed companies. It outlined responsibilities of directors, and steps to boost shareholder protection and transparency.¹⁶

This paid dividends. By 2019, Indonesia was ranked 57th out of 141 countries assessed by the World Economic Forum in terms of corporate governance. On shareholder governance, it ranking 28th — a vast improvement from 45th in 2014.¹⁷

⁹ Transparency International Corruption Perception Index

¹⁰ Indonesia Investments: Corruption in Indonesia

¹¹ Reuters: Ex-Indonesian minister jailed for 12 years in COVID-19 graft scandal

¹² Xinhuanet News: Indonesia's ex-House deputy speaker gets 3.5 years in prison for graft

¹³ Reuters: Indonesia corruption court jails executives at insurer for 20 years

¹⁴ OECD: Indonesia Policy Brief

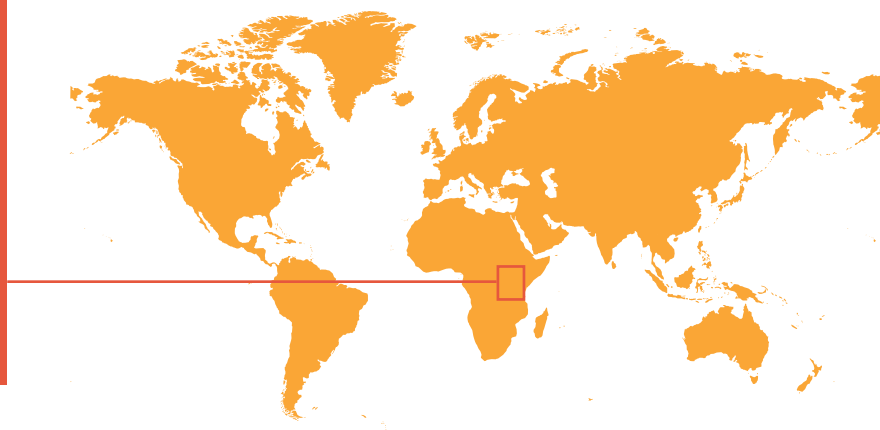
¹⁵ KPMG: Raising Corporate Governance Standards in Indonesia

¹⁶ Otoritas Jasa Keuangan: OJK Launches the Indonesian Corporate Governance Roadmap

¹⁷ World Economic Forum: The Global Competitiveness Report 2019

Rwanda

Of all the countries mentioned in this report, Rwanda went through the toughest time during the 1994 genocide when Hutu militias killed thousands of ethnic Tutsis.



Today, almost three decades later, Rwanda has become of one the fastest-growing economies in Africa. In 1994, its GDP sat at \$753m; by 2021, it had soared thirteen-fold to \$11.08bn. Its GDP per capita had grown from \$127 to \$833.8 over that period.¹⁸

Rwanda now aspires to reach middle-income country status by 2035 and high-income country status by 2050.¹⁹

This trajectory has been mirrored by a vast improvement in its ability to tackle corruption. Two decades ago, Rwanda's corruption scores were dismal. Its Corruption Perception Index score was 25 in 2006 — on par with eSwatini, Russia and the Gambia.

By 2019, Rwanda had become the best in the world on several areas in the World Economic Forum Global Competitiveness Index (GCI). This included controlling inflation, its quality of land administration and shareholder governance.

Rwanda was also in the top third of countries for the quality of its institutions, public sector performance, corporate governance, and the flexibility of its labour force. Overall, Rwanda was still 100th in the rankings, but it has shown vast progress.

Rwanda's CPI score has more than doubled, and is on par with countries like Cyprus. Transparency International ranked it higher than Greece and

just below Mauritius in 2021.

How did it get there? One of the answers is its resolve to tackle corruption.

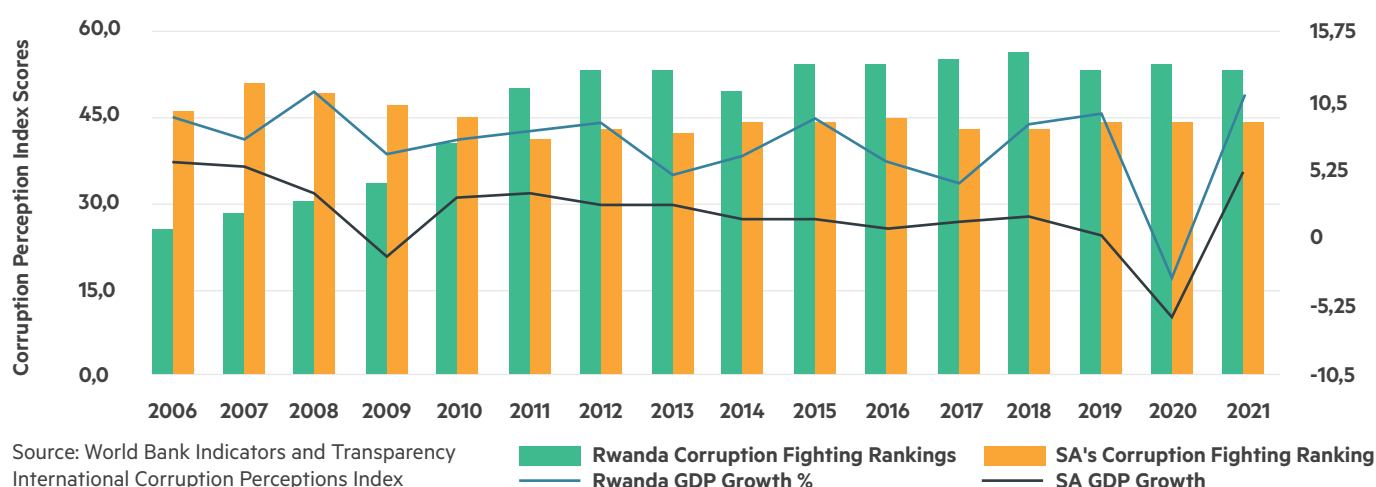
In 1997, Rwanda's post-genocide administration established a National Tender Board to replace a contract-award system.²⁰ The Rwanda Revenue Authority reformed tax collection in 1998, to curb corruption and political interference. And, in recent years, it paid greater attention to the efficiency of collections and tax enforcement.²¹

Though there are still large question marks over Paul Kagame's anti-democratic tendencies, after he became the President in 2000, he uprooted corruption in SOEs and removing 6,000 ghost employees from the public payroll.²²

It's a complex story, however, given Kagame's recent abuse of power. Author Michela Wrong details the crimes of the Rwandan armed forces under Kagame's rule in the book, *Do Not Disturb: The Story of a Political Murder and an African Regime Gone Bad*, which depicts him as a modern African dictator.²³

Much of what Kagame has done of late vindicates that view — yet it is also indisputable that his initial reforms, particularly as it came to governance and corruption, moved the country in the right direction.

