

Judicial Commission of Inquiry into State Capture Report: Part V

Vol. 2: SABC, Waterkloof Landing and PRASA



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

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

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



PART V: VOL 2

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of
State Capture, Corruption and Fraud in the
Public Sector Including Organs of State

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and

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CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

THE SOUTH AFRICAN BROADCASTING CORPORATION

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The South African Broadcasting Corporation (SABC)

1338. The South African Broadcasting Corporation (SABC) is one of the state owned entities in respect of which the Commission conducted an investigation of and held an inquiry into, certain allegations that were thought to fall within the terms of reference of the Commission. Members of the Commission's Investigation Team and members of the Commission's Legal Team interviewed, consulted with and took statements from many people who made statements or deposed to affidavits or affirmed declarations. However, as it turned out, a number of persons from whom statements had been taken or who had deposed to affidavits were not called to give oral evidence. That was either because ultimately the view taken by me as the Chairperson of the Commission was that the matters dealt with in those statements or affidavits did not fall within the terms of reference of the Commission or that, although they may have fallen within the terms of reference of the Commission, the matters were not sufficiently important to warrant that the witness or witnesses concerned be called.

1339. The Commission takes this opportunity to express its gratitude to all such persons for their co-operation with the Commission and for the time they set aside to try and assist the Commission with its investigations.

1340. There were some witnesses who gave oral evidence the relevance of which was questionable at the time they gave it which I allowed because the evidence leader had indicated that there was to be evidence at a later stage which would reveal the relevance of such evidence but there was no further evidence led. The result was that the relevance of the evidence that was given was not established. That evidence has been excluded. The Commission also wishes to thank those witnesses for their co-operation with the Commission.

1341. In her report "State of Capture" the then Public Protector, Adv T Madonsela, had this to say about the SABC¹⁰⁷⁹:

"SABC was formed in 1936 and is the South African National Broadcaster and provides services in the form of 19 radio stations and 4 televisions broadcasts.

The SABC provides a wide range of services and essentially connects the normal South African individual to the rest of South Africa.

During the course of this investigation, I interviewed Honourable Julius Sello Malema ("Mr Malema") to solicit any evidence in support of statements attributed to him in the media relating to the influence of members of the Gupta family. During the said interview, Mr Malema made the following allegations relating to SABC:

'That the SABC, previously allowed government departments to communicate with the nation at no cost. This includes instances where Ministers required air time in order to make announcements and launch campaigns; and

SABC has since entered into a partnership agreement with the New Age newspaper and government departments, including Ministers are required to pay either SABC, New Age newspaper and/or the relevant partnership to appear on SABC for purposes of communication with the nation.'

The above allegations were confirmed by Minister Mbalula during an interview with him on this investigation.

Following the above allegations, I have decided to investigate any contract(s) awarded to the New Age newspaper and/or TNA Media by the SABC. The investigation into SABC will however form part of the next phase of the investigation".

1342. The Public Protector briefly dealt with the arrival of the Gupta family in South Africa, gave an outline of their business activities and mentioned¹⁰⁸⁰ that they had started a media company called TNA Media, which published a newspaper called "The New Age"

¹⁰⁷⁹ Par 4.26-4.30

¹⁰⁸⁰ Par. 5.2

and owned a television channel called ANN7. How this came about will be dealt with hereunder under a separate heading.

1343. The Gupta family are known friends of the former President Zuma. His son, Mr Duduzane Zuma, is also involved in various business activities. The newspaper, The New Age, had also secured contracts with some provincial government departments and state owned entities most notably Eskom, South African Airways, Government Communication and Information Services (GCIS) and the SABC. The contracts between the Gupta entities and South African Airways were dealt with in Part I of the Commission's Report. Mr Ajay Gupta's attempts to compel Mr Themba Maseko to improperly give the Guptas GCIS's advertising business which ended up with President Zuma moving Mr Maseko out of GCIS and replacing him with Mr Mzwanele Manyi were also dealt with in Part I of this Report. In this section of the Report only the contracts that the SABC concluded with Gupta entities will be dealt with including its contract relating to The New Age newspaper.

1344. Terms of Reference 1.1, 1.4, 1.6 and 1.9 of the Terms of Reference of the Commission are relevant to the SABC related topics. They are formulated in wide terms and read as follows:

"1.1 whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's..."

...

1.4 whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state"

1.6 "whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other government services in the business dealings of the Gupta family with government departments and SOE's"

1.9 "the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest".

1345. The SABC is an organ of state as defined in section 239 of the Constitution. It functions in terms of the Broadcasting Act 4 of 1999 , the Electronic Communications Act 36 of 2005, certain Treasury Regulations of March 2005, the Public Finance Management Act 1 of 1999 as amended, and the provisions of section 217¹⁰⁸¹ of the Constitution.

1346. The matters that were investigated by the Commission in respect of the SABC with which this section of the Report will deal are the following:

1346.1. the contract between the SABC and TNA Media (Pty) Ltd on the TNA Breakfast Briefings

1346.2. the Sale of the SABC Archival content to the Guptas ANN7 TV Station

1346.3. the agreement between the SABC and TNA Media on The New Age newspaper

¹⁰⁸¹

"217. Procurement

1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
 - a. categories of preference in the allocation of contracts; and
 - b. the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

- 1346.4. Broadcast Digital Migration
- 1346.5. the contract between the SABC and Multi-choice
- 1346.6. the irregular processing of VISA applications for the Guptas' Indian national employees
- 1346.7. Mr Sundaram's evidence on the nature and depth of the Gupta-Zuma friendship
1347. It is now appropriate to discuss each topic.

The contract between the SABC and TNA Media (Pty) Ltd on the TNA Breakfast briefings

1348. Ms Lulama Mokhobo (Ms Mokhobo) deposed to an affidavit and testified on 4 September 2019 on various aspects concerning the SABC, in particular, the contract entered into between the SABC and TNA. Ms Mokhobo's affidavit was handed up and subsequently accepted into evidence before the Commission as Exhibit "CC 21".

Ms Mokhobo's evidence

1349. Ms Mokhobo testified that upon her joining the SABC in her capacity as the SABC's Group CEO on 16 February 2012, it was not clear to her the circumstances under which TNA started broadcasting jointly with the SABC in regards to the events. However, it was a matter of concern for her that the SABC and TNA were operating without a contract, and that potentially posed dangers in that that continued relationship without a contract could impede on the integrity of the SABC. She found it imperative that a contract should be entered into.¹⁰⁸²

¹⁰⁸² https://www.statecapture.org.za/site/files/transcript/158/04_September_2019_Sessions.pdf.

1350. Ms Mokhobo testified that it was the responsibility of the legal department of the SABC, more particularly the then Acting Legal Service Group Executive, Mr Thabang Mathibe to attend to the negotiations and to draft the contract between the SABC and TNA. After the contract had been drafted, it was presented to her and she ultimately signed the agreement on behalf of the SABC, with Mr Nazeem Howa signing on behalf of TNA. The name of Mr Mathibe and his position within the SABC appears on each page of the contract attached to Ms Mokhobo's affidavit at pages LM10–LM31.

1351. The duration of the contract was thirty –six months with each party having a right to terminate the agreement on three months' notice.

1352. In terms of clause 5 of the contract there was a recordal of certain rights that TNA granted to the SABC. They were:

1352.1. the right to broadcast the events live at the venues on an exclusive basis as the host broadcaster and/ or broadcast partner of the events;

1352.2. sub-naming rights for the events to be referred to as The New Age Breakfast Briefing Brought to you by the SABC;

1352.3. the right to film, record and broadcast the events live on SABC 2, Morning Live;

1352.4. the right to repeat broadcasts at any time after the events without restriction during the term of the agreement; and

1352.5. to broadcast two events per month and would have at all times final editorial control.

1353. In terms of the contract between the SABC and TNA, it was recorded that TNA was desirous of hosting breakfast shows on a bi-monthly basis and would assign the live

broadcasting rights to the SABC on an exclusive basis. The further obligations in terms of the contract were as follows, TNA would:

- 1353.1. convene the events twice on a monthly basis or as mutually agreed between the parties in writing;
- 1353.2. procure, book and pay for suitable venues for each of the events;
- 1353.3. ensure pre-promotion of the events combined with alternative forms of marketing to ensure strong attendance which coincided with the SABC's on air promotion and TNA would pay for free classic advertising;
- 1353.4. make available the venues to the SABC on the event dates for the events;
- 1353.5. ensure the viable and professional invitation, ticketing and welcome process at the events;
- 1353.6. ensure bar and food arrangements would be made;
- 1353.7. organise, manage and produce the events in accordance with acceptable industry standards;
- 1353.8. make available sufficient space for proper and undisturbed conduct of the events for event personnel;
- 1353.9. provide sufficient power including all power outlets, power connections and/or power generators as well as all other infrastructure as requested by the SABC to facilitate the success of the events;
- 1353.10. ensure exclusivity to SABC as the official broadcast partner of the events;

- 1353.11. ensure that the SABC was acknowledged as the official broadcast partner of the events in all media communications relating to the events and which communications would be submitted to the SABC for approval prior to printing or broadcast;
- 1353.12. permit the placement of SABC branding in and around each venue in the ratio of 33.3% (thirty-three and a third percent) to the SABC, 33.3% to TNA and 33.3% to the event sponsor (which event sponsor would change from time to time and the SABC would be notified in writing) of the total branding and branding space for events and ensure that such banners placed would continue to be displayed for the duration of the events;
- 1353.13. ensure that no sponsorship was obtained from any media competitor or broadcaster in respect of the events without the prior written approval of the SABC and that such prior approval would stipulate the terms on which the SABC agrees that such sponsorship could be obtained and so duly approved;
- 1353.14. provide unobstructed access for the SABC event personnel to and from the venues to enable the SABC to conduct the events from the venues;
- 1353.15. provide furniture as agreed to with the SABC to install broadcast equipment;
- 1353.16. ensure that the branding material supplied by the SABC in terms of clause 9.1.5¹⁰⁸³ was adequately and correctly exposed in accordance with the directives of the SABC and subject to clause 7.1.12¹⁰⁸⁴;

¹⁰⁸³ The SABC would direct the placement of its branding in and around the venues in accordance with its branding plan and subject to clause 7.1.12 prior to the start date of the event.

¹⁰⁸⁴ TNA would permit the placement of SABC branding in and around each venue in the ratio of 33.3% (thirty-three and a third percent) to the SABC, 33.3% to TNA and 33.3% to the event sponsor (which event sponsor

- 1353.17. together with the SABC, procure logistical services, agree on the duration and content of the events in accordance with the SABC audience expectations;
- 1353.18. in conjunction with the SABC agree on guest speakers at least two weeks prior to each event. Further, that such guest speakers would not be limited to cabinet ministers but rather reflect the South African business and political climate in its entirety, including provincial premiers and other prominent personalities or newsmakers;
- 1353.19. comply with all SABC's reasonable instructions consistent with the agreement entered into by them;
- 1353.20. present itself (and procure the attendance of any subcontractor) to assist at such times as the SABC might require to conduct the events subject to the provision of a purchase order from TNA;
- 1353.21. timeously pay all amounts due to any subcontractors in respect of any services rendered by that subcontractor in terms of the agreement, if relevant; and
- 1353.22. the SABC would not be held liable at all for the payment of any amounts due to such subcontractor and the subcontractor would have no claim against the SABC.
1354. In turn, the obligations of the SABC were follows, the SABC would:
- 1354.1. broadcast the events on SABC 2's Morning Live;

will change from time to time and the SABC will be notified in writing) of the total branding and branding space for events and ensure that such banners placed shall continue to be displayed for the duration of the events.

- 1354.2. use its best endeavours to promote, give exposure to or advertise the event on any platform as it deemed appropriate;
- 1354.3. cover costs of the television production to promote the events;
- 1354.4. cover travel and accommodation costs for the SABC event personnel unless otherwise arranged;
- 1354.5. direct the placement of its branding in and around the venues in accordance with its branding plan prior to the start date of the event;
- 1354.6. provide TNA with a list of guests to be given access to the event;
- 1354.7. manage the booking and the scheduling of the airtime internally. Further, the SABC would have a discretion as to which timeslots to schedule the broadcast of events, taking into consideration newsworthiness and the operational resource requirements;
- 1354.8. provide TNA with a digital copy of the broadcast material from each event at its own cost; and
- 1354.9. further provide non-exclusive license in which TNA would be able to use part of the broadcast on its website in accordance with the provisions of clause 17;¹⁰⁸⁵ and

¹⁰⁸⁵ 17.1. The SABC shall own the intellectual property rights of all material broadcast from the events.

17.2. Any use of the material by way of publication, including radio, television or such other medium must acknowledge both parties by way of displaying both parties' corporate identities in the case of television broadcast or mention SABC News and the New Age by name in the case of radio and print both parties' corporate identities in case of print.

17.3. Any information provided by the SABC in terms of the agreement would not be used for commercial gain or purposes without a commercial agreement being entered into with the SABC.

- 1354.10. script, direct, produce and pre-record all promotional spots of the airtime; and
- 1354.11. promote, give exposure to or advertise the events in any manner it deemed fit, the style, manner and extent of such exposure or the advertising would be within the sole discretion of the SABC.

1355. Ms Mokhobo further testified that she had been able to determine that the amount approximately spent by the SABC in facilitating these events amounted to R20 326 980.00 (twenty million three hundred and twenty-six thousand nine hundred and eighty rand). However, she said that the SABC finance officials would be able to confirm that amount she had stated was spent by the SABC as she was no longer in the employ of the SABC.

1356. The terms of the contract entered into between the SABC and TNA upon our analysis, in conjunction with the amount spent by the SABC to facilitate these quite obviously, TNA derived more benefit in respect of the outcomes of the contract than the SABC.

1356.1. Ms Mokhobo testified that the number of the broadcast events increased over time from the two agreed to in clause 5.6 of the contract but there was no addendum to the original agreement to regulate such increase.

1356.2. Ms Yolande Van Biljon testified that an amount of about R 4 million was spent by the SABC on the outside broadcasts for the breakfast events that were covered for TNA. *"It amounts to a total of R 4 268 887.00 excluding VAT. There is a table that was prepared and it stretches from 2011 to 2017"*¹⁰⁸⁶. The reading of the contract itself made no mention of the costs attendant to, *inter alia*, the script, production, editing and outside broadcast of each event. These costs

¹⁰⁸⁵ Page 147 Transcript 3rd September 2019 Day 155. See also: Annexure "YB3": Exhibit "CC3" page 37.1 to 167.

were all carried by the SABC. The testimony of Ms van Biljon corroborates that of Ms Mokhobo that the frequency of these breakfast shows increased and they were held prior to the contract being entered into. This demonstrates that the contract was extended well beyond the 24 months agreed to in writing and it continued until 2017 without any addendum to the original contract. This conduct was irregular and it goes against the public procurement processes sanctioned by the National Treasury and those of the SABC itself.

1356.3. The evidence led on behalf of Transnet, for example, revealed that the TNA was billing some of the SOE's and departments for the breakfast events. In this regard the Transnet contracts and other SOE's are dealt with in Part II of the State Capture report released on 1 February 2022 from paragraphs 315 to 451 at pages 596 to 640.

1356.4. Clause 15 of the contract bore the heading: "*Breach and Termination.*" It regulated the conduct of parties if one of them was in breach. It afforded each a right to terminate the contract on notice to a defaulting party¹⁰⁸⁷. The material terms of the contract could easily mislead the SABC into believing that it was not incurring any costs in honouring the contract when in fact it did.

1356.5. TNA received free marketing from the SABC because it purportedly granted to the SABC sub-naming rights to refer to the events as "*The New Age Breakfast Briefing brought to you by the SABC*".

1356.6. There was a crew or personnel of the SABC that had to attend to the filming, recording and broadcast of outside events. These employees of the SABC had to move from the SABC studios to various venues, in vehicles with equipment

¹⁰⁸⁷ Clause 15 page "LM 23 to LM 24"

to ensure that there was adequate coverage of those events. All those costs were carried by the SABC.

1356.7. The Head of SABC News, Ms Phathiswa Magopeni testified that the contract was prejudicial to the SABC in that "if you have to cover a story you would deploy a reporter, a video journalist. If it is radio you would deploy a radio reporter. If it is digital you deploy a person who is going to take care of those needs. In the case the project or broadcast project that we would charge for as an outside broadcast are those that are beyond our general coverage. They require bigger deployments in terms of resources and this is where we start charging for our coverage which is not necessarily the content but it is the deployment, the costs of deploying resources to cover these stories. The number of journalist that you are going to send, the multi camera requirements for the story that you would be covering so that you look at all of that and then you would say this is how much it's going to cost us. If we were to hire out these facilities this is what we would get and therefore this is what it would cost us to cover the story. In the way it has been done it was handled by Executive producers who would decide and it has always been around R50 000.00 regardless of the extent of deployments and the arrangement that we have now it is with commercial enterprises because it is not only about the resources that are deployed, it is the airtime that client would have derived value from us putting content on the air. In some cases it is more than an hour but you pay R45 000.00 which only covers part of the deployment costs.¹⁰⁸⁸(our emphasis)

1356.8. Although it was TNA Media that was desirous of hosting the events, the SABC accepted the assignments to it of live broadcast rights on an exclusive basis

without any monetary benefit to be gained by the SABC from such events even for airtime on a prime slot during prime time on the popular Morning Live slot. This was clearly free advertising for TNA Media for its benefit and in turn for the members of the Gupta family. There is no doubt that the SABC lost revenue and incurred unauthorised expenditure as a result of the manner in which the contract was drafted and implemented.

1357. It is important to have regard to the evidence of Mr Rajesh Sundaram. It shall be recalled that he stated that TNA refused to let any credible external agency audit its circulation. Its revenue figures were kept a close guarded secret and the only saving financial grace was the regular *New Age* business briefing broadcast on SABC.

1358. Mr Sundaram stated that Mr Atul Gupta had twisted the arm of the SABC to give him a morning slot for a question and answer formal breakfast show, featuring key national and provincial Ministers and officials. He also testified that the breakfast shows earned them 1.8 million rand per show as the paper's marketing team had always been booking Ministers and multiple venues for broadcasts at a minimal expense for TNA. The Ministers and their respective departments paid the bill of expenses incurred by The New Age Breakfast Briefings broadcasts. It appeared from the evidence of Ms Mokhobo that the SABC was not aware that TNA was receiving revenue from the departments and the SOEs that were featured in the breakfast shows.

1359. Mr Sundaram says in his book that the New Age Business Briefing broadcast on SABC was "a cash cow", obviously, for the Guptas.

1360. Mr Sundaram also testified that Mr Atul Gupta informed him that he had raised his disquiet with President Zuma that the IEC were not giving The New Age newspaper advertising and that President Zuma had responded by saying that he would look into it. As a result of this evidence certain information was requested by the Commission

from the IEC aimed at establishing whether the IEC ever gave the Guptas or their entities advertising business and a letter responding thereto was received from Mr Mamabolo, The Chief Electoral Officer of the IEC. Later on he delivered an affidavit. It is important to record the following contents of the letter for context:

"Commission of Inquiry into State Capture

Follow-up Query: 30 June 2020

Question 1

Can you kindly confirm if the IEC has any other TNA transactions outside the reported Media Shop transaction of 2013? What we are trying to establish is if TNA received any business from the IEC before the alleged time of the Gupta/President Zuma meeting (around June/August 2013)?

Response to Question 1

Our answer to this question is in three parts:

(a) Newspaper Subscriptions: The IEC subscribed for daily New Age newspaper delivery. The cost of this subscription was R 15 672 between 2011 up to 2016.

(b) Interviews for current news: several officials of the IEC were interviewed by both New Age on matters related to the election programme. With respect to these interviews, there were no costs to the IEC.

(c) The spreadsheet attached as Annexure A entails all advertising expenditure of the IEC between calendar years 2013 and 2016. The total advertising spent during this three-year period is R149 689 948,33 of which R 709 902 was spent on TNA Media. The IEC did not directly enter into any advertising agreement with TNA. All advertising on TNA and other media was arranged and placed by Media Shop based on criteria which included viewership and readership. Placement of advertisements was at the discretion of the Media Shop.

Question 2

We would also like to establish if anyone in government, be it the President or even an official approached the IEC in an attempt to persuade the IEC to advertise in TNA, even if it eventually ended up in nothing. The "approach" piece is the relevant aspect of our investigation. Please assist with contact details of the former Deputy CEO of the IEC or someone who was in a senior position at the IEC in 2013 whom you believe can assist with this information.

Response to Question 2

Our answer is in two parts, 2a and 2b.

(2a). There is no record of anyone in government, be it the President or even an official approaching the Electoral Commission to persuade the IEC to advertise in TNA. We confirm that in the placement of advertisements, neither the President nor an official of government influenced the IEC in any manner whatsoever.

It is however worthwhile to put on record a meeting that was held on the request of Mr Nazeem Howa who was a senior representative at TNA to meet with former CEO, Mr Mosotho Moepya. It is important to also note that Mr Howa was at the time known to be affiliated with the Independent Group of newspaper. This meeting was held on 4 October 2013 and attended by former CEO, Mr Mosotho Moepya and Dr. Nomsa Masuku, the erstwhile Deputy CEO responsible for Outreach. Both Mr Moepya and Dr Masuku are now members of the Commission. Representatives from TNA Media were Mr Nazeem Howa and Mr Moegsien Williams.

The representatives of TNA introduced themselves as representatives of TNA and further indicated that they both had since left the Independent Group. Furthermore, they enquired about the possibility for sourcing advertising business for TNA. The IEC officials responded by indicating that advertisement placement was managed through Media Shop.

(2b). The senior officials in charge of this area of business in the period under review were former CEO, Mr Mosotho Moepya (moepyam@elections.org.za) and Dr. Nomsa Masuku (masukun@elections.org.za), who had only recently joined the Commission.

Question 3

Finally, can you kindly confirm whether there was a "big" advertising campaign in the newspapers, as suggested by Mr Sundaram, from August 2013 to the end of that year. I had previously included this question in the draft affidavit which I sent through to your office. It's not clear from Ms Bapela's affidavit if there is any truth to what Mr Sundaram alleges.

Response to Question 3

The 'big' advertising campaigns in the newspapers and other media were in line with the electoral activities in preparation of the two general elections in May 2014 and August 2016.

A further electoral activity with localised coverage was the by-election in Tlokwe in 2014/2015.

The series of advertising campaigns were pursued through various media houses and was not exclusive to TNA as detailed in Annexure A. The Media buyer would normally develop a schedule based on readership and viewership."

1361. The evidence of Ms Mokhobo, Ms van Biljon and Ms Magopeni do fortify a finding that the entity that benefitted unlawfully from the breakfast shows and the contract itself was TNA Media and in turn the members of the Gupta family. A finding in this regard should be made.

1362. In conclusion and based on the evidence, the contract in question was irregular and was created for the benefit of TNA Media and or the members of the Gupta family to the detriment of the mandate that the SABC has towards the public .

The sale of archive content by the SABC to ANN7 to the Gupta ANN7 TV Station

Evidence of Mr Josias Johannes Scott

1363. Mr Scott, a former Senior Sales Representative at the SABC, testified that he had been responsible for overseeing the sale of archival footage from the SABC to external purchasers. In evidence, Mr Scott focused on the archival content transfer that had been undertaken by the SABC to ANN7. Mr Scott's affidavit and annexures were admitted as Exhibit "CC2".

1364. Mr Scott's evidence focused on the detail of how the SABC's archival footage came to be in the possession of ANN7, including the procedures and administrative processes that ensued.

1365. Mr Scott testified that he was summoned by the former Acting CEO of the SABC, Mr Hlaudi Motsoeneng ("**Mr Motsoeneng**") to his office. He said that Mr Motsoeneng enquired from Mr Scott as to how the transfer of archival footage worked from the SABC to an external party. Mr Scott stated that he informed Mr Motsoeneng of what the process entailed and in response, Mr Motsoeneng then informed him, that someone reached out to him for assistance in obtaining archival footage from the SABC.

1366. Mr Scott testified that, subsequent to this meeting with Mr Motsoeneng, he was contacted by Mr Howa who asked for a meeting. They subsequently met and discussed how the SABC's archival content operated and the process that followed in order for SABC's archival footage, if it was transferred from the SABC. Mr Scott stated that at the time he met Mr Howa he was not aware that Mr Howa's enquiries related to ANN7. However, Mr Howa had requested 2000 minutes of archival content.

1367. After the meeting with Mr Howa, Mr Scott arranged to meet his manager, Mr Jimi Matthews to discuss Mr Howa's request for the 2000 minutes of archival footage, including the monetary value of the content. Mr Scott testified that Mr Matthews was authorised to deviate from SABC's price guide¹⁰⁸⁹ as the Chief Executive: News. Mr Scott said Mr Matthews deviated from the normal price of R100 per minute charged for archival footage to R70 per minute and that was the first time, according to Mr Scott's recollection, that a price deviation had taken place.

1368. The transfer of archival footage then took place after the R70 per minute of archival content was accepted by ANN7. An employee of ANN7, Mr Rahul, was then deployed at the SABC to copy the archival content. That process was facilitated by Mr Masimule, Mr Scott's assistant.

1369. Mr Scott in evidence stated that 1982 minutes of archival content was copied from SABC's archival footage, but in the light of the discount that had already been given to Mr Howa, he invoiced ANN7 2000 minutes that had initially been agreed upon between SABC and ANN7.

1370. Mr Scott furthermore testified on the copyright of the content used, after the archival footage had been copied from the SABC. Mr Scott stated that he would contact ANN7

¹⁰⁸⁹ Mr Josias Johannes Scott. Exhibit CC2, Annexure JJS-17.

or any media house to inquire as to whether they had utilised any of the content copied for broadcast purposes. Moreover, he stated that he would then invoice according to the information received from ANN7 on whether they had utilised any of the content copied and how much of the content was broadcast in the event that content had been utilised. However, there was no certain way to ensure financial accountability in the utilisation of archival content from ANN7 or any other entity that had purchased archival content.

1371. Mr Sundaram disputed Mr Scott's claim that ANN7 had only copied 1982 minutes of archival content. He testified that ANN7 had in fact copied approximately 100 hours of archival content and he was aware of this amount of archival content in ANN7's possession by virtue of him having occupied the position of an Editor at ANN7. At R70 per minute means 100 x 60 minutes resulting in 6000 minutes. At R70 per minute, this would mean that the SABC ought to have been paid at least R420 000. That is on the basis of the R30 per minute discount.

1372. Although the SABC had a mechanism of protecting its content by using the "burnt in time code", it was not used. When he was asked about this mechanism, Mr Scott stated:

"If you have a burnt in time code on your tape you cannot use it for anything because it is time code that runs at the bottom of the tape continuously. 1090 And you cannot use it for any programming whatsoever. But you cannot use that footage to do any production. The footage completely becomes useless."

1373. When asked whether the usage of the burnt in time code was something that was available at the time for him to use, he testified that it was available and he could have used it. The reason he advanced for not using it was this "When I approached them after Madiba passed away they immediately responded and they came back and they

declared in an honest way. Sias we have used 27 minutes of your footage. So I trusted them." He conceded that by simply relying on what ANN7 told him he could have deprived the SABC of revenue. He agreed that the method he adopted was not a commercially viable method as testified by Mr Sundaram.

1374. When Mr Sundaram was faced with Mr Sias Scott's, the former SABC Executive of Sales version of events, that the actual archival content sold to ANN7 was 2000 minutes from the SABC, he disputed Mr Scott's evidence and said that it was not a true reflection of what was actually taken by ANN7.

Evidence of Ms Nakedi Ramoshaba

1375. The Commission obtained an affidavit from Ms Nakedi Ramoshaba who was previously employed by ANN7. The Commission had requested her to provide an affidavit setting out her knowledge of the SABC archive footage that was sold to Infinity Media and was utilised by ANN7.

1376. Ms Ramoshaba worked for ANN7 as a Senior Archivist from 14 April 2014 and later took up the position of Archive Manager until August 2018. The channel was subsequently bought by Afrotone Media Holdings ("Afrotone") who thereafter renamed the channel to Afro World View ("Afro World").

1377. Ms Ramoshaba testified that her functions and responsibilities at ANN7 included:

1377.1. capturing content and transferring it onto the Diva Archive system, she said that the content would either be from the journalists on SD Cards and memory Cards or through a live feed, i.e. OB Van and Backpack; and

1377.2. the cataloguing of the content received.

1378. Ms Ramoshaba testified that, when she commenced her role as Senior Archivist at ANN7, the SABC archival content was already on the Diva Archive System and it was already circulating. She said that there was not much cataloguing to be done as it was not properly captured in the system, making it difficult to source the content or to put metadata. She testified that the content was not easy to locate because one couldn't see exactly where the footage was coming from as it was not given proper names and was therefore not searchable. The footage would indicate that it was ANN7 footage belonging to ANN7 .

1379. Ms Ramoshaba testified that, when she started working at ANN7, she requested the licences and the copyright documents relating to the SABC content and there was no information on which she could base her cataloguing. She would be silenced when she enquired about such information.

1380. She confirmed that content of the SABC was utilised by ANN7 during her tenure there. The content of the SABC was also acquired and used by Afro Media. When Afro Media bought the Channel, it absorbed the staff of ANN7 and her contract of employment changed from her employer being ANN7 to Afro World. The infrastructure and equipment were then transferred to Afro Media, with the result that when Afro Media acquired the Channel, the content of the SABC was transferred and was utilised by Afro Media.

1381. The content of SABC was utilised by Afro World. An example of this was the Marikana shooting footage. Marikana shooting happened on 16 August 2012 and ANN7 was only launched in 2013. That content belonged to the SABC, the Marikana footage couldn't have belonged to ANN7.

Evidence of Mr Rajesh Sundaram on the Sale of SABC Archives

1382. Mr Sundaram dealt with the sale of the archive content to Infinity Media by the SABC.

He testified that Infinity Media bought the content very cheap because of its association with the son of the former President Zuma, Mr Duduzane Zuma. Mr Sundaram stated that Mr Duduzane Zuma owned 30% of shares in Infinity Media. His evidence in relation to this issue must be read together with that of Mr Josias Johannes Scott.

1383. Mr Sundaram testified that he was told by a Gupta joint venture partner, Mr L Goel that their company had concluded an agreement with the SABC relating to the purchase of 100 hours of archived video footage for what he called "peanuts". He said that the actual market value of this footage shot over decades, including priceless footage of former President Nelson Mandela, would be worth millions of dollars. He said that he was told that the SABC officials were persuaded to sell this footage for far less than the market value. Mr Sundaram stated that Mr Nazeem Howa from Infinity Media told him that, given the close relationship between the Guptas and President Zuma, no one at the SABC would dare to question this deal. Mr Sundaram testified that Mr Howa told him that in terms of that agreement the relevant footage would be transferred to an ANN7 tape and later digitized. He said that Mr Howa told him that SABC had no way to monitor the use of such footage although he was told that ANN7 had agreed to pay the SABC every time the footage was played.

1384. When Mr Sundaram gave evidence before the Commission, he confirmed under oath the contents of his book as true and correct, thus giving the contents of his book the status of evidence. Accordingly, it is appropriate to refer to those parts of his book that may be relevant to the matters relating to the SABC that are being dealt with in this section of the Report.

1385. One of the matters Mr Sundaram has written about in his book is the archive footage that the SABC sold to the Guptas very cheaply. Here is what Mr Sundaram writes in his book about this topic:

"Rajesh, you must start the recruitment process soon and tie up with the international video news services and do a deal to acquire significant segments of the SABC's library and archives. I hope you remember the conversation we had about the SABC deal."

"I will start all this at the earliest, Laxmi ji," I said. During one of my meetings with Laxmi and YP in Delhi before I left for South Africa, Laxmi had told me of an elaborate plan to buy archival footage from the SABC, the South African Broadcasting Corporation.

He told me how the Guptas had got a nod from the state broadcaster to buy this valuable archive. The SABC had plans to set up a 24/7 news channel of their own, but they were willing to sell their archives for a sweet deal to the Guptas.