Rwanda 2012-2021



¹⁸ World Bank Indicators: Rwanda

¹⁹ World Bank: The World Bank in Rwanda

²⁰ American Enterprise Institute: Rwanda Should Be the Model to Defeat Corruption

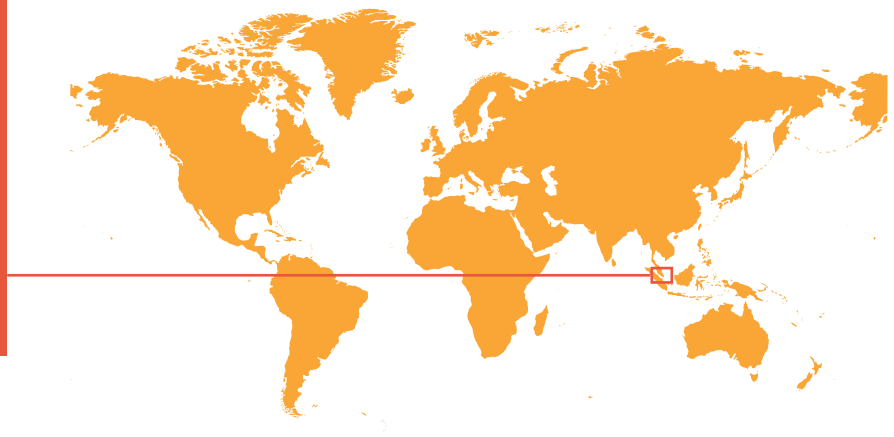
²¹ USAID: Domestic resource mobilization – Case Study of Rwanda, 1990-2016

²² Paulkagame.com: Remarks by President Paul Kagame at the National Democracy Day Anti-Corruption Summit

²³ Jonathan Ball Publishers: Do Not Disturb: The Story of a Political Murder and an African Regime Gone Bad

Singapore

Although Singapore is now a high-income country, it was a low-income country when it separated from Malaysia in 1965. Before its first election as an independent state, Singapore struggled with poverty, poor public health, and a stagnant economy.²⁴



But by the early 1970s, it reached full employment.²⁵ Today, it is the fourth least corrupt country in the world, according to Transparency International's CPI rankings, the number one country in the WEF's 2019 Global Competitiveness Index, ranked first for public-sector performance, infrastructure and a host of other indicators. It was the second-best country for corporate governance.

Singapore inherited a functioning British colonial system. But what made it different from other former British colonies, such as Zimbabwe and Kenya, is that while it wanted nothing to remind it of the colonial rule, it preserved what worked.

In an essay in *The Strait Times*, Singapore Prime Minister Lee Hsien Loong detailed the four steps that brought the country to where it is.

The first government after independence set the tone, specifying that corruption would not be tolerated, and institutionalised a comprehensive anti-corruption framework. For example, the state enacted the Prevention of Corruption Act (PCA) and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act to confiscate ill-gotten gains. It ensured that its anti-corruption agency, the Corrupt Practices Investigation Bureau (CPIB), was independent and well-resourced.

This resolve in the public sector strengthened Singapore's financial sector too.

On the corporate governance front, the Companies Act came into effect in 1967, two years after independence. It was amended in 2001, with Singapore having learnt from the 1997 Asian financial crisis. Singapore's first Code of Corporate Governance was established.²⁶

After major financial scandals in the early 2000s, including the collapse of several Chinese companies listed on the Singapore Exchange (S-chips), and the fall of China Aviation Oil (Singapore) Corporation due to accounting problems Singapore put in place strict rules around internal accounting controls and auditing rules.

Both the Companies Act and the Code of Corporate Governance have undergone significant amendments in recent years, forcing companies to be more transparent about remuneration, and accounting and ethical standards have been tightened.

Critically, there is accountability when rules are breached. The Singapore Exchange can impose a S\$250,000 penalty per contravention and up to a maximum of \$1m per hearing for multiple charges. The exchange can order the resignation of the director or executive, and block their reappointment for up to three years.²⁷

Implications for South Africa

Needless to say, South Africa's context differs from these countries.

Unlike Singapore, for example, the social complexity engineered by apartheid in South Africa has resulted in a rather unique distribution of inequality, even 28-years on. Singapore's homogeneous society and education system are nothing like South Africa's today.

In South Africa, the majority of the population — who are black — didn't inherit a functioning education system as happened in Singapore, and

this had significant implications for the first democratic government in 1994, where cadres were deployed in various positions immediately, without having first obtained all the skills needed.

Nonetheless, while the social organisation of South Africa has unique challenges and stresses, it is still encouraging that the economies of other emerging markets have recovered from what many believed was intractable corruption. This does suggest that a path to recovery — and reversing the dire unemployment scenario — is at least possible.

²⁴ The Strait Times: Fight against corruption: Singapore's experience

²⁵ World Bank: The World Bank In Singapore

²⁶ Joyce Koh and Annabel Yip: The Evolution of Corporate Governance in Singapore

²⁷ Singapore Exchange: Rule Book - Disciplinary and appeals procedures, and enforcement powers of the exchange

CHAPTER

4

THE WAY
FORWARD

Acting on the recommendations contained in these pages would go a long way to shore up the governance protections in our corporate sector.

However, in the end, even with the most formidable policies, a strict ‘letter of the law’ application will only lead to incremental progress rather than fixing the root cause of state capture: a fraying of South Africa’s moral fabric.

The systemic nature of corruption can only be addressed through the active collaboration of all sectors. The prevalence of corruption, the lack of political will to act against it, the price that whistleblowers continue to pay, and the lack of criminal prosecution, have all contributed to South Africans becoming increasingly cynical, and to hopelessness setting in. The Zondo report offers us the opportunity to address the problems proactively and to reverse the negative trends that plague our country.

A focus on substantive ethical change — such as a greater focus on due diligence, on flagging contracts with anyone considered a politically exposed person, on ensuring boards are truly independent and competent — would present the most fundamental shift. Strengthening ethical decision-making and building ethical organisational cultures across society, and in organisations of all sizes, will be crucial.

While our focus in this report was on the corporate sector — the supply side of the corruption equation — it would be wrong to end this report without a word on the demand side, the public sector. This, after all, was Raymond Zondo’s focus.

The role of the state

Business and the professions do not exist in a vacuum. Their activities are framed, enabled and limited by a legislative and regulatory environment determined and enforced by the state. A capable state enforcing a reasonable and practicable legislative and regulatory framework is a prerequisite for society — including business — to function.

The Zondo report illustrated that this prerequisite is not being met in South Africa, and has not been met for years — before, during and after the Zuma Presidency.

While the report identified shortcomings in the regulatory and legislative fields, some of its most distressing findings are about enforcement, correction and sanction. Or, more to the point: non-enforcement, non-correction and non-sanctioning.

At the heart of this is whether state capture and the flaccidity of the state are lapses of the system, or have become the purpose of the system. The answer is existential for the future functioning of business. Further questions we sought to answer include: what is to be done, can it be done and, how can business contribute to ensure it is done?

You might think nobody would set out to design a flawed system. But the Zondo report is peppered with examples of rules flouted at will, and of people appointed not despite the fact they were weak, corrupt and incapable, but because they were so. This is where political will is most urgently needed to reverse the trajectory.

An activist business sector

In the context of a governing party that remains unwilling, or unable, to genuinely seek to reverse the country's moral decay, what is to be done by business?

The success in turning the tide against former President Jacob Zuma in 2016 and 2017 was due, largely, to a concerted push from civil society, and the business sector which, organised through groups like Save SA, was fundamental in exposing the President's abuse of state funds. This happened through public campaigns, an active decision to disengage government, the decision by banks to shut down bank accounts of anyone seriously implicated in corruption, and the CEO initiative. This was the most active that the organised business sector has been in the democratic era and sets an example of what can be done if business takes its role as an active citizen seriously.

However, business seemed to believe that with the elevation of Ramaphosa to the Presidency in 2018, its job was done. It's now clear it wasn't. These influential groups should consider reviving their corporate citizenry and their more structured activist approach, which yielded important changes during Zuma's tenure.

Often, executives seem to believe this would be interference in a domain not of their competence or power. But this is not so: it is in their self-interest, given that it is impossible to maintain an enabling professional environment, in which investor confidence can remain intact, in a world of ethical collapse. The business sector has everything to gain from stamping out corruption, and it is an exceedingly powerful position to do so, given its access to resources and international best practice. It also has the voice to do more than pay lip-service to the fight against corruption.

While this report illustrates that business needs to grapple with corruption in its own ranks too, it can do this while simultaneously using its muscle to support the rebuilding of the state. This could take the form of secondments to the NPA, on a more co-ordinated basis, as well as considering an independent financing mechanism for investigation through a commercial crimes unit.

The state capture era illustrates that a more thoughtful approach to financing South Africa's democracy is vital. If the funding of the political process continues to take place in the shadows, we are likely to have a repeat of those years. Business needs to stand up, and take a role in proposing solutions that prevent such a repeat.

As Arundhati Roy, the Booker Prize winning author of 'The God of Small Things', put it: 'once you've seen it, keeping quiet, saying nothing, becomes as political an act as speaking out. There's no innocence — either way, you're accountable'.



REPORT SUMMARY

WHAT ZONDO FOUND

Zondo Report Map

1. The First Report

SAA, The New Age, SA Revenue Service and public procurement

2. The Second Report

Transnet and Denel

3. The Third Report

The Bosasa Swindle

4. The Fourth Report

The bid to capture National Treasury, EOH and Eskom

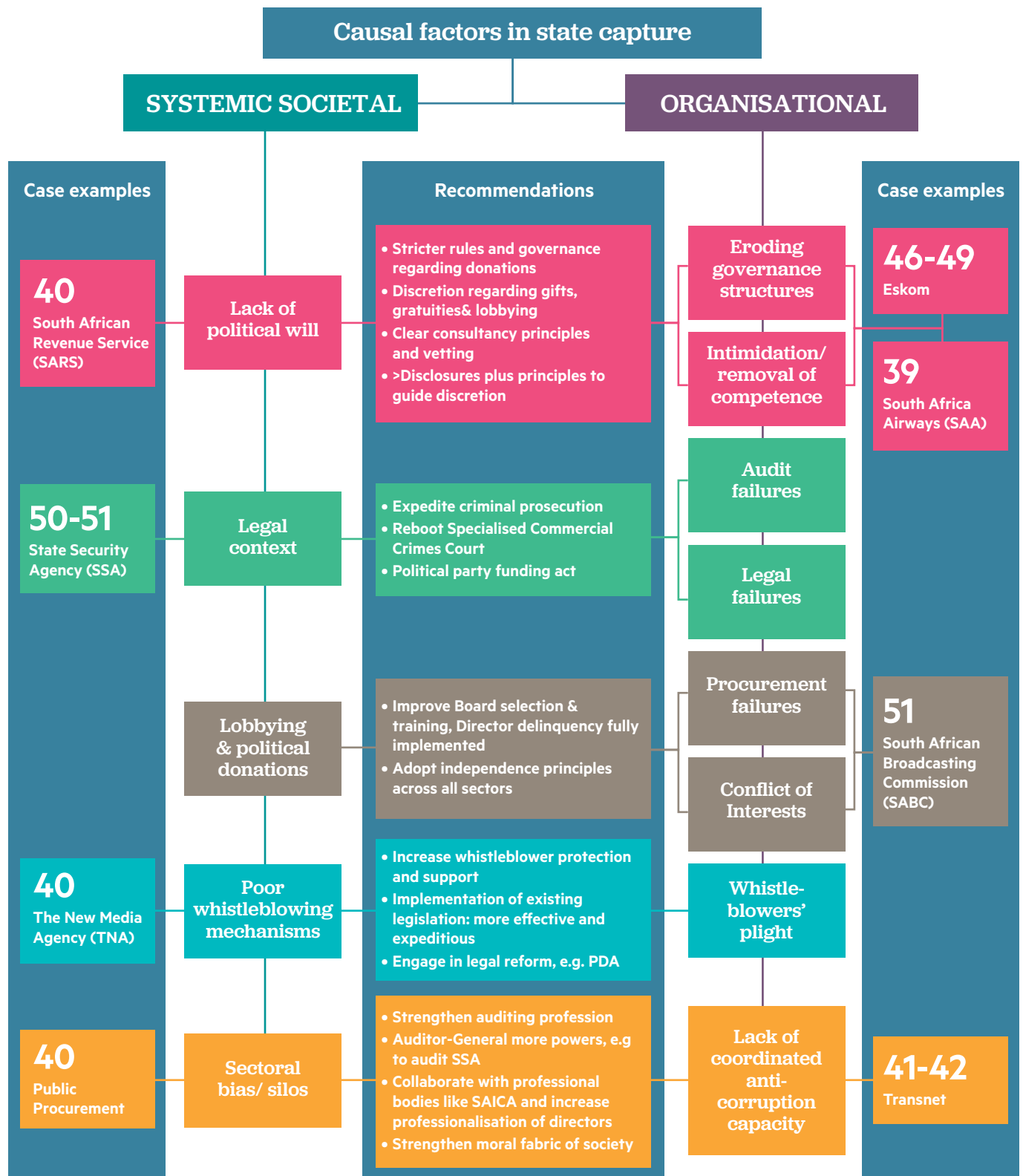
5. The Fifth Report

The abuse of State Security, abusing the SABC, and pressurising the banks

ZONDO REPORT MAP

How to use this conceptual map:

This infographic is designed as a map that can be used to navigate the report. The conceptual ordering highlights the main systemic and organisational risk factors that enable corruption and reveals its interrelationships, as indicated by the colour coding. Page numbers to some (not all) illustrative case examples are offered. In most cases, the recommendations also highlight the interrelationship between various factors.





1. The First Report: The New Age, SA Revenue Service and public procurement

The Commission's investigation of SAA focused on procurement processes over nearly ten years. Procurement was a natural focus, since this was the breeding ground for corruption in state-owned companies.

The findings showed a steady decline in governance at SAA from 2012 onwards. Dudu Myeni, the chair of the Jacob Zuma Foundation, had taken over as SAA's chair from Cheryl Carolus in October 2012. Yakhe Kwinana was the chairperson of SAA Technical.

During that period, managers who stood up to the two boards were removed from their positions. State security resources were used to subject managers and executives to unlawful and invasive state security vetting. They were forced to undergo polygraph tests, submit bank statements and reveal details about their romantic relationships. Many voluntarily left the airline or were forced out for more pliant employees.

When board members complained to former Minister of Public Enterprises Malusi Gigaba about Myeni's conduct, nothing came from it. Nor did Gigaba's successor, Lynne Brown, do anything. Myeni served until 2017, leading a board that was not properly constituted, with only four non-executive directors, compared to 11 before her time.

The number of violations of the Public Finance Management Act (PFMA) during procurement soared. SAA's chair Dudu Myeni brought in

her own external 'consultant', not contracted by SAA, at a cost of R2m to the airline, to offer legal opinions and make presentations to the board. No proper procurement process was followed.

Myeni's board was unusually involved in operational matters: it set the terms and approved Requests for Proposals (RFPs). The board would first pass a resolution, and only afterwards would the SAA CFO prepare a recommendation for decisions already taken, enlisting the help of the legal team to justify this retroactive behaviour.

There was a long list of irregularly awarded tenders during this period. The airline dished out contracts to external service providers — including McKinsey, Regiments Capital, and Trillian — for work the internal staff could do. In many cases, there wasn't even a need for the work supposedly carried out by external consultants.

By the end of Myeni's tenure, institutional knowledge was hollowed out.

By 2016, more than 40% of the airline's top positions were filled by people in an acting capacity. The key executive positions of CEO, CFO, Chief Commercial Officer and Chief Strategy Officer were all vacant, and the Chief Procurement Officer was on suspension. The high-calibre legal team that was there when Myeni arrived was decimated, while the legal division was badly under-capacitated.

Propping up the Gupta's media empire

State funds spent on The New Age Media (TNA) by Eskom, SAA and Transnet between 2011 and 2017 proved to be a critical income stream for the Gupta empire.

TNA, only established in 2010, survived almost solely on contracts and bulk subscriptions from state entities. SOEs, such as Transnet, Eskom, and the Government Communications and Information Systems (GCIS), spent hundreds of millions of rands to advertise with TNA even though it had no established readership or certified circulation figures.

'Facilitators', like Mzwanele Manyi, Colin Matjila at Eskom, and Brian Molefe and Mboniso Sigonyela at Transnet, kept the TNA going for years, assisted by 'followers', like former Eskom's head of strategic marketing, Pieter Pretorius and Transnet's brand and stakeholder relations coordinators, Joseph Jackson and Daniel Phatlane.