"They have all their archives on mini DV tapes. Their library is not automated or digitised, and it takes them ages to find any footage. We will bring these tapes to our studio and digitise them. So from day one we will have a tapeless library with systems that will make it possible for us to pull out footage within a few seconds.

"We know the people at the SABC, so we will get the footage at a very low rate. You will have to make sure that all the footage of historical importance at the SABC is included in the 100-hour bulk deal we plan to do with them," Laxmi told me.

But the SABC eventually did not allow the footage to be taken away from their office. Rahul Singh, a senior video librarian from India, was sent with mini digital video format tapes and asked to bring back 100 hours of footage from the thousands of tapes at the SABC archives.

He spent about a month going to the SABC every day and sitting at a video editing bay there and transferring all the valuable historical footage the SABC had in its tape library. By the time he resigned and went back to India, he had collected 60 hours of priceless archival footage from the SABC library.

"We are paying them a lump sum to get this footage. We have got a very sweet deal with them. The people at the SABC can be bought for a meal or a drink; they are willing to give away their treasure trove of historical footage for peanuts. They have a clause in the contract that says that we will have to also pay them a "per second" fee every time we air the footage we have taken from them but they are so stupid, how will they be able to tell what is their footage? How can they audit our use? We

will get all their footage forever at just this one-time cost,' Nazeem told Rahul and me when we were discussing the footage transfer later.

Rahul was also told to take anyone he interacts with at the SABC for a drink or meal any time they wanted to when he was at the SABC transferring footage. He was told by Nazeem that this cost would be reimbursed to him.

'Get all of Nelson Mandela's footage, get footage of the atrocities on the blacks during the apartheid years; we can use it to show the young people of today how the whites treated their grandparents and parents. This footage is priceless, and I want you to take as much of it as possible back with you. Even if you get more than 100 hours, get that, we will pay them under the table.' Atul told Rahul during our discussion.

The archival footage at the SABC was indeed of a very high quality and in my view worth millions of rands. Nazeem, Laxmi and Atul repeatedly told me that the contract with the SABC for this sale favoured ANN7, was drafted by Gupta lawyers and that the price of the footage was 'peanuts' compared to its real value.

Rahul digitised all the footage he got the very same day and catalogued and classified it on the video library system. This meant transferring the footage from tapes to servers. After the footage was tagged and put on the server, ANN7 was able to retrieve and air it in a matter of seconds, something that would take the SABC team hours or even days to do.

I have not been able to figure out why the SABC signed this contract and handed valuable footage shot over decades to a company that had far superior archiving technology and would be a rival to its own proposed 24-hour news channel."¹⁰⁹¹

Evidence of Ms Y. van Biljon

1386. Ms Yolande van Biljon furnished the Commission with an affidavit and gave oral evidence¹⁰⁹². She was appointed at the SABC as Chief Financial Officer on 25 June 2018. Much of what transpired was historical and happened prior to her tenure. She did, however, have access to relevant books and records and could give evidence on the topics presently under discussion.

¹⁰⁹¹ Indentured: Behind the Scenes at Gupta TV, p 55 – 56.

¹⁰⁹² Affidavit of 21 May 2019, Exhibit CC3, Transcript File 1/3, Day 155, p.137

1387. Ms Van Biljon testified that all relationships between the SABC and Infinity Media Networks (Pty) Ltd, relate to the sale and purchase of news archives by Infinity Media during or about October 2013 and March 2014. She testified that she was aware of the nature of the agreement described by Mr J. Scott but had no direct knowledge thereof. From the relevant records she was able to say that:

1387.1. Infinity was issued invoices amounting to a total of R405,840.00 (incl. VAT). In this regard she attached a schedule to her affidavit that reflects the composition of invoices to Infinity Media. The invoices were made up of R159 600.00 for the 2000 minutes to launch ANN7; R123 102.00 and R91 200.00 for 27 minutes and 20 minutes, respectively, of footage utilised in terms of what ANN7 and SABC had agreed upon in respect of copyright; and R31 920.00 for ANN7's declaration was received in respect of January and February 2014.

1387.2. Infinity did make these payments to the SABC;

1387.3. at no stage did the SABC make any payments to Infinity.

1388. Ms van Biljon testified that, as far as The New Age newspaper was concerned, the relationship between the SABC and The New Age had the following purposes:

1388.1. The New Age would supply newspapers on a weekly basis to the SABC;

1388.2. The SABC provided The New Age with certain broadcasting services and more particularly outside broadcasting services which were conducted at various venues across the country;

1388.3. With reference to a schedule she could determine that the SABC had made payment to The New Age for the delivery of newspapers in the sum of R908,035.57 incl. VAT;

- 1388.4. From what she could determine the SABC was never paid nor did it invoice The New Age for any of the so-called “breakfast shows” and other outside broadcasting services rendered by the SABC;
- 1388.5. From the internal records she could determine that the costs incurred by the SABC in this context amounted to R4,268,887 excl. VAT. A schedule reflecting this was annexed¹⁰⁹³. Travelling expenses alone amounted to R2,784,009.

The agreement between the SABC and TNA Media on The New Age Newspaper

1389. Ms Mokhobo, a former Chief Executive Officer deposed to an affidavit and gave oral evidence¹⁰⁹⁴. She joined the SABC on February 2012. She was asked about her knowledge concerning the distribution of The New Age newspaper by TNA Media and the “breakfast shows” topic. At the time of her appointment both of these events were already in place. The Acting Head of Legal Services, Mr T. Mathibe, had been instructed by Mr P. Mpila, the Acting General Manager for News, and Mr Mike Siluma as Acting Group Executive of News to attend to the “joint broadcasting agreement”. In terms of section D9 of the Table of Authorities in the applicable SABC Delegation of Authority Framework of 2012, the Divisional Management of News acted within their delegated authority in the decision to enter into such agreement. The relevant contract was concluded on 13 March 2012 and she annexed a copy of her affidavit. She signed it on behalf of the SABC and Mr Howa signed on behalf of TNA Media. The witnesses to the agreement were Mr Hlaudi Motsoeneng and Mr Jimmy Mathews on behalf of the SABC. Breakfast shows would be hosted on a bi-monthly basis and the SABC undertook to broadcast them on “Morning Live”. No partnership or joint venture was created. TNA Media undertook the main obligations to be able to host such event and

¹⁰⁹³ Exhibit CC3, YVB-038

¹⁰⁹⁴ Exhibit CC21 dated 22/8/19, LM 01-09 and Transcript File 3/3, Day 219, p. 11

would ensure strong attendance. At no stage was it envisaged that the SABC would invoice TNA Media for the services rendered and it was also not envisaged that the SABC would share in any profit made by TNA. In terms of the relevant legislation and policies within the SABC it was not permissible that the SABC derive any payment from any particular party in the sponsorship of any news events due to the fact that this might limit and/or impede the impartiality and independence of the SABC.

1390. Ms Mokhobo was able to determine (subject to SABC finance officials confirming this) that the amount spent by the SABC in facilitating those outdoor broadcasts over a few years amounted to some R20,326,980.

1391. She could also confirm that the events did not stay within the contract at the prescribed two events per month and suddenly escalated. She said that in certain cases they almost doubled. The decision to allow for the escalation was entirely within the purview of the News Division. The contract was also renewed. It was signed by Mr J. Matthews on 20 February 2015. By that time she had left the service.

1392. It was only when she was presented with certain facts by investigators of the Commission that she became aware that TNA was charging the various state-owned enterprises it had engaged with and who were part and parcel of the various breakfast shows. She said that during her tenure she had not been made aware of this. Also, she said that at no stage during her tenure did the SABC receive any payment from TNA Media in relation to those shows.

1393. Ms Mokhobo emphasised that the distribution of newspapers by TNA Media originated prior to her appointment. She said that the Board never requested that the relationship with TNA Media regarding the newspapers be reconsidered. In fact, she testified that she believed that the papers were being delivered to the SABC without an expectation of remuneration and purely by virtue of the fact that there was a relationship between

the parties pertaining to the breakfast shows. She said that she was not aware that the SABC was in fact paying for them. She could subsequently determine with the aid of the said investigators the amount spent by the SABC was approximately R930,873.61. She testified that at no stage was she aware of any authorisation relating to the newspapers or payment associated therewith.

President Zuma's version to Mr Sundaram's evidence

1394. On 15 to 17 July 2019, the former President testified before the Commission. He did not refute the evidence of his personal involvement pertaining to the establishment of The New Age newspaper or ANN7. He admitted his participation. He explained the reasons for him to support the birth of the ANN7 as follows: The Former President admitted that he became friends with the Gupta family and was involved in the entities as he found it as a good venture that would be beneficial for the public at large, with that, found nothing corrupt or untoward about his involvement or association with the Gupta family.¹⁰⁹⁵ Moreover, the Former President stated that many had turned their backs on him, particularly his children had suffered significantly by virtue of him being their father, and that the Gupta family assisted his children, when many had distanced themselves from him or his children.

1395. He stated that the members of the Gupta family were introduced to him by Mr Essop Pahad. They were from President Mbeki's home. They were introduced to him as good businessmen and comrades. He stated that they were again introduced by comrades from Gauteng who told him that they were providing transport for their employees to work, cook lunch for them and then take them back at sunset. One of the members of the Gupta family was a member of the International Council that was advising the President on economic matters. He found them to be very friendly. He learnt that they

¹⁰⁹⁵ Transcript, Day 133 pages 37 -40

were friends to late President Mandela and President Mbeki. He denied that he committed any wrongdoing with the members of the Gupta family.

1396. Here is Mr Zuma's version of his relationship with the Guptas and his role in the New Age newspaper and the ANN7 TV station:

98.1. There had been a problem that worried us- all of that in this country the media is very biased. At all material times it is just critical. It criticises the country etcetera. There is no alternative voice and if people could complain and say I abused them that one I could plead guilty because I then one day having known that we have been trying to have business who are progressive to establish a media sort of or candid voice of what is happening.

98.2. I think even people who are ANC members had tried even to partner with other people. It had never worked. At that time, I was the President of the ANC. I then said to them man and making a suggestion. Can you try a business- a media business- because you are comrades? We need an alternative voice. There are many attempts that have been made before by progressive people but they have never worked.

98.3. Is it possible that you could establish a newspaper? They have never thought of the idea and we discussed this. They finally said I think it is a good idea because it is business as well. I said fine. So they said no we will do something about it. They came back to say now they have decided they want to establish a newspaper. As soon as – they agreed because this was me as an individual talking about what we had seen as a problem that the media in this country is very negative.

98.4. In fact a number of things that are done which they supposed to be reported about at times they do not see the light of day only negativity. Once they agreed I then thought it would be important for me to make one person aware of this. One leader who was the Secretary – General of the ANC, Gwede Mantashe. I said Gwede I have talked to these comrades for them to do their business and they seem to be warm to the idea and thereafter I also informed the Deputy Secretary – General about this to say this is an initiative of these comrades but it is an important one.

98.5. So the two comrades and I listened to them at one time when they wanted to say how they want to go about this- this thing. So I agreed. When they were about to –when they were moving forward they then said can you help asking me. Give us a name. We do not know how to call this newspaper. So I said to them

there used to be struggle publications we used to have called Speak, Fighting Talk, New Age etcetera. So I gave all those names.

98.6. They loved this name New Age and that is how the paper was named. So they established a newspaper and started work. We were very happy. They even discussed that they were going to report about provinces in this paper. So there is no problem that is not reported to as always they are not in the national newspapers except if there is a big thing. Let us do something different as they were saying.

98.7. When this paper was operating and really being appreciated in the country to bring about a – an alternative voice. I then sat and said man the newspaper, fine we succeeded. I did – I do not know and I was thinking whether I could push then further. So I said to them this is very successful. What about a TV channel? I suggested the channel. Somebody can they say we are abusing this – this friendship. It was never the other way around. It was me who put them into trouble because I said your paper is so successful. I am sure your TV thing can be successful and they agreed. They said it is a good idea and they moved on it. I know that people who had problems had a lot to say about this.

98.8. I thought it was a very good thing that they did. There was no law broken there. There was no wrong things done. I discussed with business people many things when I was still in the Government. Even suggest certain things can you not do in your business. This was a normal kind of interaction. So they established this and indeed ANN7 brought fresh air in the country in terms of reporting. In terms of putting across progressive ideas.”

Broadcast Digital Migration

Dr F. L. Mutuvhi

1397. Mr F.L. Mutuvhi: Chief Director: Broadcasting Digital Migration with the Department of Communications. He deposed an affidavit¹⁰⁹⁶ and gave evidence¹⁰⁹⁷. His evidence concerns the role and responsibilities of the Department and entities participating in the Broadcast Digital Migration programme implemented (BDM). He holds a Master of

¹⁰⁹⁶ Exhibit CC24 dated 30 August 2019

¹⁰⁹⁷ Transcript File 2/3, Day 158

Commerce in Project Management degree and a PhD in Public Administration. On 16 October 2014 he was appointed as a project manager.

1398. Analogue television is the means by which video and audio is sent to the viewer over the airways using a terrestrial transmitter (tower) where a normal TV can receive it without an external device. Digital television is the means by which video and audio is sent to the receiver over the airwaves using a digital terrestrial transmitter (tower) where a normal TV can receive it using an external device called a decoder/set-top-box.
1399. The objective of the programme is to release radio frequency spectrum divided through migration of television broadcast from analogue to digital platforms without people losing television broadcast signal in order to expand access to mobile communications and broadband access. The programme is to be achieved through connecting citizens to digital network by means of digital decoders (terrestrial and satellite – DTT (DTH)) as well as integrated television sets. The BDM Programme Management Office (PMO) was established in October 2014 to provide technical support and programmatic implementation of the programme.
1400. In May 2015 he was appointed to the position of Chief Director: BDM after a selection process. He described challenges at the time, the role of the Department in relation to other departments, details of the roll-out plan in various phases (interrupted by litigation by eTV in the High Court, Supreme Court of Appeal and Constitutional Court), changes in policy by Cabinet Ministers, and the actual roll-out “journey” so far. He provided a status report as at August 2019 and no doubt there have been new developments since then.

1401. All of the above makes interesting reading. In his evidence¹⁰⁹⁸ he stated that the key ingredient of finalisation delayed mainly by Government dithering as well as the litigation, was the availability of the decoders. Nothing in his affidavit or evidence falls within the Commission's terms of reference. The main issue however, at least since 2008, was the question whether set-top-boxes should have encryption capabilities or not. The background to this debate and the role of various Ministers of Communications is fully set out in the minority judgment of the Constitutional Court in a judgment dated 8 June 2017¹⁰⁹⁹. The majority agreed with the factual background description. The main question was actually whether the Minister (Muthambi) had the legal authority to make a policy determination. The debate whether there should be encryption or not and the role of Ministers in this context do not concern this Commission having regard to its mandate.

Mr A.L. Jansen van Vuuren

1402. Mr A.L. Jansen van Vuuren: SAPO Project Manager for the BDM Project. He made an affidavit dated 2 September 2019¹¹⁰⁰, and also gave evidence¹¹⁰¹. He stated that the Post Office was appointed as Distribution Partner for the BDM Project. He described its functions and duties. He noted some 17 challenges facing the Post Office. As is now almost usual, one of these was the fraudulent completion of the set-top-box installation voucher forms. This should concern the prosecuting authorities. He provided a summary of SAPO investigations relating to lost or damaged items. He also

¹⁰⁹⁸ Transcript File 2/3, Day 158, p. 40 of 92

¹⁰⁹⁹ *Electronic Media Network Ltd and Others v eTV (Pty) Ltd and 14 Others*, Case CCT 140/16, 141/16 and 145/16, 2017 (9) BCLR 1108 (CC)

¹¹⁰⁰ Exhibit CC31

¹¹⁰¹ Transcript File 2/3, Day 160

gave details of the BDM roll-out status. Nothing in his affidavit or evidence brings this topic within the parameters of the Commission's mandate.

Mr L.R. Kruger

1403. Mr L.R. Kruger: Technical Advisor to Ministers D. Pule and Y. Carrim (Encryption and Introduction to the MultiChoice contract). Mr Kruger made an affidavit dated 21 August 2019¹¹⁰², and gave evidence¹¹⁰³. He has extensive experience gained over a period of 40 years in the fields of Telecommunication, Broadcasting and Data Communications. During the period January 2012 – July 2014 he was employed by the Department of Communications as a Technical Advisor to the mentioned Ministers. His services were in relation to the Digital Terrestrial (DTT) project roll-out for South Africa. As a core part of his duties was his role to ensure that the Minister and other departments directly under the Minister's control all understood what the DTT project was about. In essence the BDM project is about converting the "old" analogue TV and Radio transmission/transmitter equipment to the latest digital broadcasting equipment. He gave examples of the advantages of the project. The Government decided to provide ± 5 million set-top-boxes (STB's) to poor households at no cost, to ensure that the majority of the population could receive TV and Radio signals on all TV sets irrespective of how old the units were. He gave details of the STB control system which is in essence a computer which has the capability to control STB's by being able to "disable or switch on/off a STB". For instance, a stolen STB can be disabled and a non-paying subscriber can be "switched off". Disabling the STB also stops the unit from functioning in/on foreign networks.

¹¹⁰² Exhibit CC20

¹¹⁰³ Transcript File 3/3, Day 162

1404. However, one of the critical capabilities of the control system is that of Encryption. This function “scrambles” data to prevent unauthorised “taping/copying” of TV and Radio programmes.
1405. He established that Sentech (the Government owned TV and Radio signal distributor) already had an STB control system in place and fully operational and working with trained staff. During March 2012 he wrote to Minister Pule informing her of Sentech's capabilities. Initially the SABC technical team and management agreed to Sentech providing STB control in the DTT network and agreements were drawn by Sentech indicating costs, responsibilities etc. for the use of the STB control system. The SABC and eTV were on the verge of signing agreements with Sentech when Mr Hlaudi Motsoeneng, the acting COO of the SABC suddenly decided that the SABC would no longer require STB control.
1406. On investigating the reason, it turned out that Mr Motsoeneng had signed an agreement with MultiChoice in which the latter “banned” the SABC from using an STB control system on the DTT network. Among the reasons MultiChoice was providing and had also convinced Mr Motsoeneng of was that providing an STB control system would render the SABC TV channels as no longer “Free To Air”, supposedly meaning that all SA citizens would have to pay to watch TV. His view was that this was all nonsense as all Free To Air channels were just that: no viewers of FTA channels would have to pay to watch. MultiChoice's network is fully encrypted, which is just to protect the network and the data travelling on the network. The conclusion of the DoC project team was that MultiChoice did not want another PAY TV channel operator in South Africa.
1407. Minister Y. Carrim set up a forum to try to get all parties to agree to using an STB control system or to come to a consensus as to how to run the SA DTT network according to the existing SA Policy document. MultiChoice, supported by Mr Motsoeneng, approved

all suggestions of STB control in the DTT network. The Department in turn received support from both the then CEO Ms L. Mokhobo and the then Chairlady Ms E. Tshabalala.

1408. However, another change of Ministers again put the STB control system further in dispute when Minister Faith Muthambi with full support of Mr Motsoeneng decided to go against the Government and ANC recommendations that an STB control system be implemented in the DTT network. This points to a clear abuse of power and the question is why President Zuma stood idly by (if he did) and tolerated this change in policy? Both Minister Muthambi and Mr Motsoeneng were, of course, keen supporters of President Zuma, as various witnesses have confirmed. Parts of Mr Kruger's evidence was severely criticized by Mr Mawela on behalf of MultiChoice as being unscientific, unfounded and of little evidential value. This appears hereunder.

Ms L. Mokhobo: Former Chief Executive Officer

1409. The evidence of Ms Mokhobo relating to her knowledge of the TNA Media and breakfast show topics has already been dealt with. In her first affidavit she did not refer to the MultiChoice agreement. She first testified on 4 September 2019 and returned on 26 February 2020¹¹⁰⁴. She had deposed to a second affidavit¹¹⁰⁵. In the main this dealt with events leading up to the signing of the MultiChoice agreement with the SABC, which will be dealt with hereunder. However, as far as Digital Migration was concerned, she described the key issues as follows:

"The country-wide digital migration program has been stalled for 11 years now since its policy, the Broadcasting Digital Migration ("BDM") Policy was approved by Cabinet and reflected in the Government Gazette on 8 September 2008. This

¹¹⁰⁴ File 3/3, Day 219

¹¹⁰⁵ Referred to as Exhibit CC21A dated 16 October 2019

resulted from a seeming lack of policy agreement and/or implementation coherence as the Ministerial leadership of the Department of Communications changed hands:

Ms Ivy-Matsepe-Casaburri: June 1999-April 2009;

Ms Manto Tshabalala-Msimang: April 2009-May 2009;

Mr Sipiwe Nyanda: May 2009-October 2010;

Mr Roy Padayachie: November 2010-October 2011;

Ms Dina Pule: October 2011-July 2013;

Mr Yunus Carrim: July 2013-May 2014;

Ms Faith Muthambi: May 2014-March 2017;

Ms Ayanda Dlodlo: March 2017-October 2017;

Ms Mmamoloko Kubayi-Ngubane: October 2017-January 2018;

Ms Nomvula Mokonyane: January 2018-November 2018;

Ms Stella Ndanebi Abrahams: November 2018 to August 2021; and

Ms Khumbudzo Ntshavheni: August 2021 to date

The Department of Communications effectively changed hands 10 times in as many years, resulting in real leadership crisis as the broadcasting sector found itself with no solid Digital Terrestrial Television ("DTT") direction as it pertained to Set Top Box ("STB") technology choices, despite the provisions of the then existing BDM policy of 2008."

Mr Yunus Carrim

1410. Former Minister of Communications (between 10 July 2013 and 24 May 2014) deposed to an 80 page affidavit on 30 January 2020¹¹⁰⁶. He also gave oral evidence¹¹⁰⁷. This section will only deal with his comments regarding digital migration, which Mr Kruger had already partially explained. Soon after his appointment as Minister, he discovered that he had entered a challenging environment. There were deep suspicions and hostilities between officials in the department. He said that the department lacked coherence and cohesion. They, nevertheless, had to ensure that South Africa met its

¹¹⁰⁶ Exhibit CC41

¹¹⁰⁷ Transcript File 3/3, Day 218, p. 46 of 169

17 June 2015 deadline for the completion of the digital television regulation process, set by a United Nations Agency, the International Telecommunications Union. In addition, other Ministers and senior ANC leaders made it clear to him that they needed to prioritise the inter-related tasks of digital migration and the Broadcasting Policy.

1411. He gave an overview of the importance of digital migration, but stated that he was no expert on the topic.

1412. The BDM Policies of 2008 and 2012: The objectives of the 2008 policy were the following¹¹⁰⁸:

1412.1. "Strengthening South Africa's capacity to be a more effective information society and knowledge economy;

1412.2. Reducing the digital divide between the rich and poor;

1412.3. Releasing much-needed radio frequency spectrum for wireless broadband and mobile communications;

1412.4. Stimulating the development of the local electronic manufacturing industry and job creation;

1412.5. Provision of e-Government services;

1412.6. Encouraging additional television channels and in different languages to promote access to information and contribute towards nation-building;

¹¹⁰⁸ Exhibit CC41, CC41-YC-011 to CC41-YC-012

- 1412.7. Providing a framework for community television and mobile broadcasting services;
- 1412.8. Providing access to broadcasting for people with disabilities ;
- 1412.9. Developing the electronic manufacturing industry;
- 1412.10. Encouraging the creative industries; and
- 1412.11. Serving the needs of the disabled.

1413. The 2008 BDM policy stated that the STB's would have a control system for the following reasons:

- 1413.1. To protect government's investment in subsidised STB's;
- 1413.2. To protect consumers from low quality non-conformant STB's;
- 1413.3. To unscramble encrypted signals;
- 1413.4. To stimulate the local electronic manufacturing industry;
- 1413.5. To prevent the STB's from being used outside South Africa and disable stolen STB's; and
- 1413.6. To allow for mass and unique messaging and interactivity with government".

1414. In 2012, an amendment to the 2008 BDM policy was gazetted, mainly to revise the transition period for digital migration and to adopt the advanced DVB-T2 as the DTT standard and soften the use of the STB control system ("2012 BDM"). The 2012 BDM policy retained the main objective as set out in the 2008 BDM policy, namely, to facilitate

the development of the South African electronic manufacturing industry. However, the term “*encryption*” was deleted, but the “control” on STB’s remained to ensure that STB’s complied with the standards of the South African Bureau of Standards (“SABS”).

1415. On 14 September 2012 the STB strategy was gazetted. It emphasised the need to procure STB’s from local manufacturers, ensure local industry is protected and encourage black-owned STB manufacturers. SABS standards had to be adhered to without which TV households would become vulnerable to grey market importers.

1416. When Mr Carrim became Minister, the project was already 5 years behind with the beginning of the STB roll-out programme. Some were of a technical nature, the other related to legislation. There were also four Ministers of Communications between the five-year Presidential term 2009-2014. Why? There is no readily apparent answer for this.

1417. Mr Carrim emphasized that STB control would meet the policy objectives of a conditional access system with encryption functionality. “STB control” was thus not a technical term but a policy directive to protect STB’s. Mr Carrim said that for the Government it did not matter which system of control was used.

1418. During 2012 an ANC conference emphasized the need for competition in the Pay-TV sector. The manufacture of STBs should be linked to a long term vision to manufacture integrated digital TVs. Digital broadcasting should be implemented as soon as possible to accelerate the release of “digital dividend” spectrum. He referred to more than a dozen criteria for deciding the approach to control STB’s but details are not necessary.

1419. The BDM policy was again amended on 4 December 2013 by Cabinet. It took into account the value of Digital Migration, the eTV judgment, delays in the STB roll-out programme, the failure of the facilitation process to arrive at some consensus, the

criteria for STB control and South Africa's highly concentrated media market (with reference to Naspers) amongst others.

1420. As they saw it then, there was a vicious struggle between MultiChoice (which had been unbundled from Naspers and was a listed JSE company since 27 February 2019) and eTV over STB policy – and both sides tried to influence the SABC. ICASA fully supported the control policy, as did Sentech.

1421. A key aspect of the debate between FTA and Pay-TV broadcasters was that Pay-TV takes the FTA programmes for free and re-broadcast them and uses the programmes to build market share. In so doing, they acquired two revenue streams and subscriptions, which was unfair. STB control would allow FTA broadcasts to protect their content against unauthorised use.

1422. Mr Carrim gave details of the high concentration of the media industry, dominated mainly by Naspers which had a terrestrial subscription TV in the form of M-Net, owned by MultiChoice, had more than 98% of direct to home (DTH) satellite subscription TV and controlled the country's internet service providers mainly through MWeb.

1423. The SABC/MultiChoice Agreement will be dealt with separately hereunder. At this stage it must be remembered that it is not this Commission's task to decide whether or not encryption is desirable and who should be the service providers seen from all angles. That is Government policy. The role of Naspers in the Apartheid era is also shameful but now irrelevant in the context of the Commission's terms of reference. Mr Carrim went into great detail about certain incidents where he was insulted by either Mr Bekker and/or Naspers itself. He spent a great deal of time defending his own integrity where it was attacked by a comment that he was "in the pocket" of eTV. He described the personality defects of Mr Bekker in great detail as well. At the end of the day this was not part of this Commission's mandate, but some detail may be provided on the

question of whether the government's policy was "captured" somehow. It does seem that intense lobbying by interested parties did take place but that in itself is not unlawful, but should most probably be addressed more concisely in an "Ethics Code" made applicable to Ministers, Deputy-Ministers, Members of Parliament and Directors-General of government departments and chief executive officers of state-owned enterprises. At the end of the day Mr Carrim himself conceded that, despite allegations and counter-allegations of corruption, he himself could not attest to having personal knowledge of any fraud and/or corruption in respect of the SABC/MultiChoice Agreement. Naspers's alleged attempts to improperly influence government policy on digital migration will be dealt with.

The contract between the SABC and Multi-Choice

1424. In what follows the sequence of events will be found in the 2nd supplementary affidavit of Ms L. Mokhobo¹¹⁰⁹. She also gave oral evidence again in that context on 26 February 2020¹¹¹⁰. There is no point in repeating her oral evidence on those topics set out in her affidavit. However, one particular comment strikes the eye, and is a thread that runs throughout the SABC saga and I quote¹¹¹¹:

"Chairperson: If there is something you can say now you can do so.

Ms Mokhobo: Chair the SABC had been contested terrain for years prior to my going there – in there. There were people who reported to other people in powerful places and they would try to throw their weight around and impose their will. I think the former Minister yesterday articulated how he was told by Mr Motsoeneng in no uncertain terms about certain issues that Mr Motsoeneng had no right knowing about. He boasted to me many times how he was close to the President, how he had been at the President's until two am, how this or the other, President, President, and I think I mentioned in the previous session when I said in front of you Chair that

¹¹⁰⁹ Exhibit CC21(a) dated 16 December 2019

¹¹¹⁰ Transcript File 3/3, Day 219, p. 2 of 157

¹¹¹¹ Transcript File 3/3, Day 219, p. 57 and 58 of 157

there would be Ministers coming to see Mr Motsoeneng and not me, which was strange as the head of the company if you have the high ranking individual you would expect them to see you, but there were agendas and sub-agendas, we certainly didn't the serve the same agenda. For me the agenda was very simple, it was go in make the organisation work, make it deliver on its mandate, make sure that everything is does is lawful and ultimately make sure that it is profitable. But there were other sub-agendas and Chair speaks of culture, certainly the interest of MultiChoice became paramount to Motsoeneng to the detriment of the organisation. Yes, he claims that he succeeded in bringing R500 million into the organisation, it was R100 million per year. There is somewhere where I do very rough calculations about different scenarios for the SABC, that was very little compared to what the SABC was forced to concede as a result of this man. Chair the SABC had a history of Boards not agreeing with each other and just as they say the tone gets set at the top you know, if the top being the Board itself was not agreed on certain principles and we had Board Members siding with this person and others siding with the other there is no way that the organisation could work as a healthy organisation, and as I say this had been going on for years. I am not sure what will fix that organisation, other than to ensure that people who are brought in are people of real integrity who are ethical, who are totally committed to what is good for the organisation and do not forget at any given time what their true purpose in the organisation is, but sadly is was not to be."

1425. It is appropriate to repeat the next important facets of her affidavit regarding the said agreement¹¹¹².

Events leading to the signing of the MultiChoice contract

1426. The sequence of events leading to the signing of the Contract were as follows:

1426.1. On 15 May 2013, when MultiChoice ("MCA") wrote a set of proposed provisions to Mr Motsoeneng that would form the basis of MCA/SABC Multi-Channel Agreement it (MCA) had seen an opportunity to cause a major policy shift in the digital terrestrial TV transformation project.

¹¹¹² Exhibit CC21(a), CC21-LM-72 to CC21-LM-83

1426.2. On 6 June 2013 the SABC Interim Board and MCA's Chairman Mr Letele, CEO Mr Intiaz Patel together with Mr Greg Hamburger met to discuss the substance of the future Multi-Channel Agreement as a follow-up to the letter referred to above. Of particular contention, as may be gleaned from the verbatim minutes of the said meeting, were two provisions that effectively dictated the SABC's 2008 Digital Migration Broadcast (BDM) Policy-based strategy on STB encryption. They stated the following:

Point 9 "The offer presupposes that all SABC Channels on its DTT platform will be made available to the public unencrypted, without a conditional access system and thereby incidentally receivable by the MCA DTT decoder."

Point 10 "MCA, the SABC, Sentech (if required), work together to promote carriage of all the SABC's free to air channels on the SABC free-to-air multiplex will be made available to MCA satellite platform, subject to available capacity. This is in order to enable the SABC to generate revenue from day one".

1426.3. She was joined by SABC Board member, Mr Mavuso, in categorically stating that points 9 and 10 were not enforceable through the future Multichannel Agreement, and entirely dependent on the Department of Communications (DoC) and government deciding to amend the 2008 BDM Policy to reflect the change. Moreover, the DoC had begun a Must-Carry Regulations review process, which could ultimately lead to the SABC being paid for any channels that were broadcast through MCA and other satellite platforms.

1426.4. On 2 July 2013 she took an emergency leave of absence from and returned to work on Monday 8 July 2013.

1426.5. She became aware of the signing of the business agreement between SABC and MultiChoice when the former chairperson, Ms Tshabalala informed her of the decision to enter into the contract in her absence. She accused her of being derelict in not being available on the day when the Finance, Investment and

Procurement sub-committee ("FIPT") of the Board sat and "took the decision" to mandate Messrs Motsoeneng and Tiaan Olivier ("Mr Olivier") to proceed with the signing of the contact (between MultiChoice and the SABC). She was obviously shocked at her attack and proceeded to give her full details of her leave of absence.

1426.6. It will be noted hereunder that Mr Mawela on behalf of MultiChoice had a substantial different version including Ms Mokhobo's inexplicable failure to refer to all relevant correspondence.

1426.7. Effectively, Mr Hlaudi Motsoeneng ("Mr Motsoeneng"), Mr Tiaan Olivier and Ms Ellen Tshabalala ("Ms Tshabalala"), by entering into the aforementioned agreement on behalf of the SABC, had decided to force the SABC to support MCA's quest by arbitrarily taking the far-reaching decision to declare the set-top box encryption mechanism as wholly unjustifiable. To them, the SABC's gain of just over R500million over a period of five years was far more important than the overall impact this was going to have on the total digital transformation trajectory of the country. In concluding its investigation into this matter, the Competition Commission stated: *"Being able to influence a policy on encryption materially impacted the structure of the market in that it protected MultiChoice's dominance in the PayTV market in that the STB Control would have significantly challenged the dominance of MultiChoice particularly in lower LSM segments of the market* (pg., 7 (17) of the Competition Commission Ruling of November 2018). This was also in violation of section 2 (h) of the Broadcasting Act 4 of 1999 which reads: " ... *ensure fair competition in the broadcasting sector*".

- 1426.8. It is noted that she said nothing about certain findings of the Competition Appeal Court which, in respect of the contention that the Agreement gave MultiChoice control over SABC's public policy on STB decryption capability, held that "the agreement per se does not prevent (the SABC) from adopting a public policy supporting encryption. What it does is to constrain it from encrypting the free-to-air for the duration of the agreement"¹¹³.
- 1426.9. It was patently clear at that time that neither Mr Olivier, Mr Motsoeneng nor Ms Tshabalala (as the Chairperson of the Board), understood the gravity and future impact of their actions to both the entire public and the industry.
- 1426.10. Additionally, the entire process leading to the signing of the contract was deeply flawed in that it flouted the SABC's own Delegation of Authority Framework of 2012.
- 1426.11. Secondly, the minutes of the FIPT meeting of 2 July 2013 show no express approval from the chairman of the committee, Mr Vusi Mavuso, for the signing of the contract to be executed. An order which was in fact given was that the Contract should be given to a senior legal advisor to review and that "such review notes be provided to the Board for comment and approval". As will be shown hereunder these conclusions are not supported at all by relevant correspondence leading up to the conclusion of the agreement.

¹¹³ See *Caxton and CTP Publishers and Printers (Pty) Ltd and Others v MultiChoice (Pty) Ltd and Others* (Caxton CAC) [2016] ZACAC2 at par. 92

Mr Y. Carrim's version:

1427. The agreement was concluded a week before he became Minister. He was informed that there had been no SABC Board approval prior to signature. Moreover, Mr Motsoeneng did not have the legal authority to sign such on behalf of the SABC.

1428. After quoting criticisms raised on public platforms, he referred to the finding of the Competition Commission¹¹¹⁴ made on 9 November 2018. It found that the encryption aspect of the agreement resulted in a notifiable change of control as envisaged in section 12 (2) (g) of the Competition Act 89 of 1998 as amended. It said: "Being able to influence a policy on encryption materially impacted the structure of the market in that it protected MultiChoice's dominance in the Pay-TV market in that the STB control would have enabled new DTT entrants into the market that would have significantly challenged the dominance of MultiChoice particularly at lower LSM segments in the market". He did not add that the said Caxton application would be referred back to the Competition Tribunal for a further hearing on the issue whether the Agreement influenced the SABC's public position on STB decryption capability.

1429. According to Mr Carrim, the actual issue was not about whether STB encryption is correct or not: it is the issue about Naspers/MultiChoice being able to influence government policy, or as he calls it "regulatory capture"¹¹⁵⁷. The SABC had continually supported STB content prior to his appointment, while Mr Motsoeneng approved it, supported in his view by Ms Tshabalala, Chairperson of the SABS Board as from early October 2013.

¹¹¹⁴ Exhibit CC41, YC-037, par.118

¹¹¹⁵ Exhibit CC41, YC-049, par. 160

1430. Mr Carrim made a number of other observations which have found support in the evidence of others that has been dealt with above, including Mr Sundaram and Ms Mokhobo. Mr Motsoeneng saw himself as some sort of interlocutor between President Zuma and himself. As the debate over STB control escalated, he told Mr Carrim) on several occasions that “u Baba” – meaning President Zuma would not or did not agree that there should be STB control. Ms Tshabalala also expressed her doubts about him following President Zuma’s apparent wishes. He in turn reminded them of the December 2012 ANC conference. There is no explanation why he did not report this internal resistance to President Zuma. Mr Carrim’s opinion was that Ms Tshabalala believed that, since she was appointed by the President, she was untouchable to him. He stated that he was aware that she and Mr Motsoeneng had several meetings with the President on the STB control matter at which he was not present. Ideally, he said, a Minister should be informed at least of the outcomes of these meetings, if he or she was not present. I would suggest in turn that a Minister, once appointed, has certain constitutional obligations, and should not be timid to exercise them.

1431. I have perused the file containing the Minutes of Meetings of the various Boards of Directors prepared by Ms T.V. Geldenhys who made it abundantly clear that the entire process of writing and final approval of the Minutes can be tracked through the office of the company secretary. The Minutes were accurate and the whole process of recording them was transparent. She denied that she had ever said, as Minister Carrim stated, that “Minutes of Meetings were at that time changed under pressure”. Having regard to the detailed process described by her¹¹⁶, I would accept her evidence as being true. I could find nothing in those Minutes that reflected the fact that “secret” meetings, or a meeting without Mr Carrim had been held. In the Minutes of a Special Meeting of the Board of Directors held on 18 March 2014¹¹⁷, there is one mention of Ms Tshabalala

¹¹⁶ Exhibit CC43, TVG-003, par. 5-6

¹¹⁷ Exhibit CC43, TVG-178 at 180

the Chairlady, saying that "the matter had been escalated to the President". No further details were provided nor asked for.

1432. Mr Carrim emphasised on a number of occasions that the relevant policies were not his, even though it had been his task to process them through several collective structures, notably Cabinet. The said policy was originally adopted by Cabinet in 2008 and Cabinet in 2012 retained it with the changes explained above. The policy changes effected while he was Minister were discussed in several ANC NEC Communications subcommittee meetings. They were unanimously agreed to in all structures, including Cabinet¹¹⁸. Furthermore, the policy adopted by the Cabinet in 2013 did not "enhance conditional access" (a form of STB control), but instead made it non-mandatory, in other words, those broadcasters who did not want to use STB control were free not to do so, and those who wanted to use it were free to do so, provided they paid the state for its use. Control, in terms of the December 2013 policy, was optional.

1433. It has been already mentioned that Mr Carrim was of the view that, to his knowledge, there was no fraud and/or corruption in respect of the SABC/MultiChoice Agreement. He also added that his 80 page affidavit was not about the merits or demerits of STB control, but about the irregular manner in which the policy was changed to serve the narrow interests of Naspers/MultiChoice and others who colluded with them.

1434. It also appears that Mr Carrim's main gripe was against Naspers which during March 2014 suggested that "the current Minister is in the power of eTV and temperamentally unsuited to high political office. We understand that he will not survive the elections in May...". Mr Carrim obviously took offence and strenuously denied the accusation.

¹¹⁸ Exhibit CC41, YC-062, par. 216-217

1435. On 31 January 2018 during a MultiChoice press conference, Mr Mawela, the Chief Executive Officer of MultiChoice, apologised to him. He felt that this apology did not go far enough and expected an apology in the same newspapers that had initially published the accusation. In my view this part of the debate does not fall within the Commission's mandate, as Mr Carrim had all civil remedies at his disposal.
1436. He was not re-appointed as Minister in 2014 but denied that his affidavit was trying to settle scores. He also stated that he had known nothing about the Gupta emails about the MultiChoice/ANN7 contract.
1437. Apart from the above his main concern, as said, was not about the specific merits or demerits of STB control but about the exercise of influence by Naspers/MultiChoice outside the conventional ethics of lobbying to determine policies. This was a form of "regulatory capture". There are obviously degrees of such lobbying which occurs in most democratic States to some greater or lesser degree. In my view there is no evidence of conduct that would bring this "regulatory capture" within the ambit of the Proclamation read with its Schedule.
1438. The MultiChoice agreement came up for renewal in mid-2018 and, according to Ms Mokhobo, a new contract is in place. It was approved by the new Board, negating much of the "evidence" that it had been improperly entered into.
1439. On 31 January 2018 Mr Mawela, the CEO of MultiChoice, referred to a review that had been initiated by them during November 2017. The Board said "we made some mistakes in our dealings with ANN7, but there was no evidence of corruption or any

illegal activity". It said that they would not be renewing their contract with ANN7 once it had ended by 20 August 2018. The said board of review made the following findings¹¹¹⁹:

"It is common practice to pay for content, including local news channels.

The commercial terms of the ANN7 contract are within acceptable parameters associated with the establishment and cost of producing a news channel.

The analysis of the ANN7 contract highlighted the complexity of negotiating a start-up local news channel – a process which is very costly. The negotiations with ANN7 began at a time when MultiChoice wanted to add local black voices to reflect more diverse local news coverage on the DStv platform.

In addition, annual payments to eTV had escalated substantially, heading towards R500m p.a.

The commercial rationale was to assist in the development of the new ANN7 channel by contributing to its costs, allow it a reasonable term of three/five years to develop and, should it fail, let the agreement lapse at the end of the period as allowed for in the contract.

The value paid to ANN7 was not abnormal relative to other local news channels carried on the DStv platform. MultiChoice paid an amount to ANN7 for a start-up-24-hour local news channel that was substantially lower than that paid to eTV and higher than that paid to SABC – both established news channels. MultiChoice.

The committee found that the R25-million upfront payment to ANN7 made on 1 April 2016 was neither abnormal nor unusual. Other channels had, in the past, received upfront payments as part of channel negotiations.

A detailed data analytics exercise covering five years of payments made by MultiChoice to ANN7 was completed, and this validated the payments against the contract.

The process of negotiating the ANN7 agreements was a collective MultiChoice management process and not that of an individual. In the committee's opinion, this materially reduced the risk of corrupt activity.

MultiChoice regularly makes submissions to regulatory stakeholders, both formal and informal. This is in accordance with acceptable practice. No irregularities were found in the way the regulatory submissions were made.

No correlation was found between payments made to ANN7 and the MultiChoice lobbying effort. However, the Committee believed that processes can be improved.

¹¹¹⁹ Exhibit CC41, CC41-YC-197 to 199

Whilst it is acknowledged that MultiChoice had in the past not performed a due diligence on any channel ownership, the committee is of the view that in future such due diligence should be instituted and should be compulsory for all new start-up channels.

Given the fluid nature of lobbying, which is part of the broadcasting and telecoms industry globally, MultiChoice shall study international best practise and formalise its lobbying process. The process shall be adhered to by all involved to ensure that an acceptable line is not crossed in such activities.

When concerns were raised about the owners of ANN7, MultiChoice management should have acted more swiftly to escalate issues to the Board for formal consideration and decision.

The committee's findings and recommendations have been accepted by the Boards of MultiChoice and Naspers."

1440. MultiChoice referred to the absence of national guide-lines on lobbying. This is, indeed, a topic that should be seriously considered by Government. There may often be a fine line between lobbying for commercial gain, even if done so vigorously and persistently, and lobbying with the view to obtaining an unlawful advantage.

The Response of MultiChoice: Affidavit of Mr C.P. Mawela

1441. Mr CP Mawela filed a 170 page response affidavit dated 28 July 2020, together with 3 arch lever files with relevant annexures¹¹²⁰. He was the Group Chief Executive Officer of MultiChoice and a registered Professional Engineer based in Dubai. He did not give oral evidence.

1442. The Table of Content sets out the various topics dealt with in detail in the said affidavit. It becomes immediately apparent that many of those topics, although interesting, have nothing to do with the mandate of this Commission. There was acceptable evidence that the Guptas had played a role, had benefited, or had an improper influence on

¹¹²⁰ SABC-MultiChoice Submissions

particular officials or Ministers. I have dealt with the instances where such did become apparent.

1443. In my opinion, after having studied the said affidavit there are only two headings (which would include in part criticism of the evidence of Mr Y. Carrim, Mr Kruger and Ms Mokhobo) which are relevant and would fall within the Commission's terms of reference. They are the MultiChoice lobbying which in particular offended Mr Carrim, and the conclusion of the SABC Agreement, with particular reference to the negotiations, SABC Board approval and the views of the Competition Tribunal, Commission and the Appeal Court.

MultiChoice Lobbying

1444. The introduction to this topic really says it all, and is supported by documentary evidence. It says that MultiChoice's open and unambiguous opposition to STB decryption capability was well known and well documented. It embarked on a rigorous campaign against such capability and remained consistent in its position. It did so in order to protect the interests of its subscribers, the broadcaster sector, and the public, as well as its commercial interests in ensuring fair competition. MultiChoice maintained that at all times it engaged in lobbying that was both lawful and appropriate.

1445. Section 195 of the Constitution reads:

"195. Basic values and principles governing public administration

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- a. A high standard of professional ethics must be promoted and maintained.
- b. Efficient, economic and effective use of resources must be promoted.
- c. Public administration must be development-oriented.
- d. Services must be provided impartially, fairly, equitably and without bias.

e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.

f. Public administration must be accountable.

g. Transparency must be fostered by providing the public with timely, accessible and accurate information.

h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

2. The above principles apply to-

a. administration in every sphere of government;

b. organs of state; and

c. public enterprises.

3. National legislation must ensure the promotion of the values and principles listed in subsection (1).

4. The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

5. Legislation regulating public administration may differentiate between different sectors, administrations or institutions

6. The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

1446. Section 195 (1)(e) contemplates public participation in policy making processes.

However, in South Africa there is also public participation beyond policy making that is public participation in the legislative process where the public is invited to make written and/or oral submissions before a Bill can be passed into law.¹¹²¹ There is also direct

¹¹²¹ Section 4 of the Promotion of Administrative Justice Act of 2000

engagement between stakeholders and decision-makers and indirect engagement through petitions and media campaigns.

1447. The over-arching term “lobbying” describes direct and indirect engagements between the state and private parties with the aim of influencing legislation, policy or administrative decisions.

1448. It was said that MultiChoice was acutely aware that, while lobbying contributed towards a responsive democracy and better decision-making, it could also be abused. There were no laws prohibiting lobbying or regulating its different forms. The Executive Members Ethics Act 82 of 1998 and the Parliamentary Code of Ethics prohibit members from receiving any payment, gift or benefit from a third party in order to adopt a particular view or position. Also, all engagements with the state are subject to anti-corruption legislation. Corporations are subject to the Companies Act 71 of 2008 and the Competition Act 89 of 1998.

1449. MultiChoice states that participation by stakeholders is particularly important in a licensed and highly regulated industry such as broadcasting. Stakeholders must have a say in how, when, why and to what extent their businesses are regulated by the state. I agree that this must be so. Therefore, an enabling and stable legislative, regulatory and policy framework is critical to the growth and viability of licensees. The sector requires certainty and predictability.

1450. MultiChoice has a dedicated regulatory affairs department. Its key function is to contribute to the creation of an enabling and appropriate regulatory framework that is conducive to the continued growth and viability of the broadcasting sector.

1451. It engages frequently with Government and regulatory bodies. Lobbying is issue driven. There is also collaboration within the industry. MultiChoice’s primary method of

participation and lobbying is through the consultation processes initiated by the Department of Communications, Parliament or ICASA. When responding to a paper issued by a Minister or ICASA, it will offer its assessment of the proposal and the extent to which it agrees or disagrees with the proposal. The affidavit refers to a number of detailed examples.

MultiChoice's lobbying on the Encryption Debate

1452. Mr Carrim had suggested that there had been improper lobbying. MultiChoice said that this was not true. It said it simply actively engaged in the various consultation processes. It made dozens of written representations. It published its position in the media, for all to see. The lobbying was directed at persuading the Minister not to adopt STB decryption capability. It said it had no knowledge of whether Mr Carrim would be re-appointed after the 2014 elections. It said that it played no role in the decision of President Zuma.

1453. eTV supported encryption but this did not impact on the commercial relationships between the parties.

To sum up: there is no evidence on which a finding can be made that MultiChoice's lobbying in this regard included acts of fraud and/or corruption.

1454. The SABC Agreement is a commercial contract between the SABC and MultiChoice, for the licencing of rights in respect of television channels for a term of 5 years.

1455. In terms of this agreement:

1455.1. MultiChoice acquired the right to distribute and market specific subscription and free-to-air channels developed, produced and made available by the SABC.

These channels are the Entertainment Channel, the News Channel, and the SABC free-to-air digital terrestrial television channels.

1455.2. The SABC received fees in consideration for the rights to broadcast and distribute the said channels, and was also entitled to all revenue received from sales in respect of advertising and sponsorship on all of its channels. The SABC also acquired the right to distribute a MultiChoice free-to-air terrestrial entertainment channel.

1456. Certain technological requirements were included, and one such was that the SABC's free-to-air digital broadcasting signals should not be encrypted for the duration of the Agreement.

1457. The Agreement, concluded during the term of office of an interim SABC Board, survived the scrutiny of two subsequent Boards: the Board appointed in September 2013, which considered and debated the agreement before proceeding with its implementation; and the Board appointed in October 2017, which resolved to renew the agreement in August 2018. I believe that this is an important consideration.

Negotiation of the Agreement between the SABC and Multi-Choice

1458. Mr Mawela concisely refers to the negotiation process, and, as often happens in litigation, hearings or arbitrations, a different picture emerged than the one first presented, after the other side was heard. This applies especially to the evidence of Ms Mokhobo.

1458.1. MultiChoice submitted a written proposal to the SABC on 15 May 2013, setting out the key terms of the proposed agreement, based on discussions and

feedback from the SABC. The MultiChoice proposal, which included the encryption constraint, was unequivocal.

1458.2. It indicated that it wished to enter into an agreement “based on the following proposal¹¹²²”. Under the heading “Proposal” there followed a numbered paragraph setting out the terms of the proposal. The encryption constraint was set out in paragraph 9 of this proposal.

1459. MultiChoice made it clear that it was making “an offer” and that it appreciated that the agreement would “be subject to both parties” board approval.

1460. A meeting was held on 6 June 2013 between MultiChoice and the SABC. It was recorded. A transcript was attached to Mr Carrim’s affidavit. The Commission provided MultiChoice with a copy of the audio recording and it was noted that the SABC transcript contained some material inaccuracies¹¹²³. Accordingly, it procured a professional verbatim transcription with Mr Mawela attached as annexure “M49”.

1461. The recording clearly refers to Ms Mokhobo, (the Group CEO at the time) saying: “So the only area that we are proposing to yourselves, that we come back to you, is clause nine. As it is this afternoon, there is a meeting that’s due to take place at the DOC which is discussing precisely the DTT matter. Eh, we may actually be able to come back to you much sooner”.

1462. After a further discussion Ms Mokhobo said: “...we will come back to you with finality on clause nine”.

¹¹²² The letter was addressed to Mr H. Motsoeneng. Exhibit CC42, Annexure LVB 014, p. LVB-148

¹¹²³ Mr Mawela’s affidavit, p. 81, Footnote 148

1463. MultiChoice then enquired about anticipated timeframes for the SABC to revert, to which Ms Tshabalala responded on behalf of the SABC: "...the matter is going to be escalated to the board meeting which [is] taking place on the 12th which is next week...And the finality will be next week".

1464. MultiChoice sought clarity: "So we will hear from you after the board meeting?" The SABC confirmed that it would, and Ms Tshabalala reiterated: "...we will also express urgency into the matter so that when it goes to the board on the 12th there's a resolution".

1465. Mr J. Mathews (SABC Acting Head of News) added: "We're quite keen to get going and so the, we're confident that on the 12th the board will give us a nod".

Conclusion of the agreement between the SABC and Multi-Choice

1466. On 19 June 2013 Ms Mokhobo wrote to MultiChoice (copying Ms Tshabalala). The letter¹²⁴ reads as follows: "The Board and Executive Management has duly considered MultiChoice's proposal... and we are pleased to inform you of the decision to proceed in accordance with the proposal as the terms that will be agreed between the SABC and MultiChoice".

1467. In a letter dated 20 June 2013¹²⁵ MultiChoice replied to Ms Mokhobo's letter of 19 June 2013. Mr Mawela has expressed the view that it was inexplicable that Ms Mokhobo did not disclose this letter in her affidavit, or her evidence to the Commission. I must agree, and her failure to do so, casts a cloud over the whole of her testimony as to how the agreement was concluded. Mr Mawela wrote to Ms Mokhobo this:

"Dear Lulama,

¹²⁴ Annexure "M51" to Mr Mawela's affidavit.

¹²⁵ Annexure "M52" to Mr Mawela's affidavit.

Thank you for your letter dated 19 June 2013. We are delightful that your board has agreed to the broad terms as contained in our letter of 15 May 2013. We are in the process of drafting the agreement on this basis. I am informed that our legal teams have already been in contact and will liaise on the finalisation of the documentation as soon as possible. We share your excitement about this mutually rewarding project”.

1468. It is important to note that Ms Mokhobo did not respond to MultiChoice's letter of 20 June 2013, nor did she give any indication to MultiChoice that it had misunderstood her letter.

1469. The parties then proceeded to draft the SABC Agreement in accordance with the terms of the MultiChoice proposal. The initial draft agreement was circulated by MultiChoice to the SABC on 27 June 2013. The SABC made comments on 30 June 2013. After some discussion via email, further versions of the draft were circulated on 3 July 2013, and the agreement was signed later that day.

1470. In his affidavit Mr Mawela described in some detail the commercial rationale of the encryption constraint. It is not necessary to deal with that evidence.

1471. The SABC News Channel was launched on 1 August 2013 and in a television interview on the same day, Ms Mokhobo welcomed the launch as a significant milestone for the SABC.

1472. Mr Carrim also made a speech at the official launch and expressed unconditional support for the “public-private” partnership.

1473. On 25 September 2013, the interim SABC Boards' term came to an end. Acting President Motlanthe appointed 12 new non-executive members to the SABC Board. It is apparent from the evidence given to the Parliamentary Portfolio Committee on

Communications in December 2016, that the new Board considered and debated the terms of the agreement before proceeding with its implementation.

1474. On 16 October 2017 a new SABC Board was appointed for a five-year term. The new Board renewed the SABC Agreement on 14 August 2018¹¹²⁶. In an interview on the same day, Mr M. Mxakwe, the Group CEO of the SABC, said: "Certainly it is. (a "clean deal"). The Board has ensured that good governance is in place for this deal. So, we're very confident that it is".

1475. As far as Competition proceedings were concerned, Mr Mawela described these in some detail. Of importance is that the Competition Commission, after an investigation, reported on 9 November 2018 that in its view the SABC Agreement did not give MultiChoice control over the SABC archive. This clearly contradicts the stated views of Mr Carrim on this topic.

1476. It is in my view clear from the objective evidence referred to above, and the conduct of the parties, that MultiChoice had entered the Agreement in good faith on the understanding that the SABC's representatives had obtained the necessary approval from the SABC Board and Executive Management, and held the requisite authority to negotiate and conclude the Agreement. It had no knowledge of any of the internal irregularities such as they were, and MultiChoice relied on Ms Mokhobo's personal assurance that the SABC Board and Management had accepted its proposal before the agreement was signed. Views to the contrary must be accepted.

1477. Mr Kruger gave technical evidence which Mr Mawela severely criticised as his testimony before the Commission went beyond facts of which he could claim personal

¹¹²⁶ V. Bayi file, Annexure LVB 005.

knowledge. For purposes of the Commission's mandate, there is no necessity to deal with different views on technical topics.

Criticism of Evidence of Ms Mokhobo

1478. Ms Mokhobo's evidence is justifiably subject to criticism. She had no technological expertise yet gave incorrect views relating to aspects of STB technology. Her evidence revealed a misunderstanding of key clauses of the Agreement, but that is not the crux. As I have said, she inexplicably did not disclose MultiChoice's letter of 20 June 2013. Her involvement in the relevant negotiations does not support her evidence that she was "taken aback" when informed of the agreement. There was also no factual basis for her assertion that the agreement was hurriedly effected while she was away on leave.

1479. The Public Protector found that she ought to face disciplinary proceedings for her role in approving irregular increases to Mr Motsoeneng's salary. However, she resigned between the Public Protector's provisional and final reports on 15 November 2013 and 17 February 2014 respectively.

1480. In conclusion on this topic, there is no evidence that MultiChoice had been involved in any improper, unlawful conduct, still less conduct which amounted to fraud or corruption.

The Irregular processing of VISA applications of the Guptas' Indian employees for ANN7

1481. Mr Sundaram was offered the position of Editor whilst in India by Mr Goel. He considered the employment contract presented to him by Mr Goel and he subsequently recruited other colleagues in India to join him at ANN7 in South Africa. Upon the

negotiations of his contract of employment he was informed by Mr Goel that he would receive an 'intra-company' visa and that he would be awarded permanent residency in South Africa, even though his presence in South Africa would be dictated by a two-year employment contract. He stated further that Mr Goel informed him that an Intra Company Transfer Permit would be issued in no time as they had an arrangement with the High Commissioner in South Africa. Mr Sundaram testified that he did not go for any interviews or followed any other processes other than attaining a yellow fever certificate and police clearance certificate which he submitted for the purposes of his visa application form. Mr Sundaram was issued with an intra-company visa, even though Infinity Media had no roots in India and Essel Media had no relation or business association to Infinity Media.

1482. In his book Mr Rajesh Sundaram writes:

"The Guptas seemed to know when the labour department was sending an inspector to the site. All Indian nationals would be moved away, and the inspectors would be taken to lunch afterwards. 'It does not cost money to buy loyalty of an official in South Africa. All it takes is a free meal or a drink', Atul boasted to me once."¹¹²⁷

1483. At some stage in his book Mr Sundaram writes about how Mr Ashu Chawla could pull strings in government. He wrote:

"Ashu was the CEO of the Gupta-owned Sahara Computers. He had lived in South Africa for many years and was the Gupta's point man for any coordination with the president and the South African government. He was particularly close to President Zuma's son Duduzane.

I heard his name mentioned for the first time when I was asked to apply for my temporary residence permit under the intra-company transfer process before I left India for South Africa.

'It can take months to get a South African work permit. It is a cumbersome process. We have to advertise the position in South African newspapers and then wait for six

¹¹²⁷ R Sundaram, 'Indentured' p69

months, after which we provide evidence that we have not found a suitable local candidate. Only then can we start the process of getting a work permit. Even so, if there is an official who does not agree, the request for a work permit can still be rejected,' Laxmi had told me right after I signed the contract to work for Infinity Media.

'But Ashu ji is a genius, and he has found a way around it. We will show the visas of people going to work in South Africa as intra-company transfer. Just fill in the visa form, get police and medical clearance and get back to my office. My office will issue papers certifying that you are an employee of Essel Media being transferred to South Africa,' Laxmi added.

'But all the people I have recruited to be the core team to launch ANN7 have got contracts from Infinity Media and not Essel Media. They have never worked for Essel Media. I hope this is not illegal?' I asked.

'Absolutely legal, Rajesh. What rubbish are you thinking? Trust me Ashu Chawla will tell Shakeel at the South African High Commission to accept your application for Ms Shakeel and his bosses at the visa section have a message from the South African president's office to expedite the visas. Do you think the president would do something illegal?

Uday Kumar from HR went to the High Commission directly without informing Ashu a day later.

The High Commission refused him entry, the reception connected him to the visa section, and the guy who picked up the phone told him, 'There is no Shakeel at the visa section.'

Laxmi was very upset when he found out. He sat Uday down and read out the rules for applying for a visa in the future.

'Look Uday, I am upset that you would make such a stupid mistake. You should inform Ashu ji, and only when he tells you the appointed date and time should you go or send anyone to the High Commission.

It is not simple. They have to speak with the most senior people in government, and only after that is a message sent to the High Commission to accept documents and process them without creating a fuss,' Laxmi said in a tone that was not his usual polite one.

So it was clear to me very early on, even before I ever met him, that Ashu could pull strings in the government. He was close to the president and had a reputation for getting the toughest jobs done expeditiously for the Guptas."

1484. Infinity Media, through its attorneys, Van Der Merwe & Associates, in their letter¹¹²⁸ dated 4 October 2013 objected to the evidence of Mr Sundaram on the basis that he, *inter alia*, had entered into a valid written employment contract which had a confidentiality clause in it. They contended that he was bound by the terms thereof and should desist embarking on a smear campaign against their client and from publishing any comments in regard to his employment with them.

1485. The former Director-General of Home Affairs, Mr Apleni made a submission to the Commission dealing with the allegations made by Mr Sundaram. The Parliamentary enquiry which was conducted into the same issue is relevant to this portion of the evidence. Mr Apleni explained the visa process as follows:

"10. It is also important to indicate that any first visa or permit to enter the Republic, under the Immigration Act, is applied for, and issued, at a South African High Commission or Consular Mission in the country of residence of any individual wishing to enter the Republic. The exception could be for those countries that are visa exempted. It is further important to indicate that South African High Commission or Consular Mission is managed by a person appointed by the Department of International Relations and Cooperation.

(DIRCO) and the visas are issued either by an official of the Department of Home Affairs or, in cases, where a department official has not been deployed, by an official of DIRCO. In this regard, I wish to refer the attention of the Commission to an Agreement signed between the Department and DIRCO, which Agreement is attached hereto and marked Annexure 8 for ease of reference. Furthermore, an extract of the delegations issued in terms of Section 3(2) of the Immigration Act, which were applicable during the time I was Director – General of the Department is attached marked (Annexure "8A"). I point out that the issue of visas by foreign mission is delegated to an Administrative Officer or Foreign Assistant whilst the issue of work permits is delegated to an Administrative Officer or Foreign Assistant whilst the issue of work permits is delegated to a Control Immigration Officer or Senior Administrative.

¹¹²⁸ Exhibit CC1 (b) –RS -29 Annexure "F1 to F4"

11. As explained on paragraph 9 above, on receipt of the memo from the Minister's office, on the 17th September 2013, my then office requested Inspectorate Unit to investigate the matter and provide a report regarding their investigations into the matter. The investigations were finalised and was forwarded to the Minister's office as evidenced by (Annexure 9). In summary, the report dealt with the 8 foreign nationals alleged to be in the country without proper documents, 40 foreign nationals employed at ANN7, of whom 9 were on visitor's visa. However, 3 of the employees had already left the Republic and on the six remaining, the employer indicated that they already approached the Department for a waiver of the requirements for a work permit. 31 of the employees were found to be in possession of Intra-company transfer visas. However, 1 employee had already left, which employee was found to be Mr Sundaram.

12. With regard to the 8 foreign employees, the Report indicated that:

- (i) The employer confirmed 4 employees, namely, Anand Prakash, Sanjay Pandey, Deepak Kaushik and Vishnu Shankar. However, the 3 departed from the Republic on the 5th and 6th September, respectively, except Anand Prakash.
- (ii) The other four (4), namely, Ravi Puri, Shamin Hussain, Y.P. Singh and Sunil Kumar, who were consultants, and employed by Essel Media and all have since left the Republic.

Therefore, the investigations, according to the report, covered a wide spectrum of foreign nationals who were employed at ANN7. The overall interpretation of the report is that the foreign nationals at ANN7 had documents, however some not complied with the conditions of their visas. It is also important to note that when the submission was forwarded to the Minister."