Those who resisted — including the former CEO of GCIS, Themba Maseko — were booted out.

The GCIS spent R34m of state funds advertising on TNA between March 2011 and February 2015. But this was trumped by Eskom, which spent R58.4m on TNA between April 2012 and April 2014. Transnet exclusively used The New Age newspaper for all recruitment and tender advertisements, spending R147.6m.

At SAA, when Dudu Myeni became chair, the airline dramatically increased its TNA newspaper subscriptions from 3,000 to 7,000 per day — costing an airline that would soon go bankrupt R2.4m per year, even though there was no budget for this.

Bain's role in dismantling the revenue service

The Nugent Commission of Inquiry into Tax Administration and Governance issues at the SA Revenue Service (SARS) had already detailed the 'massive failure of integrity and governance' in the institution when it published its report in 2018.

One area the Zondo Commission delved deeper into was the collusion between former SARS commissioner Tom Moyane and consultancy Bain & Co to dismantle SARS.

Former Bain South Africa partner, Athol Williams, and some of the senior managers purged from SARS during Moyane's tenure, gave candid testimony.

Before Moyane, SARS was one of the world's most efficient tax administration services, judged to be one of the top five revenue and customs authorities worldwide.

But after Bain began scouting for consulting opportunities in SOEs, it flagged SARS as a potential source of business. Its route into the organisation proved to be former President Jacob Zuma, with whom it had 17 meetings within two years before SARS contracted it. Alarming, it turned out that Bain knew about Moyane's appointment seven months before it was announced publicly.

Bain proposed far-reaching plans to restructure certain government agencies, including SARS. However, it went further: at one point, Bain even suggested centralising procurement for the whole country, and proposed a plan to do so.

At SARS, it identified individuals who should be 'neutralised', and restructured the agency without consulting the different divisions. Yet for its role in dismantling governance at this institution, Bain & Co earned R164m. This was a radical revision from the initial six-week contract, which was meant to cost R2.6m.

Public procurement in South Africa

Public procurement is one area of government operations most vulnerable to corruption. Government institutions in SA spend an estimated R800bn per year buying goods and services.

However, during the state capture years — and more recently during the Covid-19 lockdowns — evidence has shown that government institutions bought an extensive amount of goods and services that were not needed.

Yet, the testimony to Zondo revealed that many state officials found a way to cheat the system, with deviations from the PFMA the norm rather than the exception.

Practices like 'parcelling' — which occurs when big tenders are split into multiple smaller contracts — became a common occurrence. This was done so that officials trying to defraud government institutions could dodge the approvals needed for high-value tenders, or prevent going on open tender.

In his findings, Zondo also flagged the abuse of preferential procurement and supplier development policies, ostensibly put in place to promote black empowerment. In practice, however, many state entities use this policy to award tenders to businesses with no track record, and without subjecting them to a rigorous evaluation.

Elsewhere, there were many instances of improper communication between senior managers of government institutions, and potential bidders before a formal RFP was issued. This gave those bidders the advantage of knowing the rules of the game ahead of others or, in some of the more outrageous instances, allowed them to even draft the rules themselves.

2. The Second Report: Transnet and Denel

Transnet – the earliest and largest site of state capture

The Commission's findings focused its attention on state capture at Transnet from the time after Maria Ramos resigned as CEO in 2009, until 2018.

Ramos's departure opened a door for Zuma to appoint Brian Molefe in 2011. By that time, Zondo found, Molefe was already a Gupta associate.

Zuma, however, encountered an obstacle in Barbara Hogan, then the Minister of Public Enterprises, in his bid to appoint Molefe. After many tussles with Hogan — during which time Transnet's CEO post was vacant — Zuma replaced her with Malusi Gigaba in October 2010. That set the ball rolling for the Guptas.

Gigaba overlooked the more qualified Dr Mandla Gantsho, and appointed Molefe instead, which was announced by the Cabinet in February 2011.

Gigaba then tried, unsuccessfully, to install another Gupta associate, Iqbal Sharma, as chair of the Transnet board. Sharma was already on Transnet's board, and had initiated Molefe's hiring.

When this failed, Gigaba engineered the appointment of another Gupta lieutenant, Salim Essa, as a director in another SOE, Broadband Infraco.

Under Gigaba, Transnet created an acquisitions and disposals committee within the board, chaired by Sharma. For the first time, the board became directly involved in procurement — confusing its role with that of the executive and compromising its ability to exercise oversight. This also highlighted the role that consultancy firms played. McKinsey brought in Gupta-linked Regiments Capital as a 'development partner' on the condition that it share with Salim Essa and the infamous Gupta-fixer, Kuben Moodley, the money paid to it by Transnet. Half of the money that Regiments received from Transnet was redirected to Gupta-linked shelf company, Homix.

As it turned out, many of Transnet's tenders awarded to Gupta companies were designed by officials close to the family — Molefe, Anoj Singh and Siyabonga Gama — and these contracts were ultimately approved by this 'acquisition and disposals committee'.

The first such transaction that favoured the Guptas took place in August 2011, shortly after Molefe's appointment as CEO and Gama's reinstatement to Transnet following his dismissal for serious irregularities in 2010. In this case, the board approved the purchase of 95 electric locomotives for R2.7bn.

Molefe, who, together with Singh, created Transnet's 'market demand strategy', favoured China South Rail (CSR) from the get-go, even though the Chinese firm had failed to provide the necessary documents to qualify for the bid. Molefe, Zondo found, also had inappropriate communication with the company during the bidding process.

China North Rail (CNR), which later merged with CSR, later won part of another Transnet tender to provide another 1,064 locomotives.

Both these companies benefitted despite clear manipulation in the bidding process. A Transnet official, it transpired, had adjusted both of the Chinese companies' bids to make their pricing look more attractive by excluding essential costs. Zondo reported that the two companies paid R5.9bn in kickbacks to Salim Essa for the biggest of the three locomotive contracts they won.

In all, there were three main locomotive deals that fell under the market demand strategy to purchase 95, 100 and 1 064 locomotives.

However, during the post-tender negotiations, costs soared. In the case of the 1,064 locomotives deal, for example, Transnet ended up paying 41% more than was bid.

To add salt to Transnet's wound, Singh and his accomplices made 'advance payments' to the bidders — a strategy which was later used to benefit the Guptas at Eskom — even though this seriously detracted from Transnet's cash flows.

Notably, all three transactions were initiated within Molefe's first year as Transnet CEO. In the years that Molefe and Gama led Transnet, many Gupta-associated firms landed lucrative contracts in which they were paid for doing either little, or no work.

In this way, companies like Regiments Capital, Trillian Capital, Homix and T-Systems benefitted from Transnet contracts. These ranged from providing advisory services to arranging loans and doing other work for which they had little experience.

Zondo concluded that Transnet was not only one of the earliest sites of state capture, it was also one of the largest state entities affected. In all, he found that Transnet contracts worth R41.2bn were irregularly awarded to benefit companies linked to the Guptas or their associates (like Essa).

This represented 72.2% of all government contracts linked to state capture.

Denel, and the facilitation of Lynne Brown

The state-owned arms company Denel was held in high regard internationally before the facilitators of state capture compromised it.

Until 2015, its board performed its duties commendably, achieving most of its targets. Denel was even profitable, and the board at the time extended Riaz Saloojee's term as CEO. But after a new board was appointed by Public Enterprises Minister Lynne Brown in 2015, the wheels began to come off.

The new board's first move was to suspend Saloojee, CFO Fikile Mhlontlo and company secretary Elizabeth Africa. Within a year, Denel faced a liquidity crisis.