1486. Question No. 2490 was posed by Mr McIntosh of Cope to the Department as follows:

"Whether the Department will take any steps with regard to allegations (details furnished) that some staff members from India were employed illegally and without work permits by Afrika News Network 7. If not, what is the Department's position with regard to (a) this matter and (b) other whistle blowers who bring similar occurrences to the attention of the Department. If so, what are the relevant details?"

1487. The Department responded that it acted immediately on the allegations:

"A preliminary investigation conducted by the Department confirmed that eight foreigners were in possession of visitor's permits and in the country legally. The condition of their permits allowed them to attend business meetings. The

Department discovered that four of the eight foreigners had already left the country and the remaining four were found to be conducting training for the employees but they were not on the payroll of ANN7.

Despite the fact that ANN7 did not consider them to be their employees since they were not remunerated for such an activity, the Department found that the four persons have violated the conditions of their permits and were therefore ordered to leave the country. The Department has confirmed that they all have left the country.”

1488. The Department also stated that whistle blowers were encouraged to call the departmental hotline and were expected not to prove the allegations. The reply to the National Assembly was published on 20 September 2013.

The nature and depth of the relationships between Mr Jacob Zuma and the Guptas

1489. Mr Sundaram¹¹²⁹ is a journalist from India who has over 23 years of experience having worked with various media houses. He came to the Republic of South Africa to take up employment with Infinity Media Networks (Pty) Ltd (“Infinity Media”). He stated that he was approached by Mr Laxmi Goel (“Mr Goel”), the owner of Essel Media, a joint venture partner with the Gupta family in Infinity Media. He was employed as an editor whose obligations included setting up the ANN7 TV station.

1490. In the main his evidence dealt in some part with “The New Age”, the “New Age Breakfast Briefings”, the SABC Archive deal and his reply to the criticisms of his affidavit by Mr M. Williams, the editor of the New Age Newspaper from 2012 to 2017, as well as the editor of the television news channel “African News Network 7” (“ANN7”)¹¹³⁰. Mr Williams chose not to testify before the Commission nor did he apply to cross-examine anyone.

¹¹²⁹ Affidavits and Exhibits CC1(a) + (b), (f) his book, and 1(e). Submissions by Mr M. Williams regarding Mr Sundaram’s affidavits, Supplementary affidavit CC(1)(g), Transcript File 1/3, Day 104, p. 4 of 219

¹¹³⁰ Submissions by Mr W. Williams, Exhibit CC(1)(e)

1491. In his first affidavit of 5 April 2019 he gave a brief background summary of the New Age topic, the ANN7 channel, but also the SABC archive deal, which I will revert to under a separate heading. He also described visa and labour law violations by the Guptas which is a topic to be referred to the Department of Home Affairs, which he did. His supplementary affidavit of 29 April 2019 will be dealt with under a separate heading.

1492. It is useful and appropriate to quote from his first affidavit:

"I arrived in South Africa on the 3rd of June 2013 and stayed here til September 2, 2013. During this time I worked with the Gupta family owned Infinity media and worked as "Editor" to set up 24/7 television news station called ANN7.

An account of my interactions with the Gupta brothers, former South African president Zuma and my experience setting up the television station have been given in the book "Indentured, Behind the Scenes at Gupta TV".

I hereby affirm that the contents of this book and events described in it are true to the best of my knowledge.

After I arrived in South Africa I got to know that the then president Jacob Zuma's son Duduzane was a 30 percent shareholder in Infinity media.

However, it was president Zuma who was more involved in the project and its setting up than his son.

I was part of a delegation from Infinity media that had three meetings with president Zuma at his official residence in Pretoria to review progress of the television news channel ANN7.

The delegation comprised of Ajay Gupta, Atul Gupta, Nazeem Howa, Moegsien Williams, Ashu Chawla and me.

These meetings comprised of two parts. The first hour and a half was spent telling president Zuma about the progress in the television project. Here he was (sic) brief about the progress in the construction of the studios, hiring and technical purchases. He would also give feedback on various aspects of branding. For instance he would give feedback on the logo designs.

He also had a keen interest in the investments being made for the projects. Major expense heads were narrated to him.

He would also discuss at length about the editorial policy he would want the station to follow. This included instructions to ensure that the station does not end up being

an "out and out propaganda station for the ANC". He wanted the editorial team to cover news items related to his rivals within and outside the ANC, but wanted to subtly show them in a negative light.

Duduzane Zuma was never part of these meetings.

The second part of these meetings were about businesses other than the proposed television project. I was asked to move out of the room during this time.

But from my conversations with Atul Gupta, Nazeem Howa and Ajay Gupta it was clear this time was utilized to seek Zuma's help to overcome challenges in their other businesses.

After one such meeting I was told by Ajay Gupta that they had complained to president Zuma about how the Independent Election Commission, IEC was not giving the Gupta owned newspaper "The New Age" any advertising from its multi million Rand advertising budget. He said rival newspapers were being paid. He told me that at the end of the meeting the president assured them that he would look into the matter.

The second half of the meetings were also used to inform president Zuma about his cabinet colleagues who were reluctant to attend the "New Age Breakfast Briefings" organised by the Gupta owned newspaper and aired on SABC.

I was told by Nazeem Howa that these "Breakfast briefings" were "insanely profitable" for them as the entire cost of broadcast was borne by the SABC. The New Age had to invest in just the flimsy permanent props and the cost of the venue and hospitality. They earned by selling tables (sic) at these events. He told me that often times (sic) the cost of the venue and hospitality was also picked up by the department or ministry that the dignitary came from.

He also told me that the tables too were sometimes booked by the departments and ministries from the budget.

I was told president Zuma helped not only in convincing the ministers and officials to attend these events and would also persuade them to use tax payers money to pay for the venue and hospitality and ask stakeholders to buy tables at these events.

As Duduzane Zuma was a shareholder in the Gupta's media venture at that time, he would be a direct beneficiary of these "insane profits".

These meetings happened after what is now known as the "Waterkloof scandal". The scandal and its (sic) fallout in the media had made little impact on the relationship between the Gupta brothers and President Zuma.

Zuma met the brothers warmly and extended all courtesies and hospitality to the brothers and took to them as close confidants."

Mr Sundaram's visits to President Zuma's Official Residence

1493. Reference has been made above to Mr Sundaram's affidavit. The crux of his affidavit is that the Infinity Media delegation which included himself had three meetings with President Zuma at his official residence in Pretoria. Mr M. Williams, Mr Ajay Gupta, Mr Atul Gupta and Mr N. Howa were the others. His interactions with the Gupta brothers and former President Zuma were also described in his book "Indentured, Behind the Scenes at Gupta TV", the contents of which he confirmed as correct. He testified that President Zuma showed particular interest in the television project and investments made in the project. Mr Sundaram testified that President Zuma even discussed the editorial policy at length with the Gupta brothers.

1494. His second supplementary affidavit¹³¹ is more detailed. He arrived in South Africa from India on 3 June 2013 and remained in South Africa until 2 September 2013. During this time, he worked with the Gupta family-owned Infinity Media as "Editor" to set up the 24/7 television news station called ANN7. He was part of four meetings between former President Zuma and the ANN7/The New Age teams. Three of these meetings took place at his official residence and the 4th at the Midrand office of ANN7. Each one of these meetings is dealt with below.

The First Meeting: 22 June 2013

1495. The first meeting took place on 22 June 2013. Mr Sundaram testified that he was told by Mr Atul Gupta on 21 June 2013 that the appointment with President Zuma was scheduled for 09h30 the following morning, namely, 22 June 2013. He had earlier been told to prepare a detailed presentation about all aspects of the proposed TV project for the President. Three copies of his presentation were printed and bound. The

¹³¹ Exhibit CC(1)(b) of 29/4/2019

presentation contained details of such a confidential nature as would normally only be shared with stakeholders. He was also told that the President's son, Mr Duduzane was a 30% shareholder in Infinity.

1496. He was told that there would be a meeting with President Zuma a few days before the first meeting took place, but this could not happen as the President was not in Pretoria. He was also told that Mr Ashu Chawla, a trusted employee of the Gupta family would be the point person for the family at the President's office.

1497. At the President's residence the security was very lax. Mr Ashu Chawla had conveyed the vehicle's registration number and the driver was waived in without fuss. No identification was asked for. They were ushered into a well-appointed room to the extreme right of the entrance. They were not frisked, were not asked to pass through metal detectors and were not required to give over names and details to any security personnel. Neither his cell phone nor his laptop was screened. Mr Chawla was waiting in the room when they entered. He described the room: there was a shelf with a neat collection of leather-bound books, there was a television set mounted on the wall at the far end, a coffee table in the middle with couches around it and ornate chairs in each corner. The evidence relating to the details of the features of the rooms or what was in the rooms was only important in case President Zuma disputed that such meeting took place or disputed that Mr Sundaram attended the meetings in question. As it turned out, Mr Zuma did not dispute anything.

1498. After about an hour the remaining members of the Gupta delegation appeared. He was told by Mr Nazeem Howa ("**Mr Howa**") that the two chairs closest to the entrance were reserved for the President and the head of their delegation, Mr M. Williams.

1499. There was another delay. In the meantime, Mr Ajay Gupta explained the origin of the channel name. He said that it had been suggested by the President himself during the

last meeting they had with him on this issue. "Africa News Network" had been taken, so they decided to add the "7".

1500. After a further delay President Zuma entered the room. He apologised for the delay. He said that he had been away from Pretoria and, because of that, there was a number of Ministers who needed to meet with him. Mr Sundaram and Arun Aggarwal were introduced. He and Arun were introduced. The President said: "I soon have to go back to the meeting I left behind. I know there are a lot of things to discuss, but like they say in Zulu we will just skin the animal today. We must leave the rest for later". Mr Sundaram handed the President a copy of his presentation and summarised the content.

1501. The phrase used by the President "we will skin the animal today" is a phrase used in isiZulu as Prof OTM Nxumalo explained in a "Bayede" publication. It must obviously not be taken literally and context is important. It is unlikely that the President spoke in isiZulu but the importance of this phrase is that Mr Sundaram, of Indian descent, was able to remember a phrase that is often used in the isiZulu language. His memory of this particular phrase serves to support his version that he was present at a meeting where someone conversant with that phrase in isiZulu used it.

1502. The President had a number of comments about what he preferred to see. For example, he said that he did not like the allegedly repetitive news presented on eNCA. After that it was mentioned that they wished to discuss the newspaper and commercials, and that the television personnel should leave, the President warmly shook their hands, walked them to the door and shook their hands again. All three meetings with the President ended in this way.

1503. Mr Sundaram testified that he was later told by a member of The New Age marketing team that the remainder of the discussions were crucial for the paper to get government

advertising and bring hard-to-convince Ministers and officials in as guests on The New Age Business briefing.

1504. After the so-called Waterkloof airport scandal, some Ministers and officials seemed reluctant to be seen in public with Mr Atul Gupta or on a platform hosted by the Gupta newspaper. Mr Atul Gupta told him that these Ministers and officials were convinced after a nudge from President Zuma. The bad press and public outcry following that incident did not seem to have made any difference to the relationship between President Zuma and the Gupta family. In the three meetings with President Zuma of which Mr Sundaram was part, the two brothers bonded well with the President and joked occasionally about the scandal. Mr Sundaram testified that it was like nothing had happened. The brothers had fairly free access to the President's residence and the President often defended his friendship with them. That the Gupta brothers had fairly free access to the President's residence is supported by an event about which Mr Sundaram did not testify. It is an incident about which Mr Njenje testified in respect of the State Security Agency. He testified about a day when he attended a meeting at President Zuma's official residence in Pretoria, in President Zuma's absence, where Mr Ajay Gupta had a meeting with Ms Susan Shabangu who was Minister of Mineral Resources at the time. Mr Njenje testified in effect that Mr Ajay Gupta was behaving as if he was in charge and effectively taking Minister Shabangu to task for certain delays in her Department either processing a certain application for a Mineral right or the award of that right to one or other of the Gupta entities. He said he had to intervene.

1505. In his book "*Indentured*" Mr Sundaram gives more details about this meeting. Here is his detailed version:

"Two days had gone by since we had been told about the meeting with Number 9, and there was still no talk of when we would meet with the president. Then, on one Saturday, 21 June at about 11 pm, when we had just returned home from office, I

got a call from Atul informing me that President Zuma would return the following morning, and we had an appointment with him at 9:30 am.

I had moved out of the guest house by then and into an apartment that I shared with Arun. I woke up early and made tea. Arun came out of his room in a smart green suit. 'So we are meeting the big man today,' he said, almost taunting me to come up with a humorous retort. 'Yes, we are meeting the big man for two hours today,' I said. 'Let's finish our tea and get to the office quickly. I don't want us to be responsible for delaying the meeting.' I took the apartment keys out of my pocket and pointed them towards the door. 'The driver is waiting downstairs.'

We reached the Midrand headquarters of The New Age in about 15 minutes. We worked for a couple of hours before Aslam called to tell us that a car from the Gupta fleet had arrived to take Arun and me to Pretoria. 'Please leave immediately and take the three copies of the presentation with you, Rajesh ji, Ajay ji, Atul ji, Nazeem ji and Mr Williams will leave in a convoy shortly. I have sent your vehicle number and details to Ashu Chawla, he will be waiting for you at the president's residence.'

Ashu was the CEO of the Gupta-owned Sahara Computers. He had lived in South Africa for many years and was the Guptas' point man for any coordination with the president and the South African government. He was particularly close to President Zuma's son Duduzane.

I had heard his name mentioned for the first time when I was asked to apply for my temporary residence permit under the intracompany transfer process before I left India for South Africa. 'It can take months to get a South African work permit. It is a cumbersome process. We have to advertise the position in South African newspapers and then wait for six months, after which we provide evidence that we have not found a suitable local candidate.

Only then can we start the process of getting a work permit. Even so, if there is an official who does not agree, the request for a work permit can still be rejected,' Laxmi had told me right after I signed the contract to work for Infinity Media. 'But Ashu ji is a genius, and he has found a way around it. We will show the visas of people going to work in South Africa as intra-company transfer.

Just fill in the visa form, get police and medical clearance and get back to my office. My office will issue papers certifying that you are an employee of Essel Media being transferred to South Africa,' Laxmi added. 'But all the people I have recruited to be the core team to launch ANN7 have got contracts from Infinity Media and not Essel Media. They have never worked for Essel Media.

I hope this is not illegal?' I asked. 'Absolutely legal, Rajesh. What rubbish are you thinking? Trust me, Ashu Chawla will tell Shakeel at the South African High Commission to accept your application forms. Shakeel and his bosses at the visa

section have a message from the South African president's office to expedite the visas. Do you think the president would do something illegal?' Uday Kumar from HR went to the High Commission directly without informing Ashu a day later. The High Commission refused him entry, the reception connected him to the visa section, and the guy who picked up the phone told him, 'There is no Shakeel at the visa section.'

Laxmi was very upset when he found out. He sat Uday down and read out the rules for applying for a visa in the future. 'Look Uday, I am upset that you would make such a stupid mistake. You should inform Ashu ji, and only when he tells you the appointed date and time should you go or send anyone to the High Commission. It is not simple. They have to speak with the most senior people in government, and only after that is a message sent to the High Commission to accept the documents and process them without creating a fuss,' Laxmi said in a tone that was not his usual polite one.

So it was clear to me very early on, even before I ever met him, that Ashu could pull strings in the government. He was close to the president and had a reputation for getting the toughest jobs done expeditiously for the Guptas. When Arun and I went to the car, we heard 'Ram Ram', a greeting popular in North India's small towns and villages, curiously from one of the Guptas' white drivers.

An overwhelming majority of the personal employees that the Guptas had were white. This always baffled me a bit. For all the talk Atul gave us about his 'objective' to empower the 'poor and suffering black population' that was still 'being crushed under economic apartheid', I did not see a single black employee during my various visits to their residence.

The chefs were Indian nationals, the bodyguards were mostly white, and so were the people who served food to the guests. The driver politely changed the radio station to Lotus FM, which played music in various Indian languages.

There was a Gujarati Hindu prayer on. I am not religiously inclined and asked him to change to any radio station he preferred. It was an easy journey from Midrand to Pretoria that Sunday morning, as the road was free of weekday traffic. Ashu kept calling every few minutes to find out where we were, and the driver would give him our exact coordinates.

We reached the main gate of the president's residential compound and were stopped at the security checkpoint. Compared to my experience as a journalist in the United States, UK, India, Afghanistan and even post-conflict Sri Lanka, the security at President Zuma's official residence was really very lax.

Ashu had conveyed the car's registration number, and the driver was waved in without any fuss. The security personnel did peer into the car as we passed by, but they did not ask us for any identification, although Arun and I were carrying our

Indian passports just in case. The car drove to the front stoep of the main building and dropped us at the entrance. The driver then parked right in front of the stoep among about a dozen other cars. 'The president must be having a busy Sunday,' Arun whispered to me.

We were ushered into a well-appointed room to the extreme right of the entrance. There was no frisking, we were not asked to pass through metal detectors and were not required to give our names and details to any of the security personnel. We just walked in.

I was carrying my cellphone and my laptop as well as the three copies of the spiral-bound presentation that Atul had wanted to be printed and bound: one for President Zuma, one for Ajay and one for me to keep in my hand while I made the presentation.

Electronic devices are generally not allowed to be carried for such meetings and even when they are allowed they are thoroughly screened by security personnel. I could not see any X-ray machines at the venue. I could not figure out if this was special treatment for the Gupta delegation, or if the security was generally of a low standard. Ashu was waiting in the room when we entered. This was Arun and my first meeting with him.

Ashu was a reticent man in his mid-forties. He was not very outgoing and seemed very preoccupied. He gave us a limp handshake and went back to the corner of the room opposite the door at the far end. His phone was charging, and he was constantly sending and receiving messages. 'When are the others joining us?' I asked him by way of making polite conversation. He gave me a bit of a smile and continued to fiddle with his phone.

The room had a shelf with a neat collection of leather-bound books; there was a television set mounted on the wall at the far end, a coffee table in the middle with couches around it and ornate chairs in each corner. Ashu seemed worried. While the place seemed like a waiting room, there was no one else there, only the delegation from the Guptas. I had seen many cars parked outside; surely there were more visitors?

It soon became clear to me that we were not packed into a general 'visitors' room' and that this was a space specially reserved for us. There was a knock on the door. Ashu jumped up. It was a member of staff from the president's office who came in to ask if we would like 'water, tea or coffee'. 'No, thank you very much,' Ashu decided for all of us. Arun and I nodded politely in agreement. I was wondering why the others were not here if we had an appointment at 9:30. It was already 10.

Ashu's body language made it clear that something was amiss. After another half hour passed, the door opened, and the remaining members of the delegation

entered. Atul entered first, dressed in a dark suit, followed by Ajay in casual trousers and jacket. Nazeem and Moegsien appeared in their usual smart suits and ties.

Ashu sprang to his feet and rushed towards the door, bowing to touch Ajay's feet. He then moved quickly and touched Atul's feet. Ajay acknowledged this gesture of respect like any North Indian feudal lord would; he made a half-hearted attempt to stop him. 'There are a lot of visitors today, sir, but we have been told he will come and meet us soon. Please sit, sir,' Ashu told Ajay.

The two chairs closest to the entrance were reserved, I was told by Nazeem, for the president and the head of our delegation, Moegsien. Nazeem sat on the couch near the entrance, facing the chair reserved for the president, and Ajay sat beside him. Arun and I sat on the couch opposite them, with me next to Moegsien. Atul sat on the chair near the television. Ashu sat in the corner opposite Atul, fiddling with his phone, which was still charging.

The staff member from the president's office came in again and asked if we needed any drinks. We asked for various beverages, which were soon served. 'You journalists have no issues taking advantage of hospitality paid by the taxpayer?' joked Atul. 'Why? I pay taxes here in South Africa. Why should we not?' I asked him, only half-joking myself. 'I was only kidding. You know we have paid taxes for all our companies from the day we started our business.

Ajay ji has a philosophy about taxes. When God has given us so much wealth, why should we do something as petty as not pay taxes and always be scared of being caught?' he replied. He looked at Arun and said, 'You are a chartered accountant. You know how it is in India. All the respectable companies maintain two books. One for internal use, and one for the tax department. We have never done that.' It was now about 20 minutes since Ajay had come in, and he was getting visibly impatient.

He turned to Ashu and made a gesture. Immediately Ashu left his phone and went out. He came back a few minutes later. 'Ajay ji, there will be a further delay. I am told he is in some long meetings with ministers. We have been asked to wait,' Ashu said. 'You know I hate to wait, Ashu ji. Please tell them we will have to leave if he does not have time for us today,' he said. I could tell Ajay was not his calm self now.

Ashu again left the room and did not come back for quite a while. While he was out of the room, Ajay started explaining the origin of the channel name. 'President Zuma suggested we name the news channel "Africa News Network" in the last meeting we had with him on the issue. The name was already taken, so we decided to call it "Africa News Network 7".

We must make the president feel important, and tell him that we are taking suggestions given by him seriously. He will like it if we seek suggestions from him on how to run the news channel. He would like to see us as his own channel. We

do not have to implement all his suggestions, but he would like it if we ask him for advice.' Atul then took out the TV remote and switched to the Indian news channel New Delhi Television, NDTV. 'We want all the graphics on our channel like NDTV.

We should have the graphics at the top and the bottom of the screen. There should be many layers. The people of South Africa want a screen that keeps moving and updating. They do not get that with eNCA.' I tried explaining to him how it was considered less sophisticated to have too many graphic bands and elements on the screen, how it would be better to have a cleaner screen with a graphic band only in the lower third of the screen. This was not what he wanted to hear. 'I want the screen to be cluttered; we must dazzle our viewers with as many elements as we can.' It was past noon now, and Atul was getting very impatient.

Ashu, who had come back, was sent out again to inform the president's people that we would be leaving. 'We will come back another day for the presentation,' Atul said. Ashu left the room and returned within a few minutes. 'Ajay ji, President Zuma has sent word that he will come out of the meeting and see us for a while. He wants us to wait,' Ashu told Ajay. Even as he was speaking, President Zuma entered the room.

'I am very sorry about the delay. I was away from Pretoria and there are many issues my ministers want to discuss with me,' President Zuma said as he came into the room, alone, with a broad smile on his face. He was not as tall as I thought he would be. I could sense from his informal demeanour that he knew the brothers quite well.

Ajay introduced me and Arun. 'This is Rajesh Sundaram. He is the editor of the television project, and this is Arun Aggarwal. Arun ji is the business head. They have both come from India recently and have many years of experience working with large international networks. You know the other gentlemen.' 'I soon have to go back to the meeting I left behind. I know there are a lot of things to discuss, but like they say in Zulu we will just skin the animal today. We must leave the rest for later,' President Zuma said. 'Sir, I will ask Rajesh to give you a quick overview of the project. He will answer any questions you may have, and then we will ask the TV team to leave, and we can discuss issues related to the newspaper,' Ajay said, pointing to me. I handed President Zuma a copy of the presentation.

'See the logo on the presentation, sir, it is ANN7. Like you said we are calling the channel Africa News Network. We are following all the things you told us, sir,' Ajay told President Zuma, and pointed to the logo. The president seemed impressed.

He smiled at Ajay in acknowledgement. 'This will be the most technologically advanced television news station in South Africa. The broadcast, newsroom automation and production systems we have are used by the top news networks of

the world. Our newsgathering reach will be the widest among our peers, with bureaus, studios and live sources proposed in every province.

We will also have a network of correspondents across major African and world capitals. Our newsgathering team will be predominantly female and young. We will train our journalists and technical staff to the best international standards,' I said as President Zuma flipped through the bound pages of the presentation, stopping occasionally to read. I explained the programming mix and the emphasis on provincial news through two provincial news bulletins a day, the daily Africa bulletin and half-hour bulletins on sports, entertainment and lifestyle. He listened intently and did not seem impatient to get back to the meeting he had left midway.

I explained to him how the integration of the newsroom and main studio, and placing the main anchors' desk on a revolving platform, would give every bulletin and time band a different look. I told him about the various visual elements on the news floor, the robotic cameras and the state-of-the-art PCR. 'Please leave a copy of the presentation with me. I will study it in detail and will get back to you with input in a couple of weeks after President Obama's visit when we meet again. It looks good now. I think you should keep the funny shows out. Lampooning politicians for cheap humour is not news.

I hate the one they have on eNCA,' Zuma told me. 'The news on eNCA is repeated a lot, and that irritates the audience. You seem to have a broad programming mix, so you will not have to repeat so much. No bulletin should be repeated, it should be served fresh,' he added. 'Sir, now we will discuss the newspaper and commercials. I will ask my colleagues from TV to leave,' Ajay said, looking at us.

As we rose to leave, President Zuma got up too and warmly shook our hands. He then walked us to the door and shook hands again before we left. All three meetings I had with President Zuma ended this way. Nazeem, Moegsien, Ajay and Atul stayed on. I was told later by a member of The New Age's marketing team that these discussions were crucial for the paper to get government advertising and bring hard-to-convince ministers and officials in as guests on The New Age Business Briefing.

After the Waterkloof scandal, some ministers and officials seemed reluctant to be seen in public with Atul or on a platform hosted by his newspaper. These ministers and officials were convinced after a nudge from the president, Atul told me. The bad press and public outcry following the incident did not seem to have made any difference to the relationship between President Zuma and the Gupta brothers. In the three meetings with President Zuma that I was a part of, the two brothers bonded well with the president and joked occasionally about the scandal. It was like nothing had happened.

The brothers had fairly free access to the president's residence, and Zuma left his ministers waiting for hours to attend meetings with the Guptas. Atul once showed me newspaper clippings of President Zuma defending his friendship with the Gupta family in parliament. 'Zuma, who was forced to publicly defend his relations with the Guptas for the first time since the plane-landing scandal, dismissed all allegations against him in relation to the Guptas as "rumours",' he said. 'See, I told you the bond that we have with the president is deep.'

The media and the DA will try its best to create a rift between us, but he will stand by us like a rock. The president will defend us always,' he said, showing me the newspaper clippings. I found the discussions of commercial issues of The New Age and ANN7 intriguing. There had been a lot of noise about The New Age and the way the government supported it, and it seemed to me that these discussions were probably around a similar kind of support for ANN7."

The Second Meeting

1506. The second meeting occurred during July 2013 but Mr Sundaram could not remember the exact date. However, he testified that it was a Sunday. It took place in the room in which the first meeting had taken place, and was attended by exactly all the people who had attended the first meeting. This time Mr Chawla picked him and Arun up from the Midrand office. The meeting reviewed the progress of the studio project but the primary focus was on "editorial content" and President Zuma wanted to share his vision thereof. The seating arrangement was identical to the last one. When the President arrived he was shown the channel ID, and asked to see it a number of times President Zuma said that it looked impressive. He made certain suggestions, namely that they should not convert this into a publicity channel for the ANC and himself. If they did that, they would have no credibility. The views of the opposition and his rivals in the ANC had to be presented as well. The eNCA only presented the government and himself negatively. They needed a channel that presented the positives that the government was doing. He added that he would be in Mpumalanga the following week and that he would meet people in the local communities and announce measures for their welfare. President Zuma said that he was sure that eNCA would not cover that but would seek out

opposition supporters and report negatively. President Zuma added that their teams should be present two days before him to do background reports. He was assured that this was possible.

1507. Mr Nazeem Howa then asked the President to recommend journalists and presenters. The name of Mr Jimmy Manyi then came up for the first time. The President offered to speak to him regarding talk-shows. He also wanted to know the names of any other high profile journalists who would be selected. Mr Sundaram added that it was strange to him that the President would allocate two hours of his time on a Sunday to the ANN7 project. Mr Sundaram testified that the intensity of President Zuma's interest in the project was like that of a full shareholder. He exited the meeting in the same manner as he did the first. The newspaper team remained behind.

1508. Mr Sundaram later asked Mr Nazeem Howa why the President showed so much interest in editorial and personnel matters. The reply was that his son, Mr Duduzane Zuma, held a 30% share in the company. If the newspaper was able to get government advertisements, they would be able to break even in the first year. If the news channel that he was heading would be pro-ANC and pro-Zuma and would be headed by people close to the President or even chosen by the President himself, there would, in his opinion, be a clear conflict of interest in the light of his son's shareholding in the newspaper and television news channel.

1509. I directed the Commission's Legal team and Investigation team to establish whether President Zuma was at Mpumalanga during the week he said he would be in Mpumalanga. As a result of that direction it was established that during the week when Mr Zuma had said he would be at Mpumalanga, a journalist Ms Pillay furnished the Commission with an affidavit to the effect that she attended an event at Bushbuckridge, Mpumalanga, which was addressed by Mr Zuma during that week and subsequently

wrote an article that was published in one of the newspapers about the event. Her evidence served to corroborate Mr Sundaram's evidence that he had attended a meeting between President Zuma and the Gupta brothers at which President Zuma had said that he would be in Mpumalanga during that week. In other words, if indeed, as a matter of fact President Zuma was in Mpumalanga that week, that would tend to support Mr Sundaram's evidence. In part, because of this corroboration, I find that that that meeting did take place and Mr Sundaram attended it. the Women's Day celebrations at Bushbuckridge on 9 August 2013.¹¹³²

1510. Mr Sundaram gives more details about this meeting in his book "*Indentured*." His detailed version follows:

"The second meeting with President Zuma happened in July. 'He feels good if we give him the feeling that he is moulding the news station. It is always good to have the head of state on your side. He will give us some suggestions. We do not have to follow all his suggestions, but we will make polite noises and we will follow the suggestions that are acceptable to us,'

Atul told me before the meeting, reiterating a point his brother and he had made many times before. Like the previous one, this meeting took place on a Sunday morning. Ashu Chawla came in his car to pick us up from the Midrand office. He was mostly silent during the ride to President Zuma's residence in Pretoria. He seemed preoccupied and kept checking his phone for messages as he drove. 'Have you lived here for long, Mr Chawla?' Arun asked him. 'Yes, 17 years. I have been with Atul ji right through at Sahara Computers,' he said with a rare smile through his moustache.

'So you are a regular South African then?' Arun asked. 'Yes,' Ashu replied, curtly. He then played a CD with raunchy Hindi Bollywood songs referred to in India as 'item numbers'. 'So you have a taste for "item numbers", Mr Chawla. Now that's a facet of your personality that we never knew about,' Arun teased Ashu.

He smiled sheepishly and continued driving. Arun had run out of topics to strike up a conversation, and Ashu was silent throughout the remainder of the journey.

¹¹³² Exhibit CC(1)(j).

As we reached the security gate at the president's residence, the security guards recognised him and waved the car in. We went to the same room we had been waiting in the last time and sat in exactly the same places. Ashu went to check on the president's availability. Nazeem, Moegsien, Atul and Ajay arrived about half an hour later. Ashu sprang to his feet and touched the brothers' feet.

The seating arrangement was identical to that of the last meeting. 'Rajesh, today I will ask President Zuma to give us a broad overview on editorial policy and also some suggestions on who we should hire as presenters. We will hear what he has to say, but we will only do what we think suits our vision,' Ajay Gupta told me.

As long as it was just a formality and we were not bound by what he was saying, I was happy to play the game they were playing with the president. I nodded. The video logo montage or the 'channel ID' for ANN7 had been made by a graphics designer in India and had reached us just a few days before the meeting.

Atul wanted me to load a copy on my laptop so we could show it to the president. 'Rajesh, we will show it to the president today. We can make a million presentations on paper, but he will know the project is progressing fast only when he sees videos. He is a simple man. I am sure he will be very happy to see it,' Atul said. 'Sir, the president has many visitors from his family today. I have sent a message that you have arrived, and he will join us very shortly,' Ashu told Ajay.

The president arrived shortly thereafter. He was shown the channel ID. He asked to see it again and again. 'Sir, if you like this montage, we will give it the final go-ahead,' Atul said. 'It looks good. It is impressive,' President Zuma said, asking to see it one more time. He had the copy of the presentation we had given him in the last meeting with him. 'I have a few suggestions.

We must not convert this into a publicity channel for the ANC and me. If we do that, we will have no credibility. You must present the views of the opposition and my rivals in the ANC as well. The push in our favour should be subtle. You are a seasoned journalist. You know how that can be done... eNCA only presents the government and me negatively. We need a channel that presents the positives that the government is doing,' Zuma said looking at me.

Despite Atul's constant reminders that we'd only do what 'suits our vision', President Zuma's directives on editorial policy puzzled me. 'I will be in Mpumalanga next week, and I will meet people in the local communities and announce measures for their welfare. But I am sure eNCA will not cover that. Their reporter will seek out opposition supporters and do a negative story on how the locals hate me and feel I have done nothing for them,' Zuma said. 'Sir, we will have a reporter and camera operator attached to you at all times.

You will have to ensure that they are accommodated in the plane that you travel on. We will do a live telecast of all your engagements. We have outside broadcast vans,' Ajay said, almost cutting in. 'Yes, that can be easily arranged. But your coverage will be shallow if you come with me. Our teams must move in two days ahead of me and do background reports that tell viewers how our policies are helping the people, so that they get the full picture and not the distorted one they get now. Is that possible?' Zuma asked. 'Sir, we will make it possible.

We have the technology to go live from anywhere in the country, and we have bureaus in every province. We can send reporters with you, and we will also send reporters in advance. The positives of the government will surely be highlighted,' Ajay answered, with folded hands. 'If newspapers and television news channels show that the people are happy and benefitting from what the government is doing for them, the people will believe it. What is happening now is just the opposite. Show the critics saying that the government is not working, but also show many cases of how the government is changing lives. That way we keep the credibility and we also show the government in a positive light,' Zuma said. 'I am sure you will have the best international standards of production. That is very important. The news bulletins should be slick,' he added.

Nazeem then asked him to recommend journalists and presenters. It was at this meeting that Jimmy Manyi's name first came up. 'He will be most suited for your talk shows. If you want, I will speak with him as well,' Zuma offered. 'I am sure there are many presenters available. Just do let me know if there is any high profile journalist you may have selected,' he added.

The conversation was now beginning to sound like an internal HR meeting. He had allocated two hours of his time on a Sunday, while his family was waiting, to ANN7. The intensity of his interest in the project was like that of a full shareholder. President Zuma was happy to sit for hours getting briefed and giving input on minute aspects of the venture. The time he spent helping out with the 'commercial' aspects was most intriguing. 'Sir, the DA has a very effective PR machinery, and they churn out press releases very day, twisting facts and turning them against the government.

Most journalists earn a salary by just reproducing DA press releases and news reports. We have to keep such journalists out.' Nazeem said this to immediate nods from President Zuma and the Gupta brothers. I exited the second meeting the same way I did the first. Ajay asked the TV team to leave, so that the newspaper team could have some alone time with the president.

I later asked Nazeem why President Zuma insisted on lecturing us on editorial and personnel matters. 'Don't you know? Hasn't Laxmi ji told you already? He has a big say in this venture. His son Duduzane holds 30 per cent in the company. His involvement is very critical for the first year of our operations. If we are able to get

government advertisements, we will be able to break even in the first year,' he told me. If this were true, it would explain a lot, and it felt as though everything was falling into place.

The news channel I was heading would be a pro-ANC, pro-Zuma channel that was promoted and run by not only people close to President Zuma but by President Zuma himself. If Nazeem had his facts straight and Zuma held the shares through his son, he would be projected positively in the news bulletins. In this scenario I could see how he would use his position as president to ensure government advertising for the station. It also seemed, if this was the truth, that there was a clear conflict of interest as his son had a stake in not just the Gupta-owned newspaper but also the proposed television news channel.

As a 30 per cent stakeholder, his son would get 30 per cent of the profits earned from the revenues the president was helping them generate."

The Third Meeting

1511. The third meeting took place in the first week of August 2013 but he could not remember the date. It was also at the President's official residence in Pretoria but in the evening. Mr Williams was not present. The meeting was held in a larger room to the left of the main entrance. Mr Duduzane Zuma also attended this meeting but his interventions were not serious. Having first been ushered into the waiting room, they proceeded to a larger room with a TV set. There were various seating arrangements. They sat around a coffee table. President Zuma then entered and was shown a number of news bulletins that they had produced. Mr Ajay Gupta told President Zuma that the project was only about 50% complete. One visual showed Mr Julius Malema exiting a helicopter. According to Mr Sundaram, Mr Ajay Gupta pointed out how "corrupt" Mr Malema looked. These visuals had been bought from the SABC. The President was very happy with the graphics and the bulletins. However, he said that he did not want to be present when the channel was inaugurated as this would affect their credibility. The next day he was told by Mr Howa and Mr Atul Gupta that they had secured R20 million worth of business the previous evening.

1512. By this time Mr Sundaram had decided to resign as editor at ANN7 and to return to India after the launch. What really pushed him was the violation of editorial integrity and dubious commercial dealings at ANN7.

1513. Mr Sundaram gives more details about this meeting. Here are the details extracts from his book "*Indentured*":

"The Third meeting with the president happened a few weeks later, in the first week of August. We had started producing news using a very basic PCR that was not fully integrated with the newsroom systems and the servers.

We were days away from our amended launch date of 21 August, and the technical team was nowhere close to handing over the studio or a smoothly functioning PCR or even integrated video editing systems to the editorial team.

I was in the PCR overseeing the rolling of a bulletin when Atul sent word that I must meet him at the cafeteria immediately. 'We have an appointment with President Zuma this evening. He wants a quick review of the project, and I would like you to take the bulletins we have produced over the last few days. We have to make him happy, so make sure we take bulletins where a majority of the stories show him in a good light. I do not want a bulletin filled with Malema,' he said.

Former Zuma loyalist Julius Malema had just founded a new opposition party to the ruling ANC called the Economic Freedom Fighters. The bulletins we had produced at that time were, unsurprisingly, full of technical glitches and were anchored by a group of models hired by Atul and trained by Gerry Rantseli-Elsdon.

The young women were very raw, clueless about the news they were reading and very unfamiliar with a studio setting. I was not comfortable showing these bulletins to anyone outside of the newsroom. They were produced as practice or dry runs, nothing more.

The plan was to take a chip reader to President Zuma's Pretoria house and connect it to a monitor for him to see the bulletins. I went back to the PCR and asked the team to put a few of the bulletins we had produced on a chip. The team put four recent bulletins on the chip and handed it to me. We left in Atul's car at about 7 pm.

Ashu and Ajay were going to meet us there. Nazeem travelled with me in Atul's chauffeur-driven car. 'Has someone informed Arun?' I asked Nazeem. 'Don't bother with Arun. He is not going to this meeting,' Nazeem replied. Moegsien was in Cape Town and was unable to join us. 'We must discuss the IEC issue with him today. I am told the IEC is set to run a major advertising campaign in all the big newspapers.

It is unfair for them not to advertise in *The New Age*,' Nazeem told Atul. 'Ajay bhai has already briefed him about this. We will get some action today,' Atul replied.

Atul had organised a chip reader and a 14-inch broadcast quality monitor to be sent to Ashu earlier in the day. He was to bring these for the meeting. We were ushered into the same waiting room where we had been before. Soon Duduzane Zuma walked in and greeted us before proceeding to hug the Gupta brothers. 'We have a surprise for you today, Dudu. We will show you the bulletins we have been producing,' Ajay Gupta said with an animated movement of his hands. 'Good, so we should move to the next room. It has a large TV.' He started moving out, and all of us followed him.

This was a much larger living room that had various seating arrangements and a large TV set. We sat around a coffee table. Ashu took out the chip reader and the cables. There was not enough cable to connect the chip reader to the large TV mounted on one of the walls. I gave the chips to Ashu.

He placed the chip reader and the monitor he brought with him on a coffee table and connected the cables. President Zuma walked into the room and wanted to know about the equipment. 'We want to show you a few bulletins that we have produced,' Duduzane said.

This was the first time Duduzane was seeing the bulletins. He had no clue about the process and effort that had gone into producing these. He had never attended a single meeting or even bothered to visit the studio and learn about the problems there, but today in front of his father he had no qualms about taking credit for the bulletins.

The Gupta brothers smiled indulgently as he spoke. 'Sir, we want feedback on this too. We want you to tell us if we are on the right track. Our equipment is not fully here, and this is not 100 per cent of what we will look like when we launch. This is maybe 50 per cent,' Ajay said with a broad smile on his face. Ashu pressed the play button, and the first bulletin started with the channel ID followed by the headlines. The anchor made a few fumbles, but that did not seem to bother the president.

He watched the first 15 minutes with rapt attention. 'Sir, we can fast forward the bulletin, so that you can see the others too,' Ajay offered. 'Let it go on, I want to see some more,' President Zuma said. 'Daddy likes the anchor, his eyes light up every time she comes on. Is that why you want to see some more?' Duduzane joked.

Everyone in the room broke into laughter. 'See the visuals we are using for Malema? It is of him getting out of a helicopter. He looks corrupt, does he not? We always use these visuals when we talk about Malema. This is a subtle way of telling the people he is corrupt without saying a word,' Ajay said, pointing to the screen. President Zuma smiled. Ajay knew nothing about the content.

The editorial team used these visuals because these were the only visuals available in the archives bought from the SABC. He had just made that up to please the president and from the look on his face it seemed he was happy. President Zuma watched all the bulletins. 'You have a good thing on your hands. This is much better than the bulletins on the SABC. Those are horrible. I like the way you have used the graphics. It reminds me of the international channels. If this is what you will look like on launch day you will be a hit,' President Zuma said with a smile.

The SABC had launched its 24/7 news channel a few days before, on 1 August 2013. This was the endorsement the Gupta brothers were looking for. They had softened President Zuma before their meeting on commercials, and they could hardly hide their glee. 'So you say the final product will be much better than this?' President Zuma asked, looking at me. 'Sir, it will surely be much better, as we will have completed the integration by then and will have much more equipment at our disposal to make the bulletins slicker.

I am not very happy with these bulletins; they are just practice runs,' I replied. 'I am happy with even this. You guys keep this up.' President Zuma was beaming. 'Sir, you must come and press the button to inaugurate the channel on the 21st. I know you have declined before, but you must inaugurate the channel. We will have our editors do an exclusive interview with you at the venue,' Atul said with a broad smile and his hands folded. 'That will not send the right message. It will not do your credibility any good. I am part of the project, and I am always ready to give an interview after a few weeks,' Zuma replied firmly.

At this point Ajay asked me to go back to the office while Atul, Nazeem and Duduzane met him for discussions about the newspaper and commercial issues. I was told the next day by Nazeem and Atul that they had secured 20 million rand's worth of business the previous evening. By this time, I had decided to resign as editor at ANN7 and go back to India after the launch. It was happening without the extensive training I had suggested. It was happening without test runs with all systems and equipment in place. But what really pushed me to resign was the violation of editorial integrity and the dubious commercial dealings that I had seen with my own eyes."

The Fourth Meeting at the ANN7 Office

1514. The fourth meeting was held at the Midrand office of ANN7 on 19 August 2013 just 2 days before the station was to go on air. The usual attendees were there, as was Mr L Goel, Mr Duduzane Zuma, and President Zuma. President Zuma toured the studios,

newsrooms and technical areas and met the staff. Mr Atul Gupta insisted that no recording be made of President Zuma's visit. The President himself said that any association with him at that time would be bad for both of them.

1515. Mr Sundaram made a further supplementary affidavit on 22 January 2020¹¹³³. He confirmed that his book was a true account of his experiences while working as "Editor" during the setting up of ANN7 in 2013. He said that the quotations used in the book were not verbatim the words used in conversations but they conveyed the accurate gist of what was spoken.

1516. More extracts from Mr Sundaram's book "*Indentured*", give additional details about this meeting:

"My last meeting with President Zuma happened just 48 hours before ANN7 launched. I was told that the president would make a quick trip to the studio to take a look for himself, and he was expected to stay on to see the rolling of a news bulletin.

I was part of the team that would show him around. This was a critical time as I was virtually camping in the office, sleeping for a few hours in a temporary rest area created for a few members of the core team on the first floor of the New Age office.

I was in the morning editorial meeting when I got a call from Aslam to come and receive the president. 'He is expected anytime now; Laxmi and Atul ji want you here immediately,' Aslam said. Outside, I found Nazeem, Laxmi and Atul were already there. With them was Duduzane Zuma. I greeted them and waited with them for the presidential convoy to arrive.

It was cold that day and I had forgotten to take my jacket with me as I rushed out. Atul took the scarf he was wearing and wrapped it around my neck. I couldn't know at that time that this gesture would come back to haunt me later and subject me to humiliation and belittlement at the hands of the man who made it.

At that time, Karun Shawney, the head of production, sent a news camera team out to record the president's visit. The cameraman positioned himself to record the president getting out of his car. There were other crews he had set up inside the

¹¹³³ Exhibit CC(1)(g)

studio to record the president visiting various departments. 'We do not want any record of the president visiting the studio. Can you please ask the cameramen to go away. Also please tell everyone that there will be no recording of any of President Zuma's movements inside the studio.. not even with cellphone cameras,' Atul whispered into my ear.

I called Karun and asked him to move the camera crews away. Atul wanted to keep the visit a secret, he was so suspicious and distrusting of everyone, but with over a 100 journalists in the studio, it was almost impossible. The presidential convoy arrived and was taken to Laxmi's office. 'Sir, would you like to give an interview to our news team?' Atul asked. 'We will air it on launch day.' 'I have already said I will give ANN7 an interview later, after a few weeks.

'Any association with me at this time will be bad for the both of us,' President Zuma answered. I led the team out of Laxmi's office, into the hall on the first floor where Mary Naidu and her programming team sat with the web team. President Zuma played the part of a politician, going to each team member and shaking his or her hand. He waved to the employees who were not within hand-shaking reach. We then took the stairs and moved into the newsroom.

His presence created a flutter on the floor. He waved to those working there. A live bulletin was being rolled at that time, and he waited for a while as the young anchor read her piece from the teleprompter. He waved to her and moved into the corridor that housed the technical departments. He first entered the PCR. Things were smooth in the PCR when he arrived. The systems were working fine. We had cut live to a reporter outside the courthouse where the Oscar Pistorius trial was happening.

He wanted to know from me what the exact function of each of the people in the PCR was. He also asked me about the audio panel, the vision mixer and outputs coming from various sources on the screens in front of him.

He stayed there for about 20 minutes. He then moved to the server room, the graphics room, the master control room and the video editing bay.

He was shown a few of the promos produced by the team in the graphics room. He asked to see a few of the promos again. On his way out he quickly slipped back into the PCR. This time there were technical glitches, the on-air graphics system collapsed, and the live sources started failing.

He stood at the PCR for another 15 minutes and then moved towards the door. Laxmi, Atul, Nazeem, Duduzane and I saw him off. He said he was happy before he left. Atul assured him that the station would be run 'as per his guidance and wishes.'

Additional evidence from Mr Sundaram relating to the nature of President Zuma's relationship with the Gupta brothers

1517. On 4 June 2013, Mr Rajesh Sundaram and some of the team which arrived from India the previous day met with Mr Atul Gupta and Mr Nazeem Howa at the Gupta office at Corporate Park in Midrand. The nature of the meeting was very tense. Mr Atul Gupta was the only person speaking at the meeting and he informed the team that there would be a re-designation of roles. He told the Indian team that even though they were experienced professionals, they could not appoint any of them as the head editor and the business head because South Africa was a very racist country and would not respond well to foreign nationals heading up a media house. Mr Atul Gupta then tried to substantiate his claims by saying that all the media houses in South Africa were owned by white people and that they (the Guptas) faced much opposition when they announced that they would be setting up a newspaper. Mr Atul Gupta then referred to the Waterkloof landing incident and what was written about them (the Guptas).

1518. During this meeting, Mr Sundaram says that he and Mr Aggarwal, "realised then that an influential member of the government was a shareholder in the company under a black economic empowerment (BEE) deal. But I did not know who it was at that point." Mr Sundaram further said "I found out much later about a deal that Atul had made to get 75 crore Indian rupees in the first year of operation. The deal seemed to be to use the president's influence to get various government departments and ministries to pay a part of their advertising budget to ANN7 in the form of advertising."¹¹³⁴

1519. Mr Sundaram also recalls their first meeting they had with MultiChoice and how they were told to insist on getting Channel 404 as the channel for ANN7 as all the other

¹¹³⁴ id, p46-7.

media stations were from Channel 400 onwards. According to Mr Sundaram, Mr Atul Gupta told them before the MultiChoice meeting:

“Ajay, my brother, is talking with the highest office in the country to ensure that we get this slot, but you must also push from your level.” 1135

On another occasion Mr Sundaram says Mr Atul Gupta said:

“Channel 404 is the only vacant slot next to eNCA, but these people will not allocate it to us until we hit them with a stick on their head from the highest office. 405 is Russia Today, and we will be pushed to a slot lower than 410, and no one will watch us.”1136

1520. Mr Sundaram went on to say:

“It was telling how the Guptas were not willing to subject themselves to the quality control and technical checks that MultiChoice wanted, yet were willing to invoke the president’s office to put pressure on MultiChoice to give them the 404 slot.” 1137

1521. It is most painful to learn that someone from another country who came to our country and did the things that the Gupta family members did to us as South Africans in this country came to the conclusion that South African officials not only can be bribed but that they can simply be bribed by a free meal or a drink. That’s how low the Guptas thought of us as South Africans. It must be because of the experience they gained from those South Africans with whom they had intimate dealings. Among them is obviously Mr Jacob Zuma. I cannot help but remember Mr Hlaudi Motsoeneng’s evidence in regard to the SABC and MultiChoice contract because in his evidence Mr Motsoeneng told the Commission how he enjoyed curry at the Gupta residence.

¹¹³⁵ *Id.*, p 65.

¹¹³⁶ *Id.*, p 68.

¹¹³⁷ *Id.*

1522. At a meeting at the Gupta residence in Saxonwold, Mr Sundaram attended a meeting with the Gupta brothers, Mr Singh and other Indian nationals who were part of the team. At the meeting Mr Sundaram says Mr Ajay Gupta said the following to him:

"Rajesh, Laxmi ji told me that you think many people will not join us because they fear we are going to be pro-ANC and pro-Zuma. Tell them we are not. See, the Waterkloof incident has made us a household name in this country. If the Gupta family launches a news channel, it will be watched. Even our enemies will want to know what we have to say. It is a fantastic opportunity; our reputation will get us eyeballs. We will be one of the top-viewed TV stations from day one."¹¹³⁸

1523. Describing the move to South Africa and how he was doubting his move, Mr Sundaram went on to describe how the Guptas sought to justify the Waterkloof incident despite its negative media coverage for the Gupta family. Mr Sundaram said that Atul Gupta said to him :

"Like Laxmi, he blamed the media for playing up the incident. He claimed his family had the required permission to land the jet, and in the same breath he mentioned the proximity his family enjoyed with President Zuma and his family.

'President Zuma is on our side, he knows our family, and we helped him when he was down and out; he will help us through this as well. You know, top ministers of the Zuma cabinet attended the wedding. This is a direct endorsement for us. The personnel against whom action has been taken will be reinstated very soon. We are an influential family here, and no one can point fingers at us,' Atul boasted.

'We have close relations with everyone in the ANC. If Zuma is ever ousted, I can tell you for sure that the next one in line from the ANC would be close to us as well. We are banias, and we know how to keep our business interests protected,' he added."¹¹³⁹

1524. Mr Sundaram went on to say:

¹¹³⁸ Id, p 75.

¹¹³⁹ Id, p 82.

"Atul seemed to enjoy the notoriety that the Waterkloof landing gave him. He would often amuse young staff at restaurants and ushers at conferences by introducing himself as 'Atul Gupta of Waterkloof fame'" 1140

1525. Mr Sundaram also touched on how the Waterkloof landing incident had negatively impacted The New Age newspaper revenue. He went on to say:

"The only saving grace for the paper was the regular New Age Business Briefing broadcast on SABC. This was a cash cow. Atul twisted arms at the SABC to give him a monitoring slot for a question-and-answer format breakfast show featuring key national and provincial ministers and officials.

Nazeem told me that each of the shows earned them up to 1.8 million rand. The paper's marketing team was always busy booking ministers and venues and the hospitality, and the SABC footed the costs for broadcasting. The New Age earned from not just the sale of tickets but also from various government departments.

Atul boasted to me once that he could get any national or provincial minister he wanted for the show."¹¹⁴¹

1526. Mr Sundaram also touched on how Mr Atul Gupta used the period before The New Age Business Briefings for networking opportunities with the Ministers. Mr Sundaram says:

"These meetings were almost always focused on seeking advertisements from the ministries or departments they represented and clarifying issues raised by the South African media, including the Waterkloof scandal."

1527. In addition, Mr Sundaram spoke on the decline in advertisements from the private sector on ANN7 because of the notoriety of the Guptas. He said:

"The decline in advertising revenue was something that on the surface did not seem to worry Atul or the senior management at The New Age. It was discussed during meetings with President Zuma as well.

The Waterkloof scandal had clearly had a deep impact on Atul, despite him joking about it in public. During a meeting, discussions veered towards the incident and

¹¹⁴⁰ Id, p 84.

¹¹⁴¹ Id, p 85.

how the Gupta family had been 'humiliated' and slighted by the media and a 'few inimical officials'.

'One day these officials will know the power of the Gupta family. Right now we are forced to be on the defensive, but that will not always be the case. We will remember these people and will definitely teach them a lesson when we can, and I am sure we will one day. Young children in my family have been scarred for life, and that is not something anyone in my position is likely to forget or forgive' he told me

He was referring to how the young bride and groom were put through what he called 'trauma' by his 'business and political rivals.'" 1142

1528. Mr Sundaram also described how Mr Atul Gupta enjoyed discussions that centred around the "Guptagate" saga and would often have mock interviews/scenarios with potential journalists and candidates at ANN7. Mr Sundaram said that Mr Atul Gupta would tell them to ask him difficult questions surrounding the "Guptagate" as a test. Mr Sundaram found it quite strange that, when "President Zuma suggested his old confidant and former government spokesperson Jimmy Manyi be made the host for such a show, Atul put him through the test too. It was strange how Atul steered clear of media questions and had a family spokesman and Nazeem answer questions related to Guptagate, yet he enjoyed answering questions in the mock interviews with eager-to-please job seekers."¹¹⁴³

1529. Mr Sundaram recalls an instruction he received from Mr Atul Gupta after one of their morning review meetings. He said that Mr Atul Gupta asked Mr Waggenwal to prepare a presentation with which The New Age creative head Mr Aslam Kamal was asked to assist them. According to Mr Sundaram, Atul said the following:

"Use glossy paper and make a colourful folder. Pick up good photos from the internet and Photoshop and use the logo. Baba should be happy with this. We will go to meet Number 9 any time over the next few days, so do it as soon as you get

¹¹⁴² Id, p 86.

¹¹⁴³ Id, p 87.

the text. I want you to make three copies, one for Number 9 and two for us to keep handy.”¹¹⁴⁴

1530. Atul, after clarifying to Mr Sundaram that they do not call President Zuma by his name but call him Baba because they believe their phones are tapped, went on to say:

“Baba, he told us, would not want the South African media to know about our meeting or his association with ANN7. ‘He is close to use, but we do not want to make that too obvious.’ He said.

‘We call the Rashtropati Baba. That is what people who know him call him. He was referred to as Number 9 when he was in the intelligence wing of the ANC. You must refer to him as Number 9 in all your conversations and telephone calls about this meeting that will be our code word for him,’ he continued in a hushed tone.

‘When do we meet Number 9? Do we have an appointment yet?’ Mr Sundaram asked.”¹¹⁴⁵

1531. Mr Sundaram said that Mr Atul Gupta further went on to say about President Zuma:

“We supported him when no one cared to look at him. Before the last elections his opponents accused him of rape and corruption and made all kinds of charges. Most of his friends deserted him then. The Gupta family stood by him until he came out victorious. He would often come to our house and meet Ajay ji and me. Look where that support has brought him – today he is the president.”¹¹⁴⁶

1532. Mr Sundaram also touched on the “disputes” he had with Mr Atul Gupta regarding the presenters who were to be hired for ANN7. Mr Sundaram says Mr Atul Gupta opted for models to be hired so that they could draw viewership. He says “Nazeem and Atul also had a list of presenters sent by President Zuma. This included former government spokesperson Jimmy Manyi.” Mr Sundaram says he recalled how stiff Mr Manyi was

¹¹⁴⁴ *Id.*, p 89-90.

¹¹⁴⁵ *Id.*, p 90.

¹¹⁴⁶ *Id.*, p 91.

and how unsuitable for the job he was, but Nazeem told him that, "we have to hire him; President Zuma will have it no other way".¹¹⁴⁷ Mr Sundaram went on to say:

"The others recommended by President Zuma, including a radio show presenter who was the daughter of an African National Congress (ANC) leader declined Nazeem's offer after coming to the office for several rounds of meetings and interviews.

Many recommended by President Zuma asked for a salary that was well out of the ANN7 salary band fixed by Laxmi."¹¹⁴⁸

1533. Mr Sundaram then went on to describe how Mr Zuma was even interested in the editorial and personnel matters of ANN7. He then asked Nazeem why the President was lecturing them on such matters. Nazeem responded as follows:

"Don't you know? Hasn't Laxmi j told you already? He has a big say in this venture. His son Duduzane holds 30 percent in the company. His involvement is very critical for the first year of our operations. If we are able to get government advertisements, we will be able to break even in the first year," he told me. ¹¹⁴⁹

1534. Mr Sundaram then thought:

"If this were true, it would explain a lot, and it felt as though everything was falling into place.

The news channel I was heading would be a pro-ANC, pro-Zuma channel promoted and run by not only people close to President Zuma but by President Zuma himself. If Nazeem had his facts straight and Zuma held the shares through his son, he would be protected positively in the news bulletin.

In this scenario I could see how he would use his position as president to ensure government advertising for the station.

¹¹⁴⁷ Id, p 108-109.

¹¹⁴⁸ Id, p 109.

¹¹⁴⁹ Id, p 121.

It also seemed, if this was the truth, that there was a clear conflict of interest as his son had a stake in not just the Gupta-owned newspaper but also the proposed television news channel."¹⁵⁰

1535. What Mr Sundaram says here raises the issue again why it was that Mr Duduzane Zuma who was said to own 30% of the shareholding in the Gupta TV station business had not attended any of the earlier meetings that Mr Sundaram had attended and was attending his first of the three meetings on this occasion and yet his father, President Zuma was showing a lot of interest and devoting a lot of time to meetings with the Guptas on this TV station project? It certainly gives rise to the suspicion that the real shareholder was President Zuma and not Mr Duduzane Zuma.

Mr M. Williams version to Mr Sundaram's evidence

1536. What follows is a summary of the contents of Mr William's affidavit. Mr M. Williams deposed to an affidavit but did not give oral evidence, nor did he apply for leave to cross-examine anyone¹⁵¹. In it he denied any possible wrongdoing and in any event none was ascribed to him. In 2006 he was appointed as the editorial director of Independent Newspapers in addition to his duties as editor of the Star since 2001. In September 2012 he took up the position as editor of The New Age newspaper. He retired in June 2017 as editor of The New Age. In the interim he also served as editor-in-chief of ANN7. He criticised Mr Sundaram's professional performance in South Africa indicating that the allegations made by Mr Sundaram were made by someone who had an axe to grind. According to Mr Williams the launch of ANN7 was a disaster and the launch was Mr Sundaram's primary responsibility. Mr Williams gave details of him having met President Zuma on numerous occasions since 2012 mainly at breakfast briefings. He said that this was not uncommon for journalists at all. He said that it was

¹⁵⁰ *Id.*, p 121.

¹⁵¹ Exhibit CC(1)(e)

only in that professional capacity that he attended one meeting (not two as Mr Sundaram attested to) at the President's official residence.

1537. Mr Williams said that it was widely known that The New Age newspaper and ANN7 were inclined to report on the positive achievements of Government and the ruling party. He suggested that it was therefore preposterous to suggest that President Zuma would have had any input in editorial policy and discussions and commercial decisions relating to the newspaper and the television station. It would not be uncommon though to discuss in general terms with a person, such as President Zuma, the general approach a publication such as The New Age newspaper or a television station such as ANN7, would follow insofar as its article or programme content were concerned. He added that Mr Sundaram should know, as would any seasoned journalist, that there was a "Chinese Wall" in all journalistic enterprises between journalists and its editorial staff, on the one hand, and a management of the commercial enterprise on the other. Mr Williams stated that the Gupta family in general never interfered with the editorial policy, direction or integrity of The New Age for as long as he was involved in it. He also stated that they never interfered with the editorial independence of the television station. However, he said that tensions between journalists and commercial managers do exist however. They have different aims and purposes in mind. Editorial interference for the benefit of the ANC and President Zuma however clearly appears from the evidence of Mr P Magopeni dealt with hereunder, and the reported utterances of Mr Hlaudi Motsoeneng.

1538. Mr Williams denied that President Zuma had a direct say in the commercial aspects of the newspaper and the television station in order to secure lucrative Government advertising for the television station.

1539. He also denied that he, with others, stayed on in a meeting with President Zuma to discuss advertising support for the New Age newspaper. He said that this was simply false and in any event hear-say evidence. He also denied the version that representatives of the television station were asked to leave the meeting in order for a discussion to take place in relation to the commercial affairs of the newspaper.

1540. He denied that he had participated in three meetings at the residence of the then President. He said he was also not present at the studios on 19 August 2013. It must be remembered that a careful reading of Mr Sundaram's affidavits will show that his second affidavit¹¹⁵², contradicts his first, that has been quoted, insofar as the presence of Mr Williams at the President's residence was concerned. In the second affidavit Mr Sundaram said that Mr Williams did not attend the third meeting. He also did not specifically say that Mr Williams was at the studios on 9 August 2013, but merely referred to the "usual attendees". It must be asked however: why would the editor of the channel not be present on such an occasion? He also contradicted himself in regard to the presence of Mr Duduzane Zuma at these meetings. In his first affidavit he said that he was never present, while in his supplementary affidavit he said that he was present at the third meeting. His evidence must be viewed with a degree of caution.

1541. Mr William said that he did attend one meeting with the President on an off-the-record basis in order to discuss the general objectives of the television station, its imminent launch and how it would pursue the objective reporting pertaining to Government and the ruling party. He said that this was not out of the ordinary. This meeting could well have been on 22 June 2013, the date Mr Sundaram. He noted that Mr Sundaram could not recollect the dates of the second and third meetings. He also denied that Mr Duduzane Zuma was present at the single meeting that he had with the President.

¹¹⁵² RS-SUP-24, par. 26

Access records to the official residence would belie the version of Mr Sundaram. He also denied that ANN7 delegation was permitted to circumvent the security measures.

Mr R. Mekgwe's version to Mr Sundaram's evidence

1542. Mr R Mekgwe deposed to an affidavit on 19 August 2020¹¹⁵³. He was employed as a Household Manager at the President's official residence between 2012 and 2015. He confirmed the description of the two meeting rooms described by Mr Sundaram, except to say that a television set was not mounted on a wall. In other words, evidence about how he described the rooms at the President's official residence in what Mr Sundaram said the Guptas held meetings with President Zuma on the occasion when he also attended those meetings.

Mr J Human's version to Mr Sundaram's evidence

1543. Mr J Human deposed to an affidavit on 27 July 2020¹¹⁵⁴. He was the Household Manager between 2000 and 2009 and again from 2018. He also gave a description of the two meeting rooms. His description accorded in general terms with the evidence given by Mr Sundaram and Mr Mekgwe.

The Role of Ms F. Muthambi

1544. On 17 July 2017 Ms S. Fick, the Head of Legal Affairs by the Organisation Undoing Tax Abuse ("Outa") deposed to an affidavit¹¹⁵⁵ concerning Ms Muthambi. Here is an overview of the main relevant parts.