Denel's chair of that new 2015 board was Daniel Mantsha, a lawyer who had previously represented Jacob Zuma and who had been struck off the attorney's roll in 2007 for various misdemeanours — including for lying and charging for services he hadn't provided. In his report, Zondo said that Mantsha 'must have been chosen by the Gupta', and he urged the Legal Practice Council to 'investigate how Mr Mantsha got readmitted' as an attorney.

Mantsha, he said, 'acted as he did in the expectation that he would be rewarded for his efforts on behalf of the Guptas'. The family had paid for him to travel overseas, in luxury, soon after he oversaw the suspension of Saloojee and the other executives.

Once the new board was installed, Denel awarded irregular contracts to a company called VR Laser, which by then, was 75% owned by the Gupta associate Salim Essa. VR Laser had provided armour plating and steel to Denel for years — making it one of the state-owned entities' largest suppliers.

VR Laser scored contracts running into hundreds of millions of rand — contracts which Zondo recommended that law enforcement authorities probe for breaches of the Public Finance Management Act (PFMA).

Said Zondo: 'The Guptas were not prepared to compete for Denel's business. From the outset, they put pressure on Saloojee to privilege their chosen vehicle, VR Laser, above any other competitor suppliers'.

Brown came in for searing criticism from Zondo. He found that she had 'participated in state capture by using the powers of her office to install as members of the Denel board of directors [people] whom she believed, probably because she was told so, would facilitate or at least not oppose the Guptas' state capture scheme'.

This wasn't an isolated incident. Brown was also the responsible minister when Eskom hired Ben Ngubane (whom the Gupta family believed would be sympathetic to their cause) as its chair, and when SAA hired Dudu Myeni as its chair.

3. The Third Report: The Bosasa Swindle

The third chapter of the Zondo report came in at an mammoth 942-pages, and revolved around corruption at prisons company Bosasa, which was later renamed African Global Operations.

It's a highly instructive report for the corporate sector, since it provides a cautionary tale of how private sector companies interact with the state, and the flimsy rules regarding donations to political parties.

The evidence was sensational, as former Bosasa director Angelo Agrizzi spent days on the stand, detailing how officials were bribed. For example, Bosasa donated an election 'war room' to the ANC for two elections, bought groceries for Minister Nomvula Mokonyane, and gifted home security systems to ANC's secretary-general Gwede Mantashe. Agrizzi provided video footage of CEO Gavin Watson, CFO Andries van Tonder and Chair Joe Gumedde, in a vault, counting out what Watson called 'monopoly money' used to pay bribes.

While Zondo was cautious about Agrizzi's testimony, warning that 'his evidence was contradictory in certain instances', he was 'in the main, a truthful witness'.

This was partly because much of his evidence was corroborated by the work of the Special Investigating Unit, which had independently probed Bosasa.

Said Zondo: 'Bosasa's primary mechanism for attempting to influence public office bearers was the payment of cash bribes. The amounts paid tended to be commensurate with the degree of influence that could be exercised.'

Bosasa's pay-offs went to the top levels of the executive, including former Minister Nomvula Mokonyana and President Jacob Zuma, as well as to the governing party, the ANC, and its Secretary-General Gwede Mantashe. Middle-men were often used: This included Sesinyi Seopela — a former ANC Youth League leader who was 'substantially involved' with Fana Hlongwana in the arms deal of the late 1990s. Seopela's role was to 'get involved with politicians' for Bosasa, making payments which, in the case of the department of correctional services, ranged from R500,000 to R750,000 per month (Angelo Agrizzi called him the 2.5% man, as he insisting on calculating bribes using that percentage of a company's turnover).

In his testimony about Consilium Business Consultants, which acted as a labour broker, Agrizzi testified that 'Consilium was developed to cover up what people were earning, because the law had changed in that financial statements had to reflect what the highest earners were earning'.

In his final report, Zondo found that 'Bosasa, its directors and some of its employees, along with persons and entities associated with it, were involved on an industrial scale in attempts to influence, through inducement or gain, members of the National Executive, and office bearers and functionaries of [the state]'.

He found a prima facie case of money laundering by six people, and six companies; corruption against 15 people; and fraud against 10 people.

President on the payroll

The most senior person implicated is Zuma, who first met Watson at his Forest Town house in 2009 when he was ANC president, but not yet president of SA. While Zuma was implicated repeatedly, by more than 30 witnesses at the commission, it was the Bosasa evidence that may be hardest to refute.

Zuma, Zondo found, 'accepted gratification' from Bosasa, and should be investigated for potential breach of the Prevention and Combating of Corrupt Activities Act. Agrizzi testified that Watson paid the Jacob Zuma Foundation R300,000 per month.

Additionally, Bosasa paid about R3,5m per year for ad-hoc events for Zuma, including a birthday party — in one case, Bosasa even provided a cake for his 72nd birthday, complete with a company logo, according to a photograph.

Critically, Myeni admitted to receiving payments from Bosasa.

Zondo found: 'there are reasonable grounds to suspect that Mr Zuma provided the facilitation in order to benefit a corporate entity doing business with government and organs of state, namely Bosasa, and to benefit himself and his foundations, the recipients of Bosasa's material and monetary largesse'.

While there's no evidence Zuma directly influenced any tender, Zondo found that there are 'reasonable grounds' to suspect he did exercise his influence in 'inhibiting' the criminal investigation into Bosasa. While Watson pressured Zuma to lean on prosecutors to back off, Zondo also found it likely that Zuma helped secure the leak of confidential information from prosecutors to Bosasa.

Zondo said there are 'reasonable grounds' to believe his conduct breached his constitutional obligations as president, his obligations under the executive ethics code, as well as various other laws.

Mokonyane: birthday parties and Christmas hampers

Considering all the evidence against Zuma, it is worth noting that one politician came off as badly from the Bosasa evidence, namely Mokonyane, the former premier of Gauteng (from 2009 to 2014) who was appointed by Zuma as Minister of Water and Sanitation.

Zondo found that there were 'extensive attempts' to influence her. Not only did Bosasa pay her a 'retainer' of R50,000 per month, it also installed a security system at her house, and provided 'Christmas packages' — including brandy, whisky and meat.

Zondo made special mention of how Bosasa paid for a "large volume of alcohol and birthday gifts" for her 40th birthday party, which was held at the Victoria guesthouse in Krugersdorp. In the end, 174 people attended her party.

Most damaging for Mokonyane was that she lied about this to Zondo, when she said: 'I have never benefited or received any goods to the benefit of my family'. She denied too that she'd had even had a party at that guesthouse.

In the end, Zondo found that she'd lied numerous times in her evidence, concluding that she was 'shown to have been dishonest'.

'The conclusion is unavoidable that she was well-aware of Bosasa's role in sponsoring and arranging the birthday party, but did not wish to acknowledge it because she knew it was corrupt in nature,' Zondo said.

As for the quid pro quo, Agrizzi said Mokonyane was seen as extremely influential in the ANC, and in the government, providing cover for its illicit activities. 'We knew that if we had any issues, we could go to her and it would be sorted,' he testified.

Zondo referred her case to investigators, saying an investigation may 'uncover a prima facie case [under] the Prevention and Combating of Corrupt Activities Act'.

Indirect influence: Gwede Mantashe and the ANC

Zondo's findings when it came to Bosasa don't only refer to the capture of the state, but to the more subtle mechanism of capturing the political party that runs the state.

When it comes to the ANC, Bosasa donated an election 'war room' to the party from where it could monitor, and plan, for the 2014 national election, as well as for its 2012 internal party elective conference in Mangaung.

While the value wasn't quantified, Zondo said 'it is clear from the sophistication of the equipment and facilities, and the time period over which they were provided (five months in all), that the value was substantial'.

Providing the war room was critical for Bosasa, since it had invested heavily in securing tenders from the state, and its 'business model was based on its ability to influence public office bearers', Zondo wrote.

'One need merely consider the potentially catastrophic consequences for Bosasa if the ANC were to be voted out of power, to understand how important the provision of the 'war room' facilities to the ANC was,' he wrote.

His report concluded that prosecutors must probe who was responsible for the party's decision to accept these 'gifts', and whether this contravened corruption laws.

This is important, Zondo said, because Bosasa employed a 'corrupt modus operandi' to target influential officials in the party, since the company realised the ANC indirectly wields legislative and executive power.

One example of how it targeted influential people in the ANC, even though they held no executive position, was the evidence about Gwede Mantashe, who at the time was secretary-general of the ANC, but is now minister of minerals and energy.

Bosasa viewed Mantashe as a 'brilliant connection'. It therefore paid for security upgrades at three of his homes: two in the Eastern Cape and one in Boksburg, Gauteng.

Zondo says Bosasa 'sought to be able, through Mr Mantashe and the inducements and gain provided to him, to influence the leadership of those departments and organs of state [from which it sourced tenders]'.

This was because those public servants were "drawn almost exclusively from the ranks of the ANC'.

In his evidence, Mantashe tried to play this down, arguing this was akin to 'traditional intra-family support'. Zondo, however, found this was 'not convincing'.

While Mantashe did nothing to help Bosasa, Zondo said 'there is a reasonable prospect that further investigation will uncover a prima facie case of corruption against Mr Mantashe in respect of the offence of corruption'.

The ANC: a criminal enterprise

The network of Bosasa's influence sketched by Agrizzi, and ultimately accepted by Zondo, has done much to fuel the impression that a majority of the government — and the ruling party — is for sale.

Agrizzi estimated there were 80 people paid monthly, with '38 government officials and employees who received bribes on a regular basis'.

Over a decade, Bosasa is estimated to have paid out an estimated R75m in bribes to these officials. As a result, it tied up contracts with a number of government departments — most notably the departments of correctional services, home affairs, education and transport — amounting to R2.3bn over that time.

This provided Bosasa with credibility in the market and financial muscle, which allowed it to win contracts from other companies, including Sasol, the Airports Company of SA (ACSA), and the SA Post Office.

The specific implications, as it relates to corporate donations, as well as the use of consultants and auditors, is discussed in chapter 3.



4. The Fourth Report: Eskom, EOH, and the assault on the National Treasury

The fourth chapter of the Zondo report, released on 29 April 2022 and clocking in at 1,066-pages, dealt with the attempted capture of the National Treasury, a corrupt R1bn Free State housing project, and Alexkor, among other elements.

Perhaps the most notable part of this chapter, from a corporate governance perspective, relates to the kickbacks paid for government

contracts at the JSE-listed EOH, and the way in which the state-owned power utility Eskom was hijacked.

There are plenty of implications for governance that flow from this—from the way in which donations are accounted for in the corporate sector, to how board members should deal with undue interference from shareholders.

How Treasury was nearly captured

One of the more well-known episodes of state capture was the offer made to Deputy Finance Minister Mcebisi Jonas by the Gupta family to make him finance minister, a proposition accompanied by a R600m sweetener.

Zondo's report spoke in length about this meeting, which took place on 23 October 2015 — two months before former President Jacob Zuma axed Finance Minister Nhlanhla Nene, and replaced him with the unknown Des van Rooyen (due to the outcry, Van Rooyen served only four days, before being replaced by Pravin Gordhan).

As the report relates, Ajay Gupta had told Jonas that the National Treasury had been a 'stumbling block' under Nene, and the family envisaged that with Jonas as minister, and under their thumb, many of these obstacles would fall away.

The Guptas wanted Jonas to axe numerous treasury officials, including Director-General Lungisa Fuzile. The issue, Jonas testified, was that Zuma wanted to push ahead with a R1-trillion nuclear procurement deal — which would open the taps for the Guptas, who owned the Shiva Uranium Mine — to benefit.

'The pressure from the president and other Cabinet members on the nuclear deal was immense,' Jonas testified. He added that the Guptas told him: 'the old man [being Zuma] will do anything we tell him to do'.

Jonas testified that Ajay Gupta told him he would become 'very rich' if he worked with the family, just as they had made Zuma's son Duduzane a billionaire.

Zondo's report said: "I find that the statement that Jonas said was made by the Gupta brother who met him on 23 October, 2015 was true. Zuma has not given a rational explanation for dismissing Nene. Nene's dismissal is another example that shows that Zuma would do anything that the Guptas wanted him to do'.

The real reason for firing Nene, Zondo Reported, was because 'he was not co-operating or working with the Guptas, and he was resisting Zuma and Ms Dudu Myeni's attempts to get National Treasury to approve transactions or projects or measures that were not in the interests of the country'.

Gordhan only lasted another 15 months in the role. In March 2017, Zuma told the ANC's top six officials he would be firing Pravin Gordhan, and replacing him with Brian Molefe. The party resisted, and convinced him to appoint Malusi Gigaba instead.

Said Zondo: 'there are no words to describe this conduct on President Zuma's part, except to say that he must have been determined to give the Guptas direct access to the nation's treasury'.

After Cyril Ramaphosa became ANC president in December 2017 and the country's president in February 2018, he dropped Gigaba from the Cabinet.

But Zondo concluded: 'It is almost a miracle that the National Treasury was saved from the tentacles of the Guptas'.

That this didn't happen, he said, despite relentless attempts to do so over a long period of time, is due largely to the ministers of finance — Nene and Gordhan — and Treasury officials who, 'in the interests of the country, put up serious resistance'.

The repurposing of EOH

The corruption of the once high-flying technology company EOH is one of the more under-reported elements of state capture, with pointed implications for business.

Founded in 1998 by Asher Bohbot, EOH's stock had soared 459% over a decade, but in its desperation to keep growing, it bought several companies with dubious ethical standards. EOH's decentralised management style, with little oversight, compounded this problem, allowing a culture of kickbacks to flourish.

In his report, Zondo examined how, between 2008 and 2018, EOH lavished bribes on senior officials from the governing ANC, on the party itself, and on former City of Johannesburg mayor Geoff Makhubo, as a quid pro quo for government contracts.

At the time, Makhubo — who died of Covid-19 complications in July 2021 — was the City's Finance MEC (member of the executive council), and the ANC's Regional Treasurer.

Many of the bribes — masked as 'donations' — were made through EOH Mthombo, the subsidiary that handled public sector work. It was headed by Jehan Mackay, who arrived at EOH after it bought his company TSS Managed Services in 2013.

Zondo recounts how the donations to the ANC included a R2m payment in December 2013 for 'development and education services', and a R3m payment on 16 April 2014, the same day that EOH's TSS made an unsolicited proposal to upgrade the city's network and security infrastructure.

Strangely, EOH's unsolicited proposal had been emailed to Makhubo directly, even though he had 'no business involving himself in procurement matters — particularly not unsolicited proposals from an entity from which he had recently solicited substantial donations for the ANC', said Zondo.

Yet, the City of Johannesburg then awarded that R109m contract to EOH.

Zondo said the evidence 'leads inexorably to the conclusion' that former EOH executive Patrick Makhubedu, Makhubo, and his business partner Reno Barrie, 'conspired to procure the improper acceptance' of that proposal. As a result, Zondo recommends law enforcement agencies investigate, 'with a view to the prosecution of Makhubedu, Barrie, Mackay (and EOH director) Ebrahim Laher' for possible corruption.

Zondo also cited another suspect tender awarded to EOH in 2016, worth R404m.

What happened there was that on 2nd November 2015, the City of Johannesburg issued a tender for an upgrade of its SAP technology system. Eleven days later, EOH got an email from a City of Joburg official soliciting donations.



One EOH executive then sent an internal email asking what could be donated to the ANC, saying 'we need a number urgently that can be allocated for goodwill'.

At the time, Makhubo was trying to drum up donations for the ANC ahead of the 2016 local government elections. In the end, EOH made several donations to Makhubo's company Molelwane Consulting, and donated R16m to the ANC's election campaign.