¹¹⁵³ Exhibit CC1(h)

¹¹⁵⁴ Exhibit CC1(i)

¹¹⁵⁵ Exhibit 47, SAB-01-042

1545. Certain emails were retrieved from the server of SAHARA Computers (Pty) Ltd, a company owned by the Gupta family. Outa received a copy of these emails from an unknown source. Ms Fick states that amongst those emails were those that evidenced “crimes of corruption and high treason”. This misconduct occurred during her tenure as Minister of Communications.
1546. On 25 May 2014 President Zuma appointed Ms Muthambi to the Cabinet as Minister of Communications. In the Cabinet reshuffle of 30 March 2017, she was retained as a Member of Cabinet, as Minister of the Public Service and Administration.
1547. On 24 February 2017, the National Assembly’s ad hoc Committee found that she “displayed incompetence in carrying out her responsibilities as Shareholder Representative (of the SABC)”. The Committee noted that the evidence suggested “major shortcomings” in Ms Muthambi’s conduct, particularly in relation to the SABC’s Memorandums of Incorporation (MOI) and her role in Mr Motsoeneng’s permanent appointment as COO. It concluded that “.... the Minister interfered in some of the Board’s decision-making and processes and had irregularly amended the MOI to further centralise power in the Minister...” and condemned all political interference in the Board’s operations by Ms Muthambi.
1548. The Committee recommended that President Zuma should seriously reconsider the desirability of this particular Minister being responsible for to the Communications portfolio.

1549. The Western Cape High Court¹¹⁵⁶ found that she acted irrationally and unlawfully in appointing Mr Motsoeneng as COO of the SABC in the face of the Public Protector's findings against him of abuse of power, fraud and maladministration.

1550. The Supreme Court of Appeal made the same findings on a prima facie basis against the Minister¹¹⁵⁷. It also criticized her for "treating with disdain" the allegation that Mr Motsoeneng's appointment was irrational and unlawful, and for raising technical objections rather than furnishing the Court with an explanation of her actions.

1551. The Constitutional Court¹¹⁵⁸ also expressed concern at her "evasive" and "suspicious" responses or the lack thereof to pertinent questions raised by eTV as regards consultations she had with undisclosed parties.

The Gupta Leaks

1552. The Gupta emails obtained from the SAHARA computer server show that between July and August 2014, shortly after her appointment, Ms Muthambi sent a series of emails to Mr Tony Gupta on confidential matters of executive policy and matters in the scope of her ministerial powers. The correspondence suggests either –

1552.1. that the transfer of powers to her national portfolio was influenced and vetted by the Guptas; or

1552.2. that she used their relationship with the Guptas to influence the manner in which President Zuma transferred powers to her portfolio.

¹¹⁵⁶ *Democratic Alliance v SABC and Others*, 2016(3) SA 468 (WCC). The judgment is dated 27 November 2015

¹¹⁵⁷ *SABC v Democratic Alliance* 2016 (2) SA 522 (SCA)

¹¹⁵⁸ *Electronic Media Network v eTV Pty Ltd*, 2017 (1) SA 17 (CC)

1553. These emails were either sent directly from Ms Muthambi to Mr Tony Gupta or indirectly, from her to the SAHARA Company's CEO, Mr Ashu Chawla, who in turn forwarded correspondence to Mr Tony Gupta and Mr Duduzane Zuma, the son of President Zuma. The latter appears to have acted as a conduit between the Guptas and President Zuma.
1554. On 18 July 2014 Ms Muthambi emailed a copy of the President's Proclamation on the transfer of administration and powers to certain Cabinet members¹⁵⁵⁹ to Mr Ashu Chawla, who, in turn, forwarded the email to Mr T. Gupta.
1555. This Proclamation provided inter alia that all powers under the Electronic Communications Act 36 of 2005 and the Sentech Act of 1996 were to be assigned to the Minister of Telecommunication and Postal Services Minister Cwele. Previously they were assigned to the Minister of Communications.
1556. A few minutes after emailing this Proclamation to Mr Chawla she sent a second email attaching a document which described the effect of Proclamation.
1557. On 25 July she sent two emails to Mr Chawla again describing the effect of the Proclamation and also stating that Sentech's signal distribution had to rest with the Ministry of Communications.
1558. Both emails of 25 July 2014 were subsequently forwarded by Mr Chawla to Mr Tony Gupta and Mr Duduzane Zuma, in separate emails.
1559. The said Proclamation transferred power under section 3 of the Electronic Communications Act No. 36 of 2005 to make national policy "to the extent that it deals

¹⁵⁵⁹ Proclamation. 47 of 2014 in Government Gazette No. 87839 of 15/7/2014.

in any way with a broadcasting service or an electronic communications network used for as in the provision of broadcasting service”.

1560. On 6 December 2013 the previous Minister, Mr Carrim, had used the power under section 3 by issuing for public comment draft amendments to the broadcast digital migration technology, the features of which were prominent:

1560.1. It proposed fixed dates for certain stages in the digital migration process, and

1560.2. It proposed that Government would subsidize set-top-boxes capable of receiving encrypted signals; this was in accordance with ANC policy on the issue.

1561. On 29 July 2014 Ms Muthambi sent an email to Mr Chawla giving notice of a Cabinet meeting the next day. She attached a memorandum that she had sent to Minister Cwele in connection with concerns that she had expressed regarding his intention to table final amendments to the Broadcasting Digital Migration Policy in Cabinet.

1562. Ms Fick expressed the view that this amounted to a gross violation of Cabinet confidentiality. This must be so. Mr Chawla forwarded the email and the document to Mr Tony Gupta later that day.

1563. Minister Cwele did not at any stage obtain Cabinet approval for his proposed amendments.

1564. On 1 August 2014 Ms Muthambi sent an email to Mr Chawla to which she attached a draft of a Proclamation that the President had to sign.

1565. On 8 August 2014, one “Ellen” of Fortune Holdings emailed Ms Muthambi in reply thanking her for the proposed Proclamation that President Zuma “must sign”. The email

was signed by "Zandile", presumably Ms Tshabalala, the SABC Chairperson at the time. "Zandile" copied Mr Chawla and a certain Khumalo at the SABC.

1566. The said draft Proclamation was never promulgated.

1567. Ms Muthambi had policy on Broadcast Migration under her control and on 16 March 2015 published her amendments under Government Notice 232 of 2015. It included neither of the 2 features of Minister Carrim's draft of December 2013.

1567.1. The policy no longer tied the Government to any dates for the digital migration process, and

1567.2. The policy provided that Government subsidized set-top-boxes would not be capable of receiving encrypted signals. It thus reversed Minister Carrim's proposal which had been in accordance with ANC policy and replaced it with a decision that was contrary to it.

1568. I have referred to the criticisms by the Constitutional Court regarding Ms Muthambi's "evasive and suspicious" responses relating to the identity of the persons whom she had consulted in relation to the changes. In all probability, the mentioned Mr Tony Gupta and President Zuma himself.

1569. I agree that the communications described above amount to an abuse by Ms Muthambi of her office. There is no reasonable explanation for communications of this nature between a Minister and members of the Gupta group who control a television station subject to her regulatory jurisdiction.

1570. I have already referred to her irrational appointment of Mr H. Motsoeneng as permanent COO which was set aside by the Courts. It is most probable that Mr Motsoeneng's gross abuse of power at the SABC, including diverting public resources vested in the

SABC to benefit the Gupta's rival media company, appear to have been sanctioned by both Ms Muthambi and President Zuma.

1571. In my opinion her said actions should be referred to the National Prosecuting Authorities if this has not yet been done. Her actions are in conflict with s. 96 of the Constitution as also in conflict with her oath of office. There is also sufficient evidence on record to consider charges in terms of sections 3, 4, 7, 21 and 34 of the Prevention and Combatting of Corrupt Activities Act 12 of 2004.

1572. On 21 May 2021 Ms Muthambi appeared before the Commission¹¹⁶⁰. She was legally represented. She denied that she had sent emails to persons who were not entitled to be privy thereto. She said that she merely "engaged" with various stakeholders, which included the Gupta family who were the owners of TNA Media and ANN7 television at the time. She confirmed that she had made a statement which was undated and not sworn to, but she confirmed that it was true and accurate¹¹⁶¹. She then raised preliminary objections on the basis that disciplinary proceedings were pending in Parliament and that those should run their course. She was still a Member of Parliament.

1573. She confirmed that she had sent an email to Mr Ashu Chawla on 18 July 2014. Attached to that was the Proclamation referred to above. She said that she had no knowledge of whether Mr Chawla acted as a conduit between the Guptas and President Zuma.

1574. Ms Muthambi said that Mr Chawla was merely a stakeholder and, in that context, she admitted that she had sent all emails referred to by Ms Fick but did so as part of a consultation and engagement process with stakeholders. She also denied that she had

¹¹⁶⁰ Transcript File 3/3, Day 400

¹¹⁶¹ Exhibit CC47.11, SABC-01-701

changed any policy as suggested by Ms Fick and as discussed above, saying that previous policies had merely been in draft form. She said that it was only in 2015 that the Digital Migration Policy was approved by Cabinet. She also denied that she had sent any confidential documents relating to the said Cabinet meeting inasmuch as that mentioned notification was not confidential. She also added that the fact that the Constitutional Court had criticized her as being "evasive" and "raising suspicious responses" was irrelevant because that Court had actually found in her favour regarding her powers. She also did not accept the finding of the Court that she had failed to disclose who she had consulted with. She said that in any event she did not remember having been asked to disclose whom she had consulted with. She also denied that the reason of the said non-disclosure was that she had shared information with third parties (the Guptas of course) who were not entitled so much information.

1575. I find the evidence of Ms Muthambi unconvincing to say the least. She knew quite well that she had unauthorised communications with the Guptas, and for that reason did not disclose to the mentioned Courts who she had consulted with. I do not accept her version that the Guptas in the given context were mere innocent stakeholders in a consultation process. If they were, there would have been no reason not to disclose that to the Courts. If they shared this information with the Guptas as part of a consultation process with stakeholders, how come she has not told this commission the identities of other stakeholders in the Communications sector with whom she shared the same information? There can be no doubt that there are no other shareholders with whom she shared that information because if there were, there is no way she would not have told the Commission that she had shared it with other stakeholders as well and given the Commission their identities because that would have given evidence to her version. It is clear that she had abused her power in a number of instances. In these circumstances the finding made is that Ms Muthambi unlawfully shared that confidential information with the Guptas and their associates. It is quite clear that she was doing so

in order to get the Guptas to talk to their friend, President Zuma, to ensure that she had certain powers as Minister of Communications. That means that, like Mr Mosebenzi Zwane, Ms Lynn Brown and Mr Malusi Gigaba, who were Gupta Ministers, she too, was a Gupta Minister.

Conclusions and Recommendations

1576. The question to be answered is whether the actions of the Former President by involving himself in the formation and business activities of ANN7 acted unethically or contravened the Code of Ethics.

1577. In terms of Government Gazette Notice No. 21399, Notice No. 41, Regulation 6853, the Executive Ethics Code was published. The Executive Code was published in terms of section 2(1) of the Executive Members Ethics Act, 1998 (Act No. 82 of 1998). The Executive Ethics Code was published by the then Acting President J G Zuma. The Executive Ethics Code was published and the members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils are obliged to comply therewith in performing their official responsibilities. Clause 2.3 of the Executive Ethics Code provides:

"Members of the Executive may not –

- (a) ...
- (b) ...
- (c) ...
- (d) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person;
- (e) ...
- (f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;

Conflict of interest

A member must declare any personal or private financial or business interest that the member may have in a matter –

- (a) that is before the cabinet or an Executive Council
- (b) that is before a cabinet committee or Executive Council on which the member serves or
- (c) in relation to which the member is required to take a decision as a member of the Executive.

3.5 For the purposes of the paragraphs 3.1, 3.2, 3.3 and 3.4 the personal or private financial or business interests of a member includes any financial or business interests which to the member's knowledge, the member's spouse, permanent companion or family member has.

5 Disclosure of financial interests

5.1 Every member must disclose to the secretary particulars of all the financial interests, as set out in paragraph 6 of (a) the member; and (b) the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests."

The Executive Members Ethics Act No. 82 of 1998 was intended to provide for a Code of Ethics governing the conduct of members of Cabinet, Deputy Ministers and members of Provincial Executive Councils and to provide for matters connected therewith. Its definition in section 1 provides that "Cabinet member" includes the President. The Code of Ethics that has been referred to above emanates from the provisions of section 2 of this Act as aforementioned. The Act provides –

"The Code of Ethics must include provisions prohibiting cabinet members, Deputy Ministers and MECs from – a

- (i) ...
- (ii) acting in a way that is inconsistent with their office.
- (iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.
- (iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and
- (v) acting in way that may compromise the credibility or integrity of their office or of the government."

Section 2(c)(ii) provides –

“The Code of Ethics must –

(a)....

(b)....

(c) require cabinet members and Deputy Ministers to disclose to an official in the office of the President designated for this purpose and MECs to disclose to an official in the office the Premier concerned designated for this purpose –

(i) all their financial interests when assuming office; and

(ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the Code of Ethics.”

1578. Section 3 of the Act provides that the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint contemplated in section 4.

1579. In this regard Term of Reference, 1.4 reads:

“Whether the President or any member of the present or previous members of his National Executive including Deputy Ministers of public official or employee of any State-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOEs or any organ of state to benefit the Gupta family or any other family individual or corporate entity doing business with government or any organ of state.”

1580. The Public Protector in her report dated 14 October 2016 and in her executive summary stated at page 4(i) of the report –

“(i) “State of Capture” is my report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 3(1) of the Executive Members Ethics Act and section 8(1) of the Public Protector Act, 1994.”

1581. In her report at page 4(vi) she stated that –

"The investigation emanates from complaints lodged against the President by Father S Mayebe on behalf of the Dominican Order, a group of Catholic Priests, on 18 March 2016, (The First Complainant); Mr Mmusi Maimane the leader of the Democratic Alliance and Leader of the Opposition in Parliament on 18 March 2016, (The Second Complainant), in terms of section 4 of the Executive Members' Ethics Act, 82 of 1998 ("EMEA"); and a member of the public on 22 April 2016, (The Third Complainant), whose name I have withheld."

1582. At page 6 she stated the following –

'6 (vii) In his complaint Mr Maimane stated amongst other things that –

'section 2.3 of the Code of Ethics states that members of the Executive may not –

- (a) wilfully mislead the legislator to which they are accountable;
- (b)...
- (c) act in a way that is inconsistent with their position;
- (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

"(b) It is our contention that President Jacob Zuma may have breached the Executive Ethics Code by –

 - (i) exposing himself to any situation involving the risk of a conflict between their official responsibilities and their "private interests;
 - (ii) acted in a way that is inconsistent with his position; and
 - (iii) used their position or any information entrusted to them to enrich themselves or improperly benefit any other person."

1583. At page 9 she stated –

"The complaint relates to allegations of improper conduct in state affairs and unethical conduct by the President of the Republic and other state functionaries and accordingly falls within my ambit as the Public Protector. None of the parties challenge the jurisdiction of the Public Protector."

1584. Section 96(1) of the Constitution provides –

"(a) Members of the cabinet and deputy ministers must act in accordance with a Code of Ethics prescribed by National Legislation.

(b) Members of the cabinet and deputy ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibility and private interests; or

(c) Use their position or any information entrusted to them to enrich themselves or improperly benefit any other person."

1585. There can be no doubt that in acting as he did, in relation to the TNA and the ANN7 TV station, President Zuma acted in breach of the Executive Ethics Code. He, as President, abused his office for his own benefit, that of his son and that of his friends, the Guptas. He placed himself in a situation of a conflict of interest and abused his position as President of the country.

1586. Mr Sundaram is, according to the evidence, the only witness that placed the former President in the same room with the members of the Gupta family and the managers of their entities who were attending to the formation of the ANN7.

1587. The evidence of Mr Sundaram is reliable and credible. It has not been challenged by any of the implicated persons in a manner that would create doubt in its veracity. It has been confirmed by some of the implicated persons, including the former President, in many respects.

1588. The members of the Gupta family had used their close relationship with President Zuma to facilitate and extend their business interests from India to South Africa. The extension of Infinity Media and the birth of the ANN7 demonstrate the broadening of such interests.

1589. President Zuma had enabled the extension of such business interests for the benefit of his son, Mr Duduzane Zuma.

1590. The Gupta family and in turn the President's son, Mr Duduzane Zuma, benefitted from the relationship that the Gupta family had with the President Zuma in that they entered

into contracts with various State organs and, in particular the SABC, to the detriment of other potential competitors who operated within the same media space.

1591. The Gupta family abused their relationship with President Zuma in that they used one of their employees, Mr Ashu Chawla, to access the Presidential residence as he pleased to liaise directly with the President and arrange and secure meetings for the members of the Gupta Family contrary to the applicable security measures within the Presidency or State protocol.

1592. President Zuma enabled the members of the Gupta family as business people to occupy a place of prominence over other businessmen, to the detriment of the empowerment legislative imperatives of the Republic of South Africa.

1593. President Zuma enabled, indirectly, the members of the Gupta family to abuse their relationship to the extent of flouting visa and labour laws of the country. It is not denied that through Mr Ashu Chawla visas for the Indian nationals were facilitated in a way that was contrary to law. For instance, Mr Sundaram admitted that his visa was not processed according to law.

1594. The allegations made by Mr Sundaram that some of the Indian nationals were employed by the ANN7 without permits were not far-fetched because, after investigations which were conducted by the Department of Home Affairs, it was found that four employees of ANN7 who were Indian nationals had violated the conditions of their permits and were accordingly ordered to leave the country. It is not deemed necessary for the Commission to recommend any steps to be taken in this regard since such persons were ordered to leave the country way back in 2013.

1595. In the light of the admitted evidence by President Zuma as stated above, President Zuma acted in breach of the provisions of section 96(1)(a); (b) and (c) of the Constitution.
1596. A finding that President Zuma acted in breach of the provisions of section 2 (ii); (iii); (iv); (v); section 3.1 and 3.5 of the Executive Members Ethics Act 82 of 1998, should be made as it is consistent with President Zuma's own evidence and that of Mr Sundaram.
1597. By involving himself in the conception and formation of the ANN7, President Zuma breached clauses 2.2 (d) and (f) of the Executive Ethics Code.
1598. The costs incurred by the SABC for the TNA broadcasts, coupled with the provision of the relevant services to TNA by the SABC, in the amount of approximately R4 268 887.00 excluding VAT, between 01 April 2011 and 31 March 2017, should be recovered from any of the assets belonging to TNA or any assets held by the members of the Gupta Family.
1599. In this regard President Zuma breached his obligations as the President of the country and those that are entrusted in him in terms of the Members Ethics Act.
1600. Lastly, the evidence led and dealt with hereinabove justifies a finding that the investigations of the Commission have, on the established facts, proved and answered Clause 4.1 of the Terms of Reference, positively, that:

"1.4 Whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state owned entities (SOE's) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the Gupta family or any other family, individual or corporate entity doing business with government or any organ of state"

1601. Many of the events described in this section of the Report occurred even before 2010 and much has changed, though the SABC is still in a dire financial situation. Many of the main actors have left the stage and obviously steps against them by internal processes can no longer be taken.
1602. The Guptas have left South Africa and it is not known when extradition proceedings will ensure their return to face criminal proceedings.
1603. The New Age newspaper has closed down and MultiChoice did not renew its contract with the ANN7 television channel.
1604. There was evidence that the remedial actions proposed by the Public Protector in her report of February 2014 had not all been followed-up.
1605. At the very least the appropriate investigating and prosecuting authorities should attempt to recover all monies spent through unlawful and improper actions, if that can still be done. For instance, the ± R11 million “success fee” should be recovered from Mr Motsoeneng.
1606. It is clear from the evidence relating to the New Age newspaper and the creation of the ANN7 television channel that the Gupta family and their associates had a close relationship with President Zuma and that he showed a particular interest in their ventures. Mr Motsoeneng, having regard to his own utterances as described by witnesses, and in some instances recorded, saw himself (and probably was) the facilitator between President Zuma and at the very least the news section of the SABC. Whether this was for President Zuma's personal benefit is impossible to say, but there is clear evidence that it benefited the ANC, and his son Mr Duduzane Zuma.

1607. It is further recommended that the SABC should consider instituting civil proceedings against TNA Media or any of its Directors and recover all the costs incurred by the SABC including disgorgement of profits made by TNA Media in relation to the breakfast shows. Zuma who had a 30% share in Infinity Media, a Gupta family company.
1608. A number of witnesses gave credible evidence of editorial interference with reference to specific events that were not allowed either to be broadcast or to be commented upon. Former Minister Muthambi handed the reign over SABC editorials to Mr Motsoeneng, as it was put, and allowed him to act above the law.
1609. One must wholly agree with the view expressed by Mr Makhathini, the Chairperson since 2017, that "depoliticizing is of paramount importance in the renewal, rehabilitation and strengthening of governance systems. Appointing competent and credible executives with the prerequisite skills and experience is at the heart of the renewal process".
1610. A statutory offence with severe penalties should be created dealing with the abuse of power by public officials in all spheres of government and organs of state. Abuse of power has become endemic in South Africa. It is a recurrent theme almost everywhere, as it was at the SABC, be it by Ministers, members of the Board or Executives.
1611. It is recommended that the law enforcement agencies conduct further investigations with a view to a possible criminal prosecution of Ms Lutama Mokhobo, former Group Chief Executive Officer of SABC and Mr Hlaudi Motsoeneng for possible contravention of section 38(1)(b) and (c) of the Public Finance Management Act, in the case of Ms Mokhobo, and of section 45(b) and (c) of the PFMA, in the case of Mr Hlaudi Motsoeneng, in respect of their respective roles in the conclusion of the agreement between the SABC and TNA Media (Pty) Ltd in respect of the so-called TNA Breakfast Briefings.

WATERKLOOF LANDING

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WATERKLOOF LANDING

Introduction

1612. The Waterkloof Air Force Base is an airbase of the South African Air Force. It is currently classified as a national key point – a strategic entry into the Republic of South Africa. The role of Waterkloof Air Force Base is to provide military air transport and other unique services in the interests of the South African Air Force. Waterkloof Air Force Base only receives flights classified as military flights, VVIP flights or VIP flights. Its Standard Operating Procedures indicate that “no commercial or charter flights would receive permission to land at Waterkloof Airbase except in an emergency situation”. Waterkloof Air Force Base remains the prime military airfield. Not only does it run the Ditholo Air Force training area in Hammanskraal but it also oversees Swartkop AFB, the latter interestingly known internationally as one of the longest-running air force stations in the world.

1613. One of the matters that the Commission investigated is the incident of the landing of a private aircraft carrying guests of the Gupta family at Waterkloof Air Force Base on 30 April 2013 in Pretoria. The passengers were from India and coming to attend a Gupta wedding at the Sun City Hotel, North West Province.

1614. If there was ever anything clear about the mandate of this Commission from the onset, it was that it included an investigation or inquiry into whether Mr Jacob Zuma as President of the Republic was captured by the Gupta family with the result that he abused his position as President of the country in order to assist the Guptas and his son to get certain contracts and jobs from government departments and state-owned entities and/or that he turned a blind eye to wrongdoing by the Guptas and their

associates as they sought to get certain contracts and jobs from government departments and state-owned entities.

1615. On 30 April 2013, a commercial aircraft carrying about 200 guests of the Gupta family from India who were coming to South Africa to attend a family wedding at Sun City did the unthinkable. It landed at Waterkloof. There was no Head of State or Head of Government or even a Minister of a country that was on the Gupta commercial aircraft. This sparked a national outcry in our country at the time and was a talking point long after it had happened.

1616. As members of the Gupta family were known to be President Zuma's friends, various questions arose in the public domain. They included what President Zuma knew about the plan to land the Gupta private aircraft at Waterkloof, whether he gave permission or whether he may have turned a blind eye to it and who had granted the Guptas permission to land their private aircraft at Waterkloof and how possible it would be for President Zuma's friends to land their private aircraft at a place such as Waterkloof without him knowing about it. Many people who are heroes to the majority of the people of South Africa because of the contribution they made to the attainment of freedom in this country who have never been Heads of State or Deputy President or Minister have never landed at Waterkloof and yet a family from another country that arrived in this country during the 1990s and were close friends of the President of the country had now landed their private aircraft at one of the country's key national points.

1617. Although the Waterkloof Landing was not mentioned in the Public Protector's Report: "State of Capture" nor was it specifically mentioned in the Commission's Terms of Reference, it fell within the terms of reference of the Commission to investigate the incident as it may have been a consequence or incident or manifestation of state

capture. In order to determine this, it is necessary to have regard to the evidence placed before the Commission.

1618. The terms of reference for the Commission of Inquiry into the landing, on 30 April 2013, of a Jet Airways charter flight JAI (the flight) at the Waterkloof Air Force Base (the Waterkloof Landing), require that the Commission inquire into

'whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOEs'.

1619. To answer that question, one must examine the events and people that may have led to a positive response to the question whether the Waterkloof Landing was caused or influenced by any state official or public office bearer, and what offences or breaches of protocol were committed by such person or persons. The examination will entail consideration of the oral evidence given to the Commission and the documents placed before it. These shall be discussed in more detail below.

1620. The evidence of 12 witnesses was led over seven days in July 2019. In testimony, they referred to some 19 exhibits, all of which have been examined. Not all the witnesses' testimony was relevant to the inquiry and I shall mention only the oral evidence and the documents that are of some importance.

1621. It was not contested at the hearing of oral evidence, nor in any of the documents before the Commission, that the purpose of the flight, which came from India, was to bring the guests of the Gupta family, based in South Africa, to a wedding of a family member to be held at Sun City. The officials who facilitated the landing had been advised, however, that there were several Indian Ministers of State aboard the flight. This proved to be false, as shall be shown.

1622. I shall first describe, briefly, the unfolding of events on 30 April 2013, and then detail the relevant evidence. Between 06h50 and 07h00 on that day, the flight arrived at the Waterkloof Force Base (the Air Base), a military base regarded as a strategic entry point to South Africa. The passengers on the flight were met by a number of Air Base officials, and walked along a red carpet, or were driven, to the reception area. They were entertained by some 'traditional dancers' and offered snacks or breakfast. Shortly after landing, the passengers were either driven in a convoy of cars, or flown by helicopters, which had also landed at the Air Base, to Sun City.

1623. The landing of Gupta guests from India gave rise to considerable media coverage and public outrage,¹¹⁶² and was greeted with consternation by the Ministers in the Justice, Crime Prevention and Security Cluster (JCPS Cluster). Accordingly, an Investigating Team (the Team) of Directors General was appointed by them to investigate the landing.¹¹⁶³ The Team comprised Mr DT Dlomo, Acting Director-General of the State Security Agency (who acted as Chairperson of the Team); Ms Nonkululeko Sindane, the Director-General of the Department of Justice and Constitutional Development; Mr TS Moyane, then the National Commissioner of Correctional Services; and Dr CG Swemmer, Acting Coordinator for Intelligence, who was co-opted to the team.

Report of the Investigating Team

1624. The terms of reference given to the Team were to:

1624.1. determine the sequence of events prior to, during and after the landing of the flight at the Air Base;

¹¹⁶² Transcript 3 July 2019, p 3.

¹¹⁶³ Exhibit FF1, para2,p 1.

1624.2. assess the actual events in light of the established legislation, regulations, government and departmental protocols;

1624.3. interview and interact with relevant persons to establish facts; and

1624.4. make findings and recommendations to avert similar occurrences in the future.

1625. The Team members agreed to work together, given the limited time (one week) given to them to investigate and report on their work. Mr Dlomo was not initially present as he was travelling abroad. The members agreed to meet police officials to establish the status of criminal investigations – charges had already been laid against officials who unlawfully escorted the convoy of guests to the wedding venue from the Air Base. These shall be adverted to briefly below. The Team members also agreed to meet members of the South African Revenue Services about the ways in which customs clearances had been handled at the Air Base. Importantly, they agreed to meet the Director-General of the Department of International Relations and Cooperation (DIRCO) to discuss his internal investigations of the role of members of his department in facilitating the landing.

1626. Ms Sindane took a lead role in the investigation,¹⁶⁴ contacting parties identified as necessary to establishing what had happened and organising interviews with them. She also listened to recordings of telephone conversations between the parties most closely associated with the landing of the flight. She interviewed the lawyer of the Gupta family; Ambassador B Koloane, the then Director General of Protocol at DIRCO, who was a key figure, and whose role will be discussed more fully later; Lieutenant Colonel

¹⁶⁴ Exhibit FF1, para2,p 1.

Anderson, also a figure instrumental in facilitating the landing; and Sergeant-Major Ntshisi, who followed the instructions of Ambassador Koloane.

1627. The Team also spoke to the then Minister of Transport, Mr D B Martins, who had some peripheral contact with the Gupta family when they met staff at the O R Tambo International Airport (ORT) to discuss the possible landing of the flight there. That possibility was quickly rejected as the reception that the Guptas wished to hold for their guests would have been disruptive to other activities at that airport. Since he played no role in the Waterkloof Landing or in facilitating the flight, his evidence shall not be discussed further.

1628. Ms Sindane was responsible for the report to the JCPS ministers that served before the Commission and about which she testified.¹¹⁶⁵ The report details the visits that the Team made to the following: officials of the South African Air Force (SAAF) on 9 May 2013;¹¹⁶⁶ security officers at ORT; and officials of SARS. It also considers the roles played by Ambassador Koloane, Sergeant-Major Ntshisi and Lieutenant Colonel Anderson, having regard to interviews and statements made to the Team.¹¹⁶⁷ Ms Sindane, in giving oral evidence to the Commission, confirmed the contents of the report and explained it fully. The report's accuracy was not in any way doubted and we can rely on it as being an accurate account of the events that led to the landing and subsequent use of public employees to facilitate the transport of the Gupta guests to Sun City. The contents of the report, in so far as relevant, are summarised here, and constitute a sufficient account of the conduct of officials who were responsible for the Waterkloof Landing and the transport of private passengers to the wedding venue.

¹¹⁶⁵ Exhibit FF 1, para 5, p 5.

¹¹⁶⁶ Exhibit FF 1, p 8.

¹¹⁶⁷ Exhibit FF1, p 8.

1629. It is helpful to examine the standard operating procedures that would normally have been followed where military flights or flights carrying 'VIPs', such as heads of state and government ministers, were expected¹¹⁶⁸ (as has been noted, commercial flights were allowed exceptionally, usually only in an emergency). Where a foreign state was involved the Embassy or High Commission concerned would send a '*note verbale*' to the Office of the Chief of State Protocol requesting the assistance of the appropriate government officials. The Air Force Command Post would deal with DIRCO for clearance of state visits prior to approving a visit. Where the flight was non-military or not carrying passengers regarded as VIP, special permission from the Commissioner of SARS was required, especially where the passengers were not subject to the Diplomatic Privileges and Immunities Act.¹¹⁶⁹

1630. Different protocols were followed, depending on the type of passengers. If there were vehicle convoys of visiting delegations after a flight landing, the National Commissioner of the SAPS would be involved. And the Department of Home Affairs would be required to issue visas to passengers on a commercial flight.¹¹⁷⁰

1631. These procedures were not followed by officials responsible for the landing in question at the Air Base on 30 April 2013. The Team established that in February 2013 Mr Tony (Rajesh) Gupta approached someone employed at the Airports Company South Africa (ACSA) to ask about the possible landing of a plane carrying heads of state, ministers and senior Indian officials at ORT: the passengers were coming to a four-day wedding of members of the Gupta family to be held at Sun City. Subsequently, Mr Gupta had a meeting with Ambassador Koloane, the acting Chief Executive Officer of ACSA and the Minister of Transport, Mr Martins. Mr Gupta requested that the flight land at ORT and

¹¹⁶⁸ Exhibit FF1, p 9.

¹¹⁶⁹ No 37 of 2001

¹¹⁷⁰ Exhibit FF1, p 9-10.

that the passengers, the Gupta guests, be welcomed there. This emerges from a statement made by Mr Martins, prepared for the Team, and admitted in evidence at the Commission hearing when Mr Martins testified.¹¹⁷¹

1632. The landing and reception at ORT were refused since they would disrupt the arrivals process at immigration. ACSA suggested that the flight land at Lanseria or an airport close to Sun City instead, which later proved not to be possible.

1633. In March 2013, Mr Atul Gupta approached the Minister of Defence and Military Veterans, and an aide of the Gupta family, Mr Ashu Chawla, approached the Minister's political advisor as well, presumably to facilitate the landing of the proposed flight elsewhere. The Minister and his advisor subsequently approached the Chief of the SAAF, Lieutenant FZ Msimang, to ascertain what the regulations were for landing at the Base. The latter said it was impossible, but he later testified that he had been newly appointed to the post and had found that there were no checks and balances in place.¹¹⁷² He said, further, that he had advised the political advisor to the Minister that it would be irregular for a flight carrying wedding guests to land at the Base.

1634. The Team report stated further that Ambassador Koloane, as Chief of State Protocol, had contacted the same advisor to ask about the progress of the request. He had claimed that he was 'under pressure from No 1'. Number 1 was understood by all concerned to be the then President of the Republic, Mr Jacob Zuma. Subsequently the adviser had contacted Mr Chawla to tell him that the Minister had denied the request. Various conversations followed. Ambassador Koloane had nonetheless telephoned Major Ntshisi¹¹⁷³ at the Air Base to enquire as to progress with the permission for the

¹¹⁷¹ Transcript 2 July 2019, p 17-8.

¹¹⁷² Testimony p 77 of transcript (4 July 2019).

¹¹⁷³ In some documents and oral testimony he is referred to as 'Sergeant-General Ntshisi'. When he testified he was sworn in as 'Major Ntshisi'.

proposed flight to land. The latter informed Ambassador Koloane that the Air Base would receive only heads of state and their deputies. Ambassador Koloane responded that there would be several ministers on board the flight, that the Minister of Transport and the Guptas had told him to assist, but that the request could not be put in writing, as requested by the Major.

1635. It transpired later, in the evidence of Lieutenant Colonel Anderson that Ambassador Koloane had said to her that the President had asked if everything was on track for the landing.¹¹⁷⁴ (The Presidency subsequently, on 13 May 2013, denied that the President had given any instructions, or received any request, about a landing at the Base).¹¹⁷⁵ Sergeant-General Ntshisi had nonetheless asked Lieutenant-Colonel Anderson about the '217 Indian delegates' and she had questioned him about refusing the request. He said that he had asked for written confirmation. Her response was that the request was 'political' and that 'Number 1' knew about it. She advised Major Ntshisi that permission to land depended on the type of visitor, and that even a private visit would be allowed if DIRCO approved.

1636. Major Ntshisi was reluctant to issue the necessary flight clearance certificate without a written request for it. He asked Ambassador Koloane whether he should send the clearance certificate once he had prepared it by fax to the Senior Foreign Affairs Assistant at the Directorate of State Visits at DIRCO, Mr William Matjila. Ambassador Koloane asked that it be sent instead to him by email.

1637. The result was that Mr Matjila did not see any flight clearance and did not know of the landing until news of it broke in the media.¹¹⁷⁶ He had, however, been asked by

¹¹⁷⁴ Transcript 14 January 2020, p 68.

¹¹⁷⁵ Investigating Team report p 7, NS-11.

¹¹⁷⁶ Transcript 4 July 2019, p 5.

Ambassador Koloane, who was senior to him, to assist with the 'Indian Delegation'. He had expected a *note verbale* in this regard but did not ever receive one. The most information was in an email from Ambassador Koloane's secretary stating that the latter had 'telephonically approved the request for flight clearances and landing at Waterkloof AFB for the Indian Delegation'.¹¹⁷⁷ Ambassador Koloane, when examined about this email, evaded the question whether he had authorised the sending of the email. He denied that he had approved any clearance but could not explain why his secretary had sent the email. He testified on 8 and 9 July 2019.¹¹⁷⁸ Ambassador Koloane was the key figure in facilitating the unauthorised flight carrying Gupta wedding guests, and his evidence will be discussed below.

1638. In the event, a flight clearance certificate was signed by Lieutenant S J van Zyl who had the authority to clear flights for the Air Base. He did so on the strength of various documents presented to him, and after talking to people at the Air Base. The clearance certificate indicated that an 'Indian Delegation' was the requestor.¹¹⁷⁹ Requests by Gupta family employees for protection for the convoys of cars that were to transport the wedding guests to Sun City were refused, as was a request by Sun City Security for a risk evaluation, although later in April an official classified the wedding as 'medium risk'.¹¹⁸⁰

1639. Ambassador Koloane visited the Air Base on 24 April and met a representative of the Indian High Commission and Lieutenant-Colonel Anderson. The purpose of the meeting was to discuss arrangements for the landing.¹¹⁸¹ None of this was denied in the

¹¹⁷⁷ Transcript 4 July 2019, p 19.

¹¹⁷⁸ Transcript 4 July 2019, p 101.

¹¹⁷⁹ Exhibit FF1, p 13.

¹¹⁸⁰ Exhibit FF1, p 13-14.

¹¹⁸¹ Exhibit FF1, p 14.

evidence given before the Commission by Ambassador Koloane and Lieutenant-Colonel Anderson.

1640. The following day, an official of the Indian High Commission sent the SAAF command post a request for helicopters and small aircraft to land at the base to transport the passengers aboard the flight from the Air Base to Sun City.¹¹⁸² The same day – 25 April 2013 – a South Africa Police Services (SAPS) Cluster Commander convened a meeting to initiate security planning for the landing and subsequent convoy of passengers to Sun City.¹¹⁸³

1641. Lieutenant-Colonel Anderson subsequently, on 26 April 2013, briefed staff at the base on 'the arrival of the VIP flight from India with Ministers on board'.¹¹⁸⁴ On 29 April 2013, internal flight clearances were issued by the command post for the aircraft and helicopters to be used for the convoy of passengers after the flight had landed.¹¹⁸⁵ The flight plan for the flight from India (lodged by Jet Airways) was addressed to all air traffic controllers in the areas over which the aircraft would fly: the controllers were to coordinate the flight.¹¹⁸⁶ Various other plans in respect of safety were also put into place.

1642. Ms Sindane, in her report, detailed the standard procedures that would be followed in respect of the arrival of a flight carrying foreign dignitaries, and those that related to convoy protection once flights had landed.¹¹⁸⁷ Standard procedures were not followed when the flight landed at the Base on 30 April 2013.

¹¹⁸² *Ibid.*

¹¹⁸³ *Ibid.*

¹¹⁸⁴ Exhibit FF1, p 15.

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ Exhibit FF1, p 16.

1643. Again, Ms Sindane set out the details in the Team's report.¹¹⁸⁸ Procedures were standard throughout the flight and actual landing. However, the seven helicopters and the two aircraft for transporting the passengers to Sun City, landed early, between 05h00 and 06h00. The flight from India landed at the Air Base at about 06h50. On landing, some of the passengers, instead of walking to the terminal, were immediately ferried from the plane to the reception area. Others walked. There is no evidence as to why some passengers appeared to be preferred above others. It may have been completely random.

1644. Refreshments had been provided by an external company, arranged by Gupta staff or employees. Colonel Visser was present to welcome guests, but no VIPs were pointed out to him, and so he greeted everyone who greeted him.¹¹⁸⁹ By arrangement, Lieutenant Colonel Anderson and others brought the guests' passports to the immigration counter. Ambassador Koloane had not at that stage arrived at the Air Base. He was informed, while on a golf course, by an official in the Indian High Commission, that the flight had already arrived. He rushed to the Air Base and noted (incorrectly) the number of vehicles in the convoy that were to transport passengers to Sun City.¹¹⁹⁰

1645. It subsequently transpired that the Gauteng police had deployed 31 cars and 62 of its members to provide security *en route*. Additional deployments by the SAPS in Gauteng cost the province about R47 000. The North West police took over security details once the convoy had reached the Gauteng/North West border. In the Sindane report it was estimated that some 70 security vehicles were used to transport wedding guests from the Air Base to Sun City.¹¹⁹¹ In addition, it transpired that some of the security personnel

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ Exhibit FF1, p 18.

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ Exhibit FF1, p 19.

had been employees of the Tshwane Metro Police, who were 'moonlighting' unlawfully. By the time the Team investigated, these officials had already been suspended.¹¹⁹²

1646. The convoy was followed by the media and caused great public consternation. The same day, the Government Communication and Information Systems body convened a meeting of government 'communicators' to 'manage the media environment'.¹¹⁹³ Various decisions were taken that day, including that only the GCIS (Government Communication and Information Systems) should address the media, that the entry of the wedding guests should be regularised by SARS, that the aircraft should be removed from the Air Base and that guests should not leave the country other than through regular ports of exit.

1647. On 2 May 2013, the Director-General of DIRCO spoke to the Indian High Commissioner, Mr V Gupta (who, it should be noted, is not related to the Gupta family) and ascertained that there were no state Ministers on the flight and that he had not been asked for any assistance with the arrangements for the visit. Mr V Gupta subsequently apologised for any lapse that there may have been in so far as a *note verbale* had not been produced.¹¹⁹⁴

1648. Various transgressions of statutory and regulatory measures were uncovered after the wedding was over, but the guests apparently left South Africa by regular means. The convoy of wedding guests from the Air Base to Sun City entailed many breaches of the law. The security company hired by the Guptas to accompany the convoy was not registered with the appropriate authority; two Metro Police officials had used their official firearms; and several registration plates of the vehicles used were false. At the time of

¹¹⁹² Ibid.

¹¹⁹³ Exhibit FF1, p 19.

¹¹⁹⁴ Exhibit FF1, p 20-21.

reporting, Ms Sindane said that criminal investigations were underway. The Commission is not aware of what the result of these investigations was.

1649. The Investigating Team considered that between February 2013 and the date of the landing, the requests from the Gupta family had transformed from being related to the Gupta wedding to being an official diplomatic one, with the false information that Indian State Ministers would be on board the flight. This was a 'deliberate manipulation of the system to further wedding objectives couched as official business'.¹¹⁹⁵ It was clear to the Team that Ambassador Koloane and Lieutenant-Colonel Anderson had misrepresented the facts to facilitate the landing.

1650. In their findings the Team stated that the collusion of officials in permitting and facilitating the landing of the flight from India resulted in numerous irregularities and an abuse of official authority.¹¹⁹⁶ However, none of the findings indicated that there was any inducement or gain given to any member of the National Executive or office bearer. As we shall see, when considering the evidence before the Commission, the only officials who clearly misled others to facilitate the landing, the welcoming of the wedding guests and the irregularities attendant on the convoy of vehicles from the Air Base to Sun City, were Ambassador Koloane and Lieutenant Colonel Anderson. Their evidence will be examined more closely below. Ambassador Koloane, who was disciplined and sanctioned, was however, amply rewarded for his role by being promoted to the post of Ambassador to the Netherlands two years after the landing by the then Minister of International Affairs and Cooperation, Ms M E Nkoana-Mashabane.¹¹⁹⁷

¹¹⁹⁵ Exhibit FF1, p 22-23.

¹¹⁹⁶ Exhibit FF1, p 28ff.

¹¹⁹⁷ Her evidence will be discussed below.

Other evidence led

1651. I do not consider it necessary to discuss the evidence of every witness and will confine myself to **evidence** that is **relevant to the Commission's terms of reference**. The first piece of oral evidence at the Commission relevant to the terms of reference was that of Major Thabo Ntshisi. He was the 'operations officer' at the Air Base.¹¹⁹⁸ Unfortunately, his **evidence was not helpful**. He said that **he had been reluctant to issue the flight clearance certificate requested by Ambassador Koloane for the flight carrying Indian guests without a written *note verbale* but had eventually done so under pressure from the latter and when he received the email from Ambassador Koloane's secretary saying that the clearance had been authorised, and after speaking to Lieutenant-Colonel Anderson**. He did not have the authority to issue the clearance certificate himself, but he had advised Lieutenant Colonel Van Zyl (who was new in his position at the Base) that it should be issued.¹¹⁹⁹

1652. Major Ntshisi seemed to be trying to exonerate himself from any wrongdoing, and in the process kept contradicting what he had said to the Investigating Team and also what he said in the course of his evidence to the Commission.¹²⁰⁰ Ultimately, his evidence amounts to no more than this: he facilitated the issue of the flight clearance certificate, but only because he was pressured to do so by Ambassador Koloane and Lieutenant Colonel Anderson, who had both given him the impression that the President of the Republic at the time (in 2013) had authorised the process. He had in turn misled Lieutenant Colonel Van Zyl, and Mr William Matjila who was an assistant at DIRCO.¹²⁰¹

¹¹⁹⁸ Transcript 3 July 2019, p 77.

¹¹⁹⁹ Transcript 3 July 2019, p 126.

¹²⁰⁰ Transcript 3 July 2019, p 123.

¹²⁰¹ Transcript 4 July 2019, p 23.

1653. General D M Mgwebi subsequently testified that Major Ntshisi had deliberately misled various officials: he had made that finding when presiding over a disciplinary hearing convened by the SANDF.¹²⁰² General Mgwebi claimed not to have known of the landing at the Base until it had happened, and blamed lack of communication and non-compliance with rules for the unauthorised landing of the Gupta flight. He had recommended that Major Ntshisi and Lieutenant Colonel Anderson be disciplined for 'colluding and assisting with the approval to land knowing very well that doing so was unlawful. Charges of misuse of state property and corruption should also be laid against them', he said.¹²⁰³

1654. Ambassador J M Matjila, the Director-General of DIRCO in 2013, and who has a very long career as a diplomat, testified on the standard procedure to be followed when there is a request from a foreign mission (a *note verbale*) for the landing of foreign aircraft.¹²⁰⁴ Among the details that would have to be included in a *note verbale* were: the purpose and the duration of the visit; the places in South Africa likely to be visited; who would be on board the aircraft; the date of arrival; and the size of the aircraft. That communication would be shared with the SANDF if the aircraft was intended to land at one of its facilities.

1655. These procedures were not followed for the flight carrying the guests attending the Gupta wedding. The first time Ambassador Matjila heard about the Waterkloof Landing, was through the press on the day of landing – 30 April 2013. The following day he was advised of the meeting of the JCPS cluster principals, and he asked for a briefing from the DIRCO spokesman. He invited Ambassador Koloane to attend the meeting since

¹²⁰² The transcript of his evidence starts at p 37 following Major Ntshisi's. He confirmed the contents of his report following the Board of Inquiry convened by the SANDF. The report is in Exhibit 4, CSB 002 ff.

¹²⁰³ CSB p 218.

¹²⁰⁴ Exhibit FF11.1, and Transcript 8 July 2019, p 2.

so much had been said about his role in the saga by the media.¹²⁰⁵ He also called Mr V Gupta, the High Commissioner of India, to establish whether there were Union Ministers aboard the aircraft. But Mr V Gupta advised that there were none, and that procedures had not been followed.¹²⁰⁶

1656. Ambassador Matjila then testified about the disciplinary procedures against Ambassador Koloane. On this issues, he said: a special hearing was convened by DIRCO, following the recommendations of the report of the Investigating Team that had been appointed.¹²⁰⁷ The charges that were preferred against Ambassador Koloane were that: (1) in the period between February and April 2013 he had abused diplomatic channels and had facilitated an illegal request for the landing of an international aircraft at the Air Base on 30 April 2013; (2) he had misrepresented facts in an endeavour to procure the unlawful landing; and (3) he had compromised the process and procedures of DIRCO in that no request had been properly made and the required inter-departmental coordination process had not taken place.¹²⁰⁸

1657. Ambassador Koloane pleaded guilty to the charges.¹²⁰⁹ Following the recommendation made by the committee that heard the charges, the sanction imposed on Ambassador Koloane was, as an alternative to dismissal, suspension without pay, for a period of two months.¹²¹⁰ The Chairperson of the Enquiry considered, however, that the infractions were serious, since Ambassador Koloane caused embarrassment to the Republic, and abused diplomatic channels.

¹²⁰⁵ Transcript 8 July 2019, p 51.

¹²⁰⁶ Exhibit FF11.1, p 4.

¹²⁰⁷ Exhibit FF11.1, p 5, and Transcript 8 July 2019, pp 68.

¹²⁰⁸ Exhibit FF 3, p 7.

¹²⁰⁹ Exhibit FF 3, p 27.

¹²¹⁰ Exhibit FF 3, p 6.

1658. Before the Commission, Ambassador Koloane was not a credible witness. He evaded questions and denied having suggested to anyone that the President knew about the proposed landing of the flight from India at the Air Base. A clear example of his evasion was in relation to the email sent by his secretary to Mr W Matjila stating that the flight had been approved.¹²¹¹ First, he tried to obfuscate the questions he was asked by the evidence leader. Then he denied that he had asked his secretary to communicate authorisation to Mr William Matjila. He said that he did not have such authority. She must have misunderstood him, he said.¹²¹² The email read:

'As per your discussion with Ambassador Koloane with regard to the request for flight clearance and landing at Waterkloof AFB for the Indian delegation. Kindly note that Ambassador Koloane telephonically approves the request.'¹²¹³

All that he had said to her, he claimed, was that she should push 'them' to process the request.

1659. As to the meeting earlier in the year at ORT, which was attended by Mr Tony Gupta, Ambassador Koloane said that his memory had faded, but that he did recall that at the meeting Mr Gupta did say there would be wedding guests aboard the flight, some of whom would be 'Ministers' and possible one of the 'Vice Presidents' of India.¹²¹⁴ He could not, however, deny the veracity of a recording of a phone call between Major Ntshisi and himself in which he had explained to the Major that he could not put the request in writing.¹²¹⁵ Major Ntshisi said that Colonel Anderson was in charge of the Air Base. Ambassador Koloane then reminded him that people representing the Indian

¹²¹¹ Transcript 8 July 2019, p 97.

¹²¹² Transcript 8 July 2019, p 101.

¹²¹³ Transcript 8 July 2019, p 105.

¹²¹⁴ Transcript 8 July 2019, p 112.

¹²¹⁵ Exhibit FF 13, p 5.

delegation had met Colonel Anderson at the Air Base and said that a few Ministers would be on board to attend the Gupta wedding.

1660. At the Commission's hearing on the following day,¹²¹⁶ Ambassador Koloane admitted to 'name dropping', presumably in respect of the President. But, he said, he had done this purely to push officials who were 'supposed to process the flight clearance to do their job' –to process the flight. However, he insisted that no one in a position of power, such as a Minister or the President, had asked him to act in this way. He said that using their offices and names was an error of judgement on his part.¹²¹⁷ Later in the day,¹²¹⁸ he accepted that he had been wrong to use the names of Ministers and the President because it could have tainted their reputations.

1661. When asked why he had resorted to untruthfully mentioning certain people's names, he responded that there was 'nothing in it' for him personally. He had wished only to service the relationship between India and South Africa.¹²¹⁹

1662. Ambassador Koloane said that he had gone to the Air Base on the morning of 30 April 2013. He had completely forgotten about the landing but had been telephoned by someone in the Indian High Commission and by Colonel Anderson advising that the flight had landed.¹²²⁰ He also said that he knew the Guptas as friends of the President because he had met them at functions that the President had hosted. Although invited to the Gupta wedding, he said that he did not attend it.

¹²¹⁶ Transcript 9 July 2019, p 11.

¹²¹⁷ Transcript 9 July 2019, p 13.

¹²¹⁸ Transcript 9 July 2019, p 41.

¹²¹⁹ Transcript 9 July 2019, pp 57-58.

¹²²⁰ Transcript 9 July 2019, p 65.

1663. The later promotion of Ambassador Koloane to South Africa's Ambassador to the Netherlands, in 2014, will be considered when the evidence of the Minister of International Relations and Cooperation, who was in the post both at the time of the landing and when Ambassador Koloane was appointed to the post in the Netherlands, is dealt with. First, though, it is convenient to discuss the evidence of former Lieutenant Colonel Christine Anderson, who was employed at the Air Base by the SAAF in 2013.
1664. Lieutenant Colonel Anderson deposed to two affidavits in respect of the landing: the one was for the Board of Enquiry convened by the SANDF and the other was prepared for the Commission. She said in the first affidavit,¹²²¹ deposed to on 3 May 2013, that she was requested by Lieutenant General D Mgwebi, the Chief of Joint Operations in the SANDF,¹²²² to attend a Board of Inquiry to be held on 8 May 2013. She discussed at some length the process she followed before deposing to the affidavit and then described the events preceding the landing of the flight. These are summarised hereunder.
1665. On a Sunday night sometime in March 2013, Ambassador Koloane had phoned Lieutenant Colonel Anderson to enquire whether the Air Base had the capacity for the landing of an Airbus A330. He told her that there would be a 'cultural event' following the landing of the aircraft, which had 'two ministers' on board and that 'Number One' had knowledge of the flight proposed. She understood the term 'Number One' to refer to President Jacob Zuma. 'We never refer to the President in telephone conversations by name for security reasons.'¹²²³

¹²²¹ Exhibit FF 15, p 09.

¹²²² His evidence is discussed above.

¹²²³ Exhibit FF 15, p 10.

1666. She had advised Ambassador Koloane that it was possible for the aircraft to land but that an overflight clearance (a landing authority) was required for landing at the Air Base. He said that he would start the process of obtaining the clearance from the Air Force Command at the Air Base.

1667. On 2 April 2013 a gentleman whom she thought was named 'Mr Ashuc', and two others, visited Lieutenant Colonel Anderson at the Base and she escorted them through the lounges. They told her that there would be about 150 to 200 people on board the flight. After some discussion it was agreed that the passengers could use the two lounges and a reception area. She was informed that once the immigration process was finalised the passengers would be escorted to Sun City. She told them that, if the weather was bad, the flight might have to be diverted to ORT.

1668. In mid-April 2013 Ambassador Koloane phoned her and said that he had been asked by the President if the flight 'was still on track'. She responded that, once flight clearance had been obtained, 'we would be able to finalise the movements of the passengers'.¹²²⁴

1669. He had phoned her again two days later and said that the passengers would not be taken in buses to Sun City. At that stage no flight clearance had been obtained. She had sent a message to the Officer Commanding at the Air Force Command Base, Brigadier General Lombard.¹²²⁵ Ambassador Koloane had then made an appointment to see her at the Air Base on 22 April 2013, and he had arrived with Mr Ashuc and two women. She had shown them the arrival and departure procedures. That afternoon, she had spoken to her Officer Commanding, Brigadier General Madumane, and had informed him that the overflight clearances for the international flight had not yet been

¹²²⁴ Exhibit FF 15, p 12.

¹²²⁵ Exhibit FF 15, p 13.

obtained. He asked whether the media would be present at the landing, and her response was that she had not yet be advised about this.¹²²⁶

1670. Lieutenant Colonel Anderson had received clearances for the flight from India, and for the local aircraft that were to land and depart with the passengers to Sun City, on 23 and 25 April respectively.¹²²⁷ The aircraft from India, and the other national aircraft and helicopters for shuttling passengers, had arrived early in the morning of 30 April 2013. She explained that she had ensured that persons responsible for handling baggage and immigration had been present to assist with the landing.¹²²⁸ She was of the view that because the visit by the passengers was private, no coordination with DIRCO officials was required. Lieutenant Colonel Anderson attached to that affidavit a passenger list, external clearances, and permission for helicopters and chartered aircraft to land.

1671. In 2019, in response to a request from the Commission and questions sent to her, she confirmed the contents of her affidavit deposed to in May 2013.¹²²⁹ She denied allegations about what she had allegedly done in preparation for the landing in 30 April 2013. She also denied that she had done anything to pressure Major Ntshisi into unlawfully issuing a flight clearance for the flight from India that landed at the Base.

1672. In her oral evidence to the Commission, Lieutenant Colonel Anderson (represented by a legal practitioner), said that she had ascertained that Mr Ashuc was Mr Ashuc Chawla, employed by a company associated with the Gupta family.¹²³⁰ She had believed at the time of the proposed landing that he was a Protocol Officer at DIRCO. She said that she had also believed that there was nothing untoward about Ambassador Koloane's

¹²²⁶ Exhibit FF 15, p 13.

¹²²⁷ Exhibit FF 15, p 14.

¹²²⁸ Exhibit FF 15, p 14.

¹²²⁹ Exhibit FF 15, p 1.

¹²³⁰ Transcript 14 January 2020, pp 34-35.

requests: she was told that there were wedding guests on board the flight but it was not her job to question the purpose of the visits of passengers.¹²³¹ She said that she had been told that the President was supposed to fly from the base to Sun City, but had discovered later in the day, when checking the operations room, that that flight had been cancelled and that he was scheduled to fly instead to the Democratic Republic of Congo.¹²³²

1673. When questioned, Lieutenant Colonel Anderson admitted that she had realised that the landing of the flight from India at the Base was not lawful.¹²³³ However, that realisation struck her, she said, only when she heard press reports. When pressed, she said that 'at one stage it felt like the base was captured by this Indian delegation'.¹²³⁴

1674. Lieutenant Colonel Anderson denied that she had put any pressure on Major Ntshisi to issue a flight clearance certificate,¹²³⁵ but accepted that she had been pressured by Ambassador Koloane to put procedures in motion for the improper landing of the flight at the Base.¹²³⁶

1675. It should be noted that Lieutenant Colonel Anderson, after attending the Board of Inquiry, complained to the Public Protector about the process that was followed by the Board: she had not been given an opportunity to state her position to the Board, she said. The Public Protector did not proceed with any investigation in respect of the complaint and did not deal with the Waterkloof Landing in her report that formed the basis of the Commission's terms of Reference. Lieutenant Colonel Anderson conceded

¹²³¹ Transcript 14 January 2020, pp 49-51.

¹²³² Transcript 14 January 2020, p 52.

¹²³³ Transcript 14 January 2020, pp 52 -56.

¹²³⁴ Transcript 14 January 2020, p 61.

¹²³⁵ Transcript 14 January 2020, p 67.

¹²³⁶ Transcript 14 January 2020, p 69.

that the Public Protector had not proceeded with the investigation into her complaint because she had been cleared by the Board of Inquiry.¹²³⁷

1676. It is necessary now to consider the evidence of Minister Nkoane-Mashabane, who was the Minister of International Relations and Cooperation at the time of the landing of the flight in 2013.¹²³⁸ She testified at the Commission on 21 November 2019.¹²³⁹ At the hearing, she confirmed the correctness of the contents of an affidavit to which she had deposed on 18 September 2019.¹²⁴⁰

1677. Her evidence is relevant only in so far as she testified to the appointment in 2014 of Ambassador Koloane as Head of the Mission of the South African Embassy in the Hague in the Netherlands.

1678. She claimed not to know much about the minutiae of the work in DIRCO. She had heard about the landing at the Air Base only after the flight had landed.¹²⁴¹ She said that she had been informed that Ambassador Koloane, the Chief of State Protocol, was present at the Base after the landing, and that she had phoned the Director-General of DIRCO, Ambassador Matjila, to find out what had happened.¹²⁴²

1679. She said that she had been aware that Ambassador Koloane had been disciplined and had been sanctioned by being put on suspension without pay. However, when the post at The Hague had become vacant, he had applied for the position. In her view, he had served his sentence and there was nothing untoward about his promotion. Thus she

¹²³⁷ Transcript 14 January 2020, pp 69-70.

¹²³⁸ At the time of giving evidence to the Commission, she was the Minister in the Presidency for Women, Youth and Persons with Disabilities.

¹²³⁹ Transcript 21 November 2019

¹²⁴⁰ Exhibit FF 14, p 1

¹²⁴¹ Transcript 21 November 2019, p 9.

¹²⁴² Transcript 21 November 2019, p 11.

had not in her letter asking the President to appoint Ambassador Koloane said that he had been found guilty of charges, including abuse of diplomatic channels. However, she had, she said, alerted the President to his offences and sanction before she sent the letter.¹²⁴³ It remained her view that his conduct was not relevant to the new post. That was an astonishing admission. Moreover, the reasons that she gave for choosing him as South Africa's Ambassador to the Netherlands, namely that he had applied, was eligible, and was experienced do not appear plausible.

1680. On 28 November 2018 Adv Ngoako Ramatlhodi testified before the Commission about the controversial landing of the Gupta aircraft at Waterkloof Military Airbase. In part, this is what he said:

"Now my attitude, I did not know these people. They came into South Africa and one day I met Correctional Services that a private jet lands at Waterkloof Air Force base carrying wedding and people. That for me was the last insult. I mean it was a stab at the back for those who died. Because there were many who died when I was there with them. That we should get foreigners they come in here and then they land a wedding charter in our air force base."

He continued:

"Not only did they land there, they actually got even the escorts of the security, everything, to that place there."

When probed about his understanding of the controversial landing Adv Ngoako Ramatlhodi states:

"We said to him, Mr President it is unacceptable that a private jet carrying wedding party from another country lands at our air force base. We had fought for this base to be under our command. So it is not acceptable. So do not grace this thing by going to the wedding, in addition to what has already happened.

¹²⁴³ Transcript 21 November 2019, pp 92-95.

Chair what happens at air force bases of South Africa is only Heads of States land there, and when they land we receive them with all the protocols, either one Minister or the other is sent to go and do that. But on this occasion this aeroplane from India just landed there. There was preparations, because even the traffic cops were escorting those buses which were going to North West.

So it was a well-planned reception, which could not happen without higher authority knowing. Well, they mobilise even the Municipalities to provide security for those buses to go there. So I think it was quite heavy for us, some of us."

1681. The Investigation Task Team that was assigned by the Justice and Security Cluster to investigate this incident did not interview President Zuma despite the fact that it heard that Ambassador Koloane had given two contradictory versions, one being that he had told certain officials at Waterkloof Military Air Base that President Zuma knew about the impending arrival of the aircraft and wanted the landing of the aircraft at Waterkloof Military Air Base facilitated or approved or expedited and the other being that President Zuma had not said anything along those lines to him.

1682. When Ambassador Koloane gave evidence before the Commission, he wanted the Commission to accept that President Zuma had never said anything to him about the then planned landing of the Gupta aircraft. Mr Koloane wanted the Commission to accept that he had only said what he had said about President Zuma to officials at Waterkloof Military Airbase as part of name-dropping because he wanted to help the relations between South Africa and India. The position is that, ahead of the landing of the aircraft, Ambassador Koloane told certain officials that President Zuma knew about the plan for the Gupta aircraft to land at Waterkloof Military Airbase and he said either that President Zuma wanted that to be approved or he said that President Zuma wanted the landing to be approved or facilitated or expedited.

1683. On 15 July 2019 President Zuma appeared before the Commission and, among other things, told this Commission his version about the incident. In part, this is what he said:

"I am sure you have listened here to and I have been you know given names and names that I allowed these people to land in the National Point in South Africa. No one has ever asked me did you do so or is there any information to that effect because it never happened. I did not know where they were going to land nor whether there was a landing to happen on a particular day but it has been Zuma again and that is what Ngoako Ramatlhodi said as he was giving evidence here. He allowed his friends to – to land in a highly sensitive area. Comrade Ngoako has never asked me whether I talked to them and I allowed them to come there and I am sure you have it now in your – in your records. Perhaps not the matter to dwell so much but the point I am making I never did any other thing out of or breaking the law with this family never."¹²⁴⁴

1684. Mr Zuma's version is that he never discussed the intended or planned landing of the Gupta aircraft at the Waterkloof Military Airbase and that he did not even know that there was to be a landing of the aircraft at Waterkloof. The question that arises is this: how credible is Mr Zuma's version that, prior to the landing of the Gupta aircraft at Waterkloof, he did not know about it and he had never discussed the issue with the Guptas? It is necessary to examine Mr Zuma's evidence in the light of the totality of evidence heard by the Commission, including Mr Zuma's relationship with the Guptas, the nature of his relationship with them and what he was prepared to do for the Guptas. This is dealt with below.

1685. The one known fact is of course that Mr Jacob Zuma's son, Mr Duduzane Zuma, is in business with the Guptas. In this regard Mr Zuma gave evidence which suggested that he was grateful to the Guptas because he said that they gave his son employment many years ago when nobody was prepared to employ his son or his children at the time. Indeed, Adv Ngoako Ramatlhodi also testified before the Commission and said that, whenever in meetings of the National Executive Committee of the ANC voices were raised to the effect that President Zuma's relationship or friendship with the Guptas was affecting the image or reputation of the government and the ANC negatively and he was

¹²⁴⁴ Transcript 15 July 2019.

urged to end it, Mr Zuma always defended his relationship with the Gupta family on the basis that they had helped him and his children when he was going through difficult times and would not entertain the idea of ending his friendship with them.