These payments were largely made from EOH Mthombo, through a company called Mfundi Mobile Networks, and it accounted for these payments in its books as 'Sales COJ SAP Support Special'. Overall, EOH paid R34m to Mfundi.

Individual politicians also leant on EOH. In May 2016, EOH was sent a 'request for sponsorship' from Pilisiwe Tau, the wife of the City of Johannesburg's then Mayor, Parks Tau. A month later, EOH paid R512,000 to Serendipity Tours for Pilisiwe Tau's project.

EOH was also the source of payments made to Zizi Kodwa, South Africa's current deputy state security minister, who was the national spokesperson for the ANC at the time.

Zondo's report shows that in 2015 and 2016, Kodwa benefitted to the tune of R1.68m from EOH, transferred through Jehan Mackay. This included a R1m loan (which Kodwa used to buy a car), and R666,000 spent on luxury accommodation.

In his testimony, Kodwa said Mackay was a friend, and he believed there were no strings attached. This, at best, was naive, since Mackay did communicate with Kodwa about tenders that EOH was bidding for. Zondo concluded: 'it is clear that Mr Jehan Mackay was attempting to buy influence by making the 'loans' that he made to Mr Kodwa and by providing Mr Kodwa with luxury accommodation. Mr Jehan Mackay repeatedly attempted to engage Mr Kodwa in relation to pending EOH Group tenders'.

Mackay's attempt to get Kodwa to interfere with procurement processes 'appears prima facie to contravene section 3(b) of the Prevention and Combating of Corrupt Activities Act', said Zondo.

Yet what is most remarkable is that today, Kodwa still remains Deputy Minister of State Security — one of the most corrupted government departments around. As Zondo said: 'it is untenable for the Deputy Minister of State Security to find himself in a position where he is beholden to a suspect in multiple criminal investigations.'

It is unclear why President Cyril Ramaphosa has not yet acted on this.

How the Guptas took control of Eskom

The travails at Eskom have rightly been flagged as the biggest risk to the country's prospects. In 2019 alone, blackouts knocked up to 1.1 percentage points off SA's GDP.

The extent to which Eskom's governance was systematically dismantled during state capture is bracingly clear in the fourth instalment of Zondo's report.

'South Africans thought that the ANC government was in control of Eskom but it was not,' Zondo wrote in his report. 'It had relinquished the control to the Guptas and those people the Guptas wanted. The ANC and the ANC government should be ashamed that this happened under their watch.'

The process to capture Eskom began in 2010, when Zuma appointed Malusi Gigaba as Minister of Public Enterprises. But the plan really accelerated in 2014.

Though the Guptas initially believed Gigaba to be pliant, he stopped taking calls from Ajay Gupta. This the family apparently told him, according to testimony, that they 'had put [him] in the position which he occupied ... and they could take him out'.

In 2014, Gigaba was replaced by former Western Cape premier Lynne Brown — and Zondo says the probability is that the Gupta family had a hand in her appointment.

'Brown was a Gupta associate. So, the Guptas had the minister responsible for Eskom on their side. Furthermore, they had a number of the members of the board of Eskom on their side,' said Zondo.

Soon after she took charge, Brown appointed a new Eskom board ill-equipped for the role. Simphiwe Makhathini, a Deputy Director-General at the Department of Public Enterprises, raised concerns about this, but Brown ignored it.

After that, the intervention from the executive became more brazen.

In one particular case, Zuma himself gave an instruction that Eskom's February 26, 2015 board meeting must be postponed — a moment which Zondo said 'marked the beginning of the implementation of the Gupta's plan to capture Eskom'.

Zondo described Zuma's action as 'unlawful, because he had no power to decide when the Board could hold its meetings, nor had he any power to dictate what matters the board could discuss or not discuss'.

The reason for the postponement, Zondo concluded, is that the Guptas wanted to have their own deployee, Ben Ngubane, installed as Chair instead of Zola Tsotsi, before certain commercial decisions were taken.



A month later, in March 2015, a decision was taken to suspend Eskom's four top executives — CEO Tshediso Matona, Finance Director Tsholofelo Molefe, Group Capital Executive Dan Marokane and Commercial Executive Matshela Koko.

The circumstances around this were highly unusual. First, the decision to suspend them was taken during a meeting at Zuma's presidential residence in Durban, attended by Dudu Myeni, the Chair of the Jacob Zuma Foundation. Tsotsi, who also attended that meeting, said he found this 'altogether shocking'.

Standard & Poor's downgraded Eskom's credit rating, saying the suspensions had 'led us to have less confidence in the company's corporate governance'.

Zondo said while 'the Guptas intended for Koko to return to Eskom in due course', the others remained side-lined, providing the pretext to parachute in people sympathetic to the Guptas — Brian Molefe as CEO, and Anoj Singh as finance director.

Molefe, Zondo said, 'was spared the inconvenience of a transparent, fair and competitive process before he was appointed CEO of Eskom'.

In March 2015, Tsotsi resigned as Chair, and was promptly replaced by Ngubane.

Zondo summed it up: 'So, the minister was their minister; the President was their man. The chairperson of the board was their man and the acting group CEO was their man. The acting CFO was also their man. That is Mr Anoj Singh.'

The aim, he said, was to 'divert Eskom's assets to the Guptas' financial advantage' — with the Gupta's Optimum Coal supplying Eskom's power plants with coal. As predicted, a number of corrupt deals soon rolled through the company.

Zondo flags many of them. In particular, he says, Singh and Koko should be investigated for their role in approving contracts with consultancy McKinsey, and its supposed black empowerment partner Trillian, which was also linked to the Guptas.

Zondo said there had been 'rampant corruption' in these contracts — which cost Eskom R1.6bn, and which may have fallen foul of the Corruption Act.

The Guptas' Brakfontein mine also scored a ten-year deal to provide coal to Eskom's Majuba Power Station. That deal was done 'without a financial due diligence having been done — that was only done in April, after coal supply had started'.

Zondo also recommends Koko and Singh be criminally prosecuted for their role in pressuring Glencore to sell Optimum Coal to the Gupta family. This was notable, in that Eskom provided a highly unusual R659m 'prepayment' to the Guptas for coal, as well as a R1.68bn 'guarantee', which allowed it to clinch the deal.

The report says those Eskom officials who facilitated those pre-payments are, on the face of it, guilty of theft and ought to face criminal charges for corruption.

'The recommendation for criminal charges is particularly applicable to Mr Anoj Singh and Mr Koko, who by false pretences led Eskom ... to believe that the R659m payment was in the nature of pre-payment for coal, as was the R1.68bn pre-payment, later converted into a guarantee, when in truth and fact, they knew that the prepayment and the guarantee were needed to enable the Guptas to complete [the sale]'.

The failure of the Eskom board to exercise its fiduciary duties and governance obligations was evident. The board rubber-stamped the suspensions of four executives, even though this wasn't in Eskom's interests. Zondo said the directors who did this 'wished to do the bidding of President Zuma and Minister Lynne Brown and not because they regarded the suspensions as being in the interest of Eskom'.

Eskom's 2014 board was compromised from the start, as many directors had links to one of Eskom's suppliers, the Gupta-owned Optimum Coal.

This wasn't disclosed as a conflict of interest. Instead, the non-executive directors were held out as independent.

Mark Pamensky is a case in point. Appointed as an Eskom 'independent non-executive director' on 11 December 2014, he had been appointed as an independent non-executive director of the Guptas' Oakbay Resources, three months earlier. Pamensky was questioned about his role in approving an Eskom board resolution for a contract to pay R43m to sponsor business breakfasts organised by the Gupta-owned The New Age newspaper. Pamensky voted to approve this, even though audit firm Sizwe Ntsaluba Gobodo (SNG) found the contract to involve 'reportable irregular expenditure'.

Pamensky testified that he'd relied on Matjila's explanations before ratifying it. But his de facto conflict of interest meant he was poorly placed to assess this. In 2017, the Organisation Undoing Tax Abuse (Outa) laid criminal charges against Pamensky, as he was 'the conduit for the flow of privileged information between the companies'. Outa's CEO, Ben Theron, said Pamensky used his position 'to influence decisions', and failed to recuse himself where he had a conflict of interest.

In November 2015, Pamensky wrote to the Guptas about Oakbay's bid to buy Tegeta, which had a contract with Eskom. Said Pamensky: 'I sit on the Eskom board and this can be perceived to be a conflict. I don't believe there is any conflict whatsoever'. We now know that Oakbay was only able to buy Oakbay thanks to an irregular 'advance payment' of R659m which Eskom made to the Guptas.

There were other conflicts. Pamensky was a member of Eskom's investment and finance committee which oversaw its 'investment strategy' and planned for South Africa's 'nuclear programme'. Yet Pamensky was also a director of the Gupta's uranium company, whose future depended on that nuclear programme. It seems unlikely, given his sentiments on conflict, that he recused himself on this score.

This is one of the reasons why Zondo says prosecutors should examine whether that entire 2014 board of Eskom should be prosecuted.

5&6.

The Fifth and Sixth Report: The State Security Agency, the SABC, and bank behaviour in closing accounts



The 472 pages of the Commission's report about malfeasance in the SSA, which coordinates surveillance and investigations into threats to state security, bears little resemblance to the everyday running of legitimate businesses.

The problems that Zondo flagged about SSA weren't new — they'd been flagged before — but nothing had been done. But the brazenness of the looting was still alarming.

For instance, at one point, officials from the SSA and the criminal intelligence arm of the police (which is funded through the SSA budget) were handing out up to R4.5m in cash at a time, in plastic bags, to unidentified people, without any paper trail.

Separately, between R17m and R145m in cash was stolen from SSA headquarters in one go, in all probability by SSA staff. While there was video footage, there was no sanction. Firearms were also stolen with as much abandon, but no consequence.

All this was possible because the agency is not audited, and has never been properly audited since it was founded in 1995. Even the AG was denied access to the SSA's financial records, so it could not furnish an opinion.

The result is that no-one knows — not even Zondo's commission — the amount of taxpayers' money stolen or misused at the SSA. The Commission's guess casts a wide margin — between R600m and R4bn — but there really is no way of saying.

Without proper documentation of financial information and processes, no consequence management or sanction could take place at SSA.

Fixing state security

Zondo recommended the AG be given more access and powers to audit SSA, but provided no suggestion of how to achieve that in practice

The government, with the help of the AG, needs to draw-up a framework with practical steps on how the balance can be found between secrecy (the primacy of which it accepts) and the transparency constitutionally demanded of the SSA.

Zondo also called on Parliament's Joint Standing Committee on Intelligence (JSCI) to provide better oversight. But this also needs to be fleshed out: there must be guidelines on what information the SSA must report to the Committee and the AG, and mechanisms to ensure this information is correct.

Secondly, since SSA's meetings are held behind closed doors and those meetings are confidential, there must be an independent party — preferably from the AG — that will always be in the know. No board meeting should take place without that party present. In other open democracies, the same problems exist (in more authoritarian setups, similar situations are not considered problematic). The situations in the US and UK are both currently in flux, with the general drive to greater openness and accountability being regarded as folly and fiercely resisted by many in the various intelligence establishments. The established practice in those countries has been (and was, in South Africa before democratisation) that a specific auditor seconded from National Treasury be given an office within the intelligence head office, to act as external auditor to the intelligence agency's own internal auditors.

Another question to be answered is how to ensure accountability at the SSA, given that wrongdoing at the agency is typically kept secret. As it stands, even if there is major wrongdoing, MPs cannot brief the public on the matter. Parliament could pass a law that strikes a balance between the imperatives of accountability and secrecy.

Zondo made extremely serious findings against David Mahlobo, currently Deputy Minister of Human Settlements in Ramaphosa's Cabinet. There were also serious findings against the former State Security Minister Ayanda Dlodlo, who served in Ramaphosa's Cabinet until April 2022 and has since taken up a position at the World Bank.

While Zondo made no finding against Police Minister Bheki Cele, he is implicated — so the Commission asked law enforcement agencies to investigate further.

There are two implications. First, what message of accountability does it send to society, and business, when Ramaphosa retains compromised individuals in his Cabinet? Second, given that all of these individuals are, or were, members of the security cluster, surely South Africa needs an independent agency to investigate the evidence?

Abusing the messenger: dirty tricks at the SABC

When it came to the SABC, there were many allegations — from the breakfast briefings of the New Age Newspaper, the sale of the SABC's archives to television station ANN7, and the government's policy on Broadcast Digital Migration (BDM).

Of particular interest to business is the question of lobbying by MultiChoice to influence government policy on the decryption capabilities of set-top box (STB) control. Although the government policy on this changed between 2008 to 2013, Zondo does not say whether this could be ascribed to lobbying by MultiChoice.

This raises the issue of 'regulatory capture' by the private sector.

Zondo spoke of a five-year contract between MultiChoice and the SABC, in which the state broadcaster was 'blocked' from using STB encryption for the duration of the contract. This would appear to be the result of successful lobbying by MultiChoice.

Lulama Makhobo, the former CEO of the SABC, testified at the commission about 'improper conduct' regarding the contract between MultiChoice and the SABC. But her testimony was called into question because she could not answer why she'd then emailed MultiChoice saying that the contract was entirely above board.

As a result, Zondo found that MultiChoice signed that contract in good faith, and on the understanding that the SABC's representatives had obtained the necessary approval from the board and management.

Either way, the question remains: should South Africa not seek to legislate, or exercise oversight of lobbying activities by companies, as many other countries do? What is acceptable lobbying, and when does it become regulatory capture?

Leaning on the banks: undue pressure over Gupta accounts

In her *State of Capture* report, which laid the foundation for the Zondo Commission, former Public Protector Thuli Madonsela instructed that an investigation be opened into whether the President, deputy President, ministers, or deputy ministers, had improperly intervened in the banking sector.

This question arose after South Africa's four largest banks (Absa, First National Bank, Standard Bank and Nedbank) terminated their relationships with Gupta-linked companies because of discomfort with the way in which the companies operated.

Each of those banks was asked by the ANC to attend a meeting at the party's headquarters at Luthuli House. Absa, Nedbank and Standard Bank attended.

Initially, the ANC officials said they didn't want to discuss individual bank clients, but only wanted to know about the 'guidelines' for the bank to terminate a relationship with a client. But when banks pointed out the risks under the Financial Intelligence Centre Act of keeping ties with corrupt companies, the discussion turned to the termination of the specific Gupta-linked banking accounts.

Next, the four banks were each invited to separate meetings with an 'inter-ministerial committee' convened by mining minister Mosebenzi Zwane (a lackey of the Guptas) to discuss how banks terminate client relationships. Only Standard Bank and Nedbank attended. Zwane implied that they might lose their licence to operate.

While the ANC officials said their interest was only in the job losses that would eventuate from closing accounts, Zondo found that the Gupta companies had asked the party to pressurise the banks. The ANC knew it should not have behaved in this manner, said Zondo, but it persisted nevertheless.

Zondo found that Zwane and former President Jacob Zuma's interventions on behalf of the Guptas around the banks, were improper and breached the Executive Members' Ethics Code. However, Zondo also found it unacceptable that clients were not given a chance to explain themselves to the banks, before the accounts were closed.

'The Commission finds it unacceptable that clients are not guaranteed the right to put their side when accounts are closed by the banks, and calls for new legislation to remedy the situation,' Zondo said.

The commission recommended that Parliament introduce new laws that would require banks to afford clients an opportunity to make representations.

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