1686. In Vol 2 of Part I of the Commission's Report, reference was made to the evidence of Mr Themba Maseko who testified that, before his removal from his position as CEO of GCIS, Mr Ajay Gupta had told him that:

"(a) President Zuma would do anything they wanted him to do;

(b) if any Ministers did not co-operate with the Guptas, they (i.e the Guptas) would report them to him and him (i.e President Zuma) and he would summon them; and

(c) since he (Mr Themba Maseko) was not co-operating, he (i.e Mr Ajay Gupta) would report him to his seniors who would replace him with somebody who would co-operate with them."

1687. Mr Themba Maseko testified that early in February 2011 – his interactions with Mr Ajay Gupta was around October 2010 and late November or early December 2010 –he was removed from his position at the instance of Mr Zuma and he was replaced by Mr Mzwanele Manyi, an associate of the Guptas. Mr Manyi co-operated with the Guptas. Furthermore, in Vol 1 Part IV of its Report, the Commission already found that Mr Tony Gupta told Mr Jonas at the Gupta residence on 23 October 2015 that President Zuma was going to fire Minister Nene because he refused to work with the Guptas and, indeed, President Zuma did fire Minister Nene a few weeks thereafter and gave a reason that made no sense in the context of Mr Nene's dismissal.

1688. Furthermore, President Zuma and Minister Gigaba ensured that Mr Brian Molefe was appointed as Group CEO of Transnet after the Guptas had announced in their newspaper, The New Age, on or about 10 December 2010 that Mr Brian Molefe would be the next Group CEO of Transnet. They made this announcement even before the

Transnet post of GCEO had been advertised. Mr Brian Molefe was appointed despite the fact that he was not the candidate who scored the highest points in the interview.

1689. President Zuma and Minister Lynn Brown ensured that Mr Brian Molefe, whom the Guptas wanted to be appointed as Group CEO of Eskom (as Mr Salim Essa had told Mr Henk Bester in 2014), was appointed Group CEO of Eskom in 2015. Furthermore, President Zuma participated in the Guptas' scheme to have certain Eskom executives suspended and ultimately removed from certain strategic positions at Eskom so that the Guptas and their associates could be appointed to those strategic positions. President Zuma told Ms Dudu Myeni about the plan and asked her to convene a meeting at his Durban official residence on 8 March 2015 at which a decision was taken that certain Eskom executives should be suspended. President Zuma took part in that meeting.

1690. President Zuma and Minister Brown ensured that Mr Siyabonga Gama was appointed as Group CEO of Transnet in or about 2016 and there is evidence before the Commission that Mr Gama was working with the Guptas.

1691. When President Zuma wanted to remove Minister Pravin Gordhan as Minister of Finance in March 2017, he wanted to replace him with Mr Brian Molefe, a Gupta associate, but was stopped from doing so by other officials of the ANC who objected to Mr Zuma replacing Minister Gordhan with Mr Brian Molefe. After President Zuma had been prevented from replacing Minister Pravin Gordhan with Mr Brian Molefe, he replaced him Mr Gordhan with Mr Malusi Gigaba, another Gupta associate.

1692. On the probabilities President Zuma informed Mr Ajay Gupta or one or more of the Gupta brothers that he was going to appoint Mr Fikile Mbalula as Minister of Sports and Recreation before making an official announcement and before he told Mr Fikile Mbalula of that appointment. This is mentioned to show how close Mr Zuma is to the Gupta family.

Evidence of Mr Sundaram

1693. In addition to what has been set out above, it is necessary to refer to the evidence that Mr Rajesh Sundaram gave before the Commission. Mr Sundaram had been recruited from India by the Guptas in 2013 to be the editor of the TV station that the Guptas were planning to establish.

1694. Mr Sundaram spent about two months in South Africa in mid-2013 in the employ of the Guptas and he attended some meetings between the Guptas and President Zuma. He also got to experience how the Guptas talked about their relationship with President Zuma. He testified under oath that the contents of his book are true, I understood this to mean that what he wrote in the book was to the best of his knowledge and belief, true. Accordingly, the contents of the book enjoy the status of evidence. Below I shall make some references to the contents of Mr Sundaram's book.

1695. On 4 June 2013, Mr Sundaram and some of the team who had arrived from India the previous day met with Mr Atul Gupta and Mr Nazeem Howa at the Gupta office at Corporate Park in Midrand. On account of matters not connected to the Waterkloof Landing, the author says, the nature of the meeting was very tense. Mr Atul Gupta was the only person speaking at the meeting. One of the issues that Mr Atul Gupta alleged at the meeting was this. All the media houses in South Africa were owned by white people and that they (the Guptas) faced much opposition when they announced that they would be setting up a newspaper. Mr Atul Gupta then referred to the Waterkloof landing incident and what was written about them (the Guptas). He said that that was a co-ordinated effort by vested interests to break the Guptas. Mr Atul Gupta then felt the need to explain the background to the Waterkloof landing affair to the Indian team. Summarising what was said, Mr Sunandram says in his book:

"Atul spent a lot of time justifying the Waterkloof landing incident, which happened just days before our arrival, at this first meeting. Our family is close to President Zuma. We have never hidden it. We are a powerful family, and I am sure all the hype around this landing will also pass with time. We land at Air Force stations in India all the time, so what is wrong with landing our guests at an Air Force base here with all due clearances? We are being targeted."¹²⁴⁵

Mr Sundaram's book then records that Mr Atul Gupta continued as follows:

"President Zuma knows our family well, and we have deep bonds with his family. We have enough influence in the government to clear our name and it is not just President Zuma – we have close links with all senior ANC leaders. We are *baniyas*, we are Indian Jews; we do not keep all our eggs in one basket. Whoever becomes president of South Africa in the years to come, I can assure you he will be our friend."

1696. Describing his decision to move to South Africa and the doubts that he thereafter entertained about its wisdom, Mr Sundaram went on to describe how the Guptas sought to justify the Waterkloof incident despite the negative media coverage for the Gupta family. Mr Sundaram said Atul Gupta said:

"Like Laxmi, he blamed the media for playing up the incident. He claimed his family had the required permission to land the jet, and in the same breath he mentioned the proximity his family enjoyed with President Zuma and his family.

'President Zuma is on our side, he knows our family, and we helped him when he was down and out; he will help us through this as well. You know, top ministers of the Zuma cabinet attended the wedding. This is a direct endorsement for us. The personnel against whom action has been taken will be reinstated very soon. We are an influential family here, and no one can point fingers at us,' Atul boasted.

'We have close relations with everyone in the ANC. If Zuma is ever ousted, I can tell you for sure that the next one in line from the ANC would be close to us as well. We are *baniyas*, and we know how to keep our business interests protected,' he added.¹²⁴⁶

¹²⁴⁵ R Sundaram, *'Indentured'*, p 46.

¹²⁴⁶ *id.*, p 82.

1697. The book then goes on to say:

"Atul seemed to enjoy the notoriety that the Waterkloof Landing gave him. He would often amuse young staff at restaurants and ushers at conferences by introducing himself as 'Atul Gupta of Waterkloof fame'.¹²⁴⁷

Mr Sundaram's book also says:

"After the Waterkloof scandal, some ministers and officials seemed reluctant to be seen in public with Atul or on a platform hosted by his newspaper.

These ministers and officials were convinced after a nudge from the president, Atul told me.

The bad press and public outcry following the incident did not seem to have made any difference to the relationship between President Zuma and the Gupta brothers. In the three meetings with President Zuma that I was a part of, the two brothers bonded well with the president and joked occasionally about the scandal. It was like nothing happened.

The brothers had fairly free access to the president's residence, and Zuma left his Ministers waiting for hours to attend meetings with the Guptas.

Atul once showed me newspaper clippings of President Zuma defending his friendship with the Gupta family in parliament. 'Zuma, who was forced to publicly defend his relations with the Guptas for the first time since the plane-landing scandal, dismissed all allegations against him in relation to the Guptas as "rumours",' he said.

'See I told you the bond that we have with the president is deep. The media and the DA will try its best to create a rift between us, but he will stand by us like a rock. The president will defend us always,' he said, showing me the newspaper clippings.¹²⁴⁸

1698. According to Mr Sundaram's book, Atul Gupta once told him:

¹²⁴⁷ id, p 84.

¹²⁴⁸ id, p 103-104.

"President Zuma knows our family well and we have deep bonds with his family. We have enough influence in the government to clear our name".

1699. In his book, Mr Sundaram also refers to an occasion when there was a discussion about the Waterkloof Landing and Mr Atul Gupta said something that would prove to be correct. In this connection, Mr Sundaram says that, after Mr Atul Gupta had said that President Zuma was on their side and he would help them since they had also helped him "when he was down and out", Mr Atul Gupta went on to say:

"You know, top ministers of the Zuma Cabinet attended the wedding. This is a direct endorsement for us. The personnel against whom action has been taken will be reinstated very soon. We are an influential family here ..."

1700. As predicted by Mr Atul Gupta, one of the people against whom action had been taken for his role in the Waterkloof Landing, Ambassador Koloane was not only reinstated but he was rewarded by being appointed as South Africa's Ambassador to The Netherlands. It is reasonable and fair to assume that Mr Atul Gupta knew well in advance that President Zuma would undo the action that had been taken against Koloane.

Conclusion

1701. Ambassador Koloane was guilty of abuse of diplomatic channels. His promotion to a more senior position came only about a year or so after the Waterkloof Landing. Worryingly, the fact that he had admitted abusing diplomatic channels did not appear to have been regarded as a factor that should have been taken into account and negatively influenced his being appointed as a senior representative of the Republic. That appears untoward. In addition, the fact that he had gone to undue lengths to facilitate the landing of a plane carrying passengers who had no official status or office at a military base and to accord a special status to the Gupta family and their wedding

guests does not appear to have negatively affected his prospects of being appointed, as it should have. This is highly regrettable.

1702. In the light of the evidence and the background surveyed earlier in this Report, it is difficult to accept what President Zuma said to the Commission, namely that he did not know about the Waterkloof Landing before it had happened.

1703. A reasonable and fair consideration of what has been set out above, leads to the following conclusion. Given the admittedly close relationship between President Zuma and the Guptas, the evidence set out above, what Mr Sundaram said in his book, as this is summarised and quoted above, the following conclusions are drawn:

1704. First, the probabilities are overwhelming that President Zuma knew about the plans for a Gupta private aircraft to land at Waterkloof Military Air Base and had no objections to plans being implemented. In fact all indications are that he would have taken steps to have the landing of the private aircraft facilitated. If that is what the Guptas wanted from him, how could he not do it for them when the evidence has shown that he could even fire his own comrades if that was what the Guptas wanted.

1705. Second, given how the Guptas flaunted friendship with President Zuma, it is extremely unlikely that they would not have informed him about those plans and attempted to secure his support for their implementation.

1706. Third, having regard to the evidence about Ambassador Koloane's role in the landing saga, his reference to the President (or No 1), his incomprehensible promotion and what Mr Atul Gupta told Mr Sundaram about the "reinstatement" of persons involved in the Waterkloof Landing, and the poor impression that Ambassador Koloane made as a witness at the Commission, it is probable that he acted on the instructions of or at the

request of President Zuma when facilitating the landing. This is said notwithstanding his subsequent denial that President Zuma has asked him to facilitate the landing.

1707. In this regard, I have taken into account the following. Ambassador Koloane's evidence was in places incoherent and in several respects contradictory. Importantly, on the first day that he testified, he denied having 'name dropped'. However, after listening to tape recordings of his telephone conversations with Major Ntshisi overnight, on the following day he suddenly recalled that he had referred to Ministers and the President. However, he said, he had done so simply to put pressure on the Major and others to expedite the proceedings. He also apologised for his wrongdoing.

1708. The foregoing notwithstanding, the evidence does not justify a finding that Ambassador Koloane, or any official whom he had pressured, acted as a result of the 'capture' of any officer or institution of the State. At worst, his conduct and the lapses in procedure by the officials at the Base, brought embarrassment to the Government and to the country. Be that as it may, what the positive purpose that Waterkloof saga, for which he was responsible, has served for the country was to starkly demonstrate to the media and the wider public the scandalous influence that the Guptas exercised in the highest office in the Republic and how they shamelessly flaunted it.

1709. It is hoped that an incident like the Waterkloof Landing will never happen again in this country.

PASSENGER RAIL AGENCY OF SOUTH AFRICA

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PASSENGER RAIL AGENCY OF SOUTH AFRICA

INTRODUCTION

1710. As a result of serious allegations, including of corruption, that the Commission received in respect of the Passenger Rail Association of South Africa (PRASA), the Commission heard extensive evidence on alleged wrongdoing at PRASA.

1711. PRASA is not specifically mentioned in the Public Protector's State of Capture Report, dated 2 November 2016, that led to the appointment of the Commission. However, in terms of Tern if Reference 1.9 of the Terms of Reference of the Commission, among the matters that the Commission is required to investigate, inquire into, make findings and report on and make recommendations on include: the nature and extent of corruption, if any, in the award of contracts and tenders to companies, business entities or organisations by Government agencies and entities.

1712. Significantly, however, some 15 months before the then Public Protector, Ms Thuli Madonsela, released her State of Capture Report she also released her report on an investigation she had conducted into PRASA. Her report was titled: *Derailed*. In that Report, she made several findings of maladministration at PRASA. Some of the remedial actions she took in *Derailed* are the following: the Chief Procurement Officer of National Treasury is required to conduct a forensic investigation into all PRASA contracts above R10 million since 2012; PRASA's Acting Group CEO was to commission that forensic investigation; and the chairperson of the PRASA's Board of Control (the Board) was to support the forensic investigation by National Treasury.

1713. PRASA is a National Government Business Enterprise that is listed in Part B of Schedule 3 to the Public Finance Management Act¹²⁴⁹ (PFMA). Accordingly, Term of Reference 1.9 of the Commission's Terms of Reference requires that the Commission investigate the kind of allegations that had been made in respect of PRASA, and evidence in respect of such allegations was led.

1714. There are at least two general themes that emerge from the evidence heard by the Commission concerning PRASA. **First**, a pattern developed at PRASA that allowed influential individuals and/or entities in which they or their family members had an interest to benefit unduly, especially in respect of the procurement of goods and services. It is known that at some institutions employees or officials who resisted acts of state capture or corruption were victimised and often hounded out. That also happened at PRASA. However, what is most worrisome is this: it was also the fate of its Board under the chairmanship of Mr Popo Molefe from 2014 to 2017 when it sought to put PRASA right and instil a new and "cleaner culture".

1715. **Second**, those who were pursuing acts of maladministration and corruption at PRASA were so determined not to be disturbed in their agenda that when a few men and women tried to resist this and insist on compliance with the law or on doing the right things, they were unfairly suspended or dismissed or their lives were made difficult. These people were unable to stop the rot and weed out the wrongdoers because people who wielded public power, whether as leaders of the ruling party, Cabinet Ministers, Members of Parliament or members of law enforcement agencies were obstructive, refused to assist or simply stood by when there was a duty, whether constitutional, legal or moral, to actively assist the Board. This is part of the sad story of PRASA that unfolded during the hearing of evidence by the Commission on PRASA and will be dealt with in this

¹²⁴⁹ No 1 of 1999

section of the Report. These two themes, it is considered, are starkly illustrated by the following developments which serve as an instructive point of departure to introduce the evidence that was heard by the Commission on PRASA.

1716. As already indicated earlier, PRASA had for a considerable period before the establishment of the Commission been the subject of numerous adverse reports in the media. After the Commission had been established, public invitations were issued to people with knowledge of matters falling within the Terms of Reference of the Commission to come forward and give that information to the Commission. Only a few people, especially from PRASA who had first-hand knowledge or access to knowledge of matters that the Commission required, came forward to provide information.

1717. On 1 August 2014, a "new" Board of Control took office at PRASA. Although some members of the "old" Board were re-appointed, the majority were new appointees. The new Board was headed by a veteran ANC leader, Mr Popo Molefe, who was appointed its Chairperson. From the formation of the United Democratic Front (UDF) in 1985 to its dissolution in the 1990s, Mr Molefe was its Secretary General. The UDF had played a significant role in the struggle against apartheid to bring about democracy in South Africa. Mr Molefe was also one of the accused in the Delmas treason trial and was jailed on Robben Island. After the first democratic elections in 1994, he was appointed as the first Premier of the North West Province. He served two terms in that capacity until 2004. At the time of the appointment of the Molefe Board, Mr Lucky Montana was PRASA's Group Chief Executive Officer (Group CEO or GCEO).

1718. According to Mr Molefe, inspired by an opportunity to serve the many commuters, mostly poor, who depend on PRASA for the rail and bus services it provides, principally with public funds, the new Board set about understanding how PRASA worked and perhaps how it could be improved.

1719. However, the new Board soon began to experience unexpected challenges as it set about diligently attempting to discharge the responsibilities whilst duly complying with the constitutional obligations and other regulatory measures such as the PFMA that applied to the Board as PRASA's accounting authority. More worryingly, the Board encountered obstacles and resistance, not least from Mr Montana, to changes it considered were required for it to fulfil its weighty obligations. The obstacles and resistance, some direct but others somewhat more subtle, were widespread but manifested themselves, especially in respect of the procurement of goods and services, in respect of some contracts that PRASA had concluded costing billions of Rands.

1720. Within a few months of taking office, the new Board declined to approve the award of two contracts, with a combined value of more than R4 billion, to service providers which a committee of the Board¹²⁵⁰ had recommended should be awarded the contracts. Not long thereafter, the Board became aware that in her Interim Report, which preceded the Final Report titled: "Derailed", the Public Protector had made findings of serious maladministration at PRASA. As already stated, in her final report she recommended forensic investigations into the award of all contracts that PRASA had concluded after 2012 that cost more than R10 million.

1721. Mr Montana who, according to Mr Molefe, appeared to view the new Board with suspicion, told it in March 2015 that he would be leaving PRASA when his contract expired in mid-July 2015. By then, Mr Montana's relationship with the Board and especially Mr Molefe, had become strained and was on a sharp downward spiral. By the time Mr Montana left PRASA on 15 July 2015, the relationship between him, on the one hand, and the Board and Mr Molefe, on the other, had become quite acrimonious

¹²⁵⁰ The Board's Finance Capital Investments and Procurement Committee ("the FCIP")

and the acrimony was playing itself out in the public space. The events that strained their relationship will emerge later in this Report.

1722. Sometime in July or August 2015, it was reported to Mr Molefe that Mr Auswell Mashaba, the chairperson of Swifambo Rail Leasing (Pty) Ltd (Swifambo), the company that in July 2012 had been declared by the previous Board the preferred bidder to supply locomotives to PRASA at a cost of some R3,5 billion, had alleged that, after his company had been awarded the contract, he had been directed to, and did, pay some R79 million to persons who were to pay the money over to the ANC. As Mr Molefe regarded himself as a "deployee" of the ANC, he felt constrained to raise this bombshell allegation with the ANC. Seemingly on account of his weighty political profile, Mr Molefe was granted an audience with the ANC's Top 6. The reference to the Top 6 of the ANC is a reference to its top six leaders. Those would be the President, the Deputy President, the National Chairperson, the Secretary-General, the Treasurer-General and the Deputy Secretary-General. One of the issues that Mr Molefe raised at that meeting was the attacks by Mr Montana on the Board. Mr Molefe told the meeting that he saw himself as having been deployed by the ANC as the Chair of PRASA's Board. In the circumstances, he had expected that the ANC leadership would come to their defence when he and his Board were attacked by alleged wrongdoers such as Mr Montana. As a result, he told the meeting that the Board would be using its statutory powers to act against wrongdoers.

1723. He was however disappointed as he did not receive the commitment of support he had expected from the leadership of the ANC. Undeterred, the Molefe Board decided to use its statutory powers to try and rid PRASA of the rot that had set in, as evidenced by the Final Report of the Public Protector and an earlier direction by the Auditor-General (AG) that forensic investigations should be conducted in respect of certain matters. The Board appointed a law firm, Werksmans Attorneys (Werksmans), to investigate certain

matters. Among the matters that were investigated by the law firm were the R35 billion locomotives contract awarded to Swifambo and contracts costing some R2,8 billion that had been awarded irregularly to a long-standing service provider to PRASA, namely, Siyangena¹²⁵¹.

1724. Mr Molefe said that his Board had hoped that the processes that it had initiated to clean up PRASA would enjoy support and that entities whose duty it was to assist public bodies such as the Board in ridding such bodies of corruption would render the requisite assistance.

1725. Sadly, as will be seen later in this Report, these entities did not provide the requisite support or assistance. Whilst the Top 6 officials¹²⁵² of the ANC was non-committal, if anything, when asked for its support, the other entities from which Mr Popo Molefe and his Board had hoped for support proved obstructive, often placing serious obstacles in the way of the Board's efforts. Instead of finding ways to assist in the fight against wrongdoing, for example, Parliament's Portfolio Committee on Transport attacked the Board for, among other things, Mr Molefe's stating in a court review application papers relating to Swifambo that he had been told that the ANC had been a beneficiary of the contract that PRASA had concluded with Swifambo. ANC members of that Committee also accused the Board of paying Werksmans too much and questioned Werksmans' integrity in respect of the investigations they were conducting. Eventually, the Molefe Board was rendered dysfunctional even before its term of office formally ended on 31 July 2017. The evidence has revealed, quite clearly, that neither the ANC leadership, the National Executive nor the Portfolio Committee on Transport wanted to assist this Board in its fight against corruption at PRASA. This Board was on its own in fighting

¹²⁵¹ That service provider was Siyangena Technologies (Pty) Ltd ("Siyangena")

¹²⁵² The reference to the Top 6 or Top Six of the African National Congress (ANC) is the reference to the President, Deputy President, National Chairperson, Secretary-General, Treasury-General and the Deputy Secretary-General of the ANC. It is a term that is used by the ANC itself.

corruption at PRASA. The then President, President Jacob Zuma, gave it no support. The then Deputy President of the ANC and of the country, now President Ramaphosa gave it no support. Indeed, all the Top Six officials of the ANC gave it no support. The Parliamentary Portfolio Committee on Transport was openly hostile to this Board. Minister Dipuo Peters became hostile to this Board and fired it through a letter read out in the Portfolio Committee on Transport in Parliament when the Board went to have a meeting with the Committee. The Board had to go to Court to get reinstated. The next Minister, Mr Maswanganyi, was worse. He rendered it dysfunctional.

1726. Mr Molefe said that the ANC's and, indeed, Government's reaction to what his Board had uncovered at PRASA was difficult to understand. He said that what was even more difficult for him to comprehend was that, after Mr Montana had left PRASA in July 2015, only Acting Group CEOs were appointed for a number of years. The next permanent GCEO was only appointed in March 2021. Only "interim" Boards were appointed until late 2020. The Boards that were so appointed were referred to as interim boards but there is no provision for an interim board in the relevant legislation. The foregoing meant that PRASA did not have a permanent Group CEO for nearly six years and for more than three years of that period it had what were referred to as interim Boards. Since there was no provision for interim Boards in legislation governing a PRASA Board, it may well be that, objectively speaking, those so-called interim Boards were normal Boards save that the Executive intended them to be interim and for them to see themselves as interim.

1727. What has been set out above is part of the quite depressing general picture that emerges from the evidence heard and uncovered by the Commission concerning PRASA. The evidence also records the difficulties that the Molefe Board encountered in investigating wrongdoing at PRASA and reveals the entities which overtly or covertly contributed to the failure to bring to book those who contributed to, or benefited from,

the rot at PRASA. It is so that the *Swifambo* and *Siyangena* Court review applications may lead to the recovery of monies that were paid by PRASA. Although the Courts concluded that the awards of the tenders were tainted by corruption, investigations into criminal charges laid against those possibly involved in corruption have not been pursued. Yet, information that is contained in those court review papers and the Sachs' report which will be dealt with later herein that was prepared and handed to the police as early as April 2017 ought to have assisted in ensuring that wrongdoers should long have been brought to book. It is quite worrying that many years after complaints were laid with the HAWKS, nobody has been charged.

1728. It is necessary to hasten to point out that Mr Montana in particular challenged Mr Molefe's version that he was attempting to clean up PRASA. He stated that Mr Molefe had waged a vendetta against him and that, in any case, Mr Molefe was himself guilty of corruption and irregularities. A somewhat similar allegation was also made by Mr Sifiso Buthelezi, who was the Chairperson of the Board before Mr Molefe.

1729. However, notwithstanding that Mr Montana strenuously challenged some of the evidence that implicated him in wrongdoing, a fair amount of evidence relating to him was based on documents. As a result, whilst many factual disputes may remain, in some instances the disputes may be resolved by a proper construction of the relevant documents. In addition, some of the evidence heard by the Commission was based on what had been set out in affidavits made in support of court applications instituted by PRASA or the Board and the ensuing judgments and the findings of the Public Protector in her Report: *Derailed*.

1730. In judgments handed down in review applications aimed at having the multi-billion rand *Swifambo* and *Siyangena* contracts set aside, Courts found that not only were the procurement processes followed irregular, but that they were also tainted by corruption.

To the extent that those Courts made adverse findings against him or the propriety of decisions that PRASA took, Mr Montana challenged the findings. The following comment is however warranted at this stage. Whilst accepting Mr Montana's entitlement to challenge the findings that the Courts made, it should be borne in mind that different Courts and the Public Protector quite separately and independently made findings that reveal that PRASA was plagued by maladministration and that its procurement processes were suspect at best. As a result, those findings and the bases on which they were made must form part of the matters that require to be taken into account when assessing the cogency of complaints made about how PRASA was administered during the years when Mr Montana was in charge.

1731. There were several other issues on which statements were obtained or received and evidence led. One concerned the role of Ms Nana Makhubele, the chairperson of the Interim Board that was appointed after Mr Molefe's Board had left office. It is alleged that she took unusual steps to bring about the settlement of claims against PRASA totalling some R60 million. Payments that were made pursuant to those settlements were set aside by the High Court and the money returned to PRASA.

1732. However, for the most part, the focus in this Report will be on the two main issues noted above, namely the extent of corruption at PRASA and the failure to provide appropriate assistance to bring about their elimination when steps were taken to address them. On the latter issue, the persons against whom Mr Molefe gave evidence may be divided into three broad categories: those who did not act against the perpetrators when they should have acted; those who appeared to side with the perpetrators; and those who refused to act notwithstanding that there was a duty to act against the perpetrators.

1733. With that in mind, a useful approach to the evidence heard by the Commission in respect of PRASA is the following. First, to describe what the position at PRASA was

when the Molefe Board took office and why it appears that its relationship with Mr Montana deteriorated. Second, to consider the steps that Mr Molefe's Board took to ensure that its clean-up efforts succeeded. Third, to consider what has been uncovered in respect of corruption at PRASA. Fourth, to consider why the clean-up efforts did not succeed.

1734. The issues that will be considered in this Report, are the following:

- 1734.1. **First**, regarding Mr Molefe: his evidence about the state of affairs at PRASA soon after his Board was appointed; the deterioration of his relationship with Mr Montana; his notification to the ANC's Top 6 of problems at PRASA; President Zuma's attempt to have Mr Montana back at the helm of PRASA; and the mechanisms used to obstruct the Molefe Board's clean-up attempt.
- 1734.2. **Second**, in the light of the fact fact that they provide a concrete basis for the concerns that Mr Molefe expressed about the PRASA that he had "inherited", a quite extensive consideration of the irregularities that plagued the award of the locomotives contract to Swifambo and the reports prepared thereon by a forensic investigator and by the Liquidators of Swifambo.
- 1734.3. **Third**, a consideration of the irregularities and improprieties surrounding the award of certain contracts to Siyangena and the findings of the Full Bench of the North Gauteng High Court in the application that PRASA instituted to have the contracts reviewed and set aside.
- 1734.4. **Fourth**, the sale of a property by Mr Montana to the company of a lawyer who had acted for Siyangena and the funding for the purchase of three properties in which Mr Montana had expressed an interest in purchasing, one of which he did in fact purchase and had transferred into his name.

- 1734.5. **Fifth**, evidence by senior members of PRASA's internal legal section on the consequences that they suffered after they had opposed attempts to unduly benefit entities in which Mr Roy Moodley had an interest.
- 1734.6. **Sixth**, the failure, until quite recently, to appoint a permanent Board and a permanent CEO.
- 1734.7. **Seventh**, the appointment of Werksmans to conduct forensic investigations.

MR POPO MOLEFE'S EVIDENCE

Introductory matters

1735. PRASA's main object and business is to provide rail and bus passenger services in the public interest and to generate income from the use of its assets. PRASA is funded by the National Treasury through allocations made to the Department of Transport. PRASA's Board is its accounting authority. As an organ of state, PRASA is required to procure goods and services in compliance with section 217 of the Constitution and other applicable statutory and regulatory measures as well as its own supply chain management policies. For many years, it has been failing to carry out its mandate in any satisfactory manner. In fact, many would describe PRASA as a failed project.

1736. Mr Molefe said that his experience at PRASA equipped him to assist the Commission to better understand the different strategies that were used by those involved in state capture. As regards state capture, he was of the view that PRASA was one of the state institutions that was identified for and became a victim of deep state capture, particularly in the award of quite lucrative tenders. He went on to note the following: irregularities in the award of tenders occurred because [lower] decision-makers were made vulnerable by the manipulations of those who were at the heart of the capture of PRASA or simply

permitted it as they were afraid of the consequences of being seen to be "opposed" to the senior management at PRASA. In addition, individuals who and institutions that were under a duty to protect PRASA and the vulnerable failed to fulfil that duty and as a result allowed the capture of PRASA to succeed and benefit certain connected individuals and entities associated with them.

1737. He also noted that the *modus operandi* of those bent on capturing state-owned entities is to first capture senior officials in strategic and influential positions at such entities. It was his experience that the captors target the decision makers, so that they can direct contracts, and ultimately money, to favoured companies or individuals. One example he gives is that of Mr Roy Moodley, a known associate of former President Jacob Zuma.

1738. Dealing with his early experiences at PRASA, Mr Molefe said that at his first meeting with Mr Montana, Mr Montana told him that he had told the previous Chairperson of the Board, Mr Sifiso Buthelezi, that he intended to resign from his position of Group CEO. Mr Molefe said that he told Mr Montana that he expected him to stay for a while, as PRASA was in the process of carrying out its modernization program, which would entail a spend of some R172 billion over 40 years and envisaged among other things the following: the replacement of aged trains, coaches and locomotives with new ones; delivering a better quality of service to commuters; renovating train stations and other infrastructure; and installing a modern signalling system. When he gave his evidence, Mr Montana did not dispute the thrust of this evidence, but qualified it by saying that¹²⁵³ the matters referred to by Mr Molefe were not discussed at their first meeting. Mr Montana said that he raised the issue of his resignation with Mr Molefe only a few months later; and the period of spend was 20 years, not 40 years. Nothing turns on this.

¹²⁵³ From page 42 of the transcript of the evidence he gave on 16 April 2021

The initial problems

1739. Mr Molefe's evidence continued as follows. The problems in the relationship between Mr Montana, on the one hand, and the Board and Mr Molefe, on the other, began to manifest themselves soon after the events described in the preceding paragraph. Among those were the following. As most of the major contracts had already been concluded, the Molefe Board asked for details and the status of these contracts but Mr Montana proved uncooperative. Among those contracts were two that ran into billions, namely, the Swifambo contract and the Siyangena contract. In addition, the Board became aware of the following: audits of the financial statements for the previous years indicated a steep rise in irregular expenditure; many of PRASA's departments were dysfunctional, its controls were weak or non-existent and many employees in strategic positions lacked the requisite skills; and there were serious labour issues, with employees being suspended or dismissed only for the decisions to be successfully challenged, and PRASA being required to find funds to pay to compensate these employees for which it had not budgeted.

1740. In his evidence,¹²⁵⁴ Mr Montana disputed each of these allegations and said that in the nine years that he had headed PRASA it had not had a qualified audit. In respect of suspensions, he said he was being blamed for what had been done by other managers. In addition, he said that in one case the Labour Appeal Court had reinstated 500 dismissed employees because PRASA under Mr Molefe had not properly opposed the appeal. This, he said, had cost PRASA about R1 billion.¹²⁵⁵ He also stated that he and Mr Molefe had had a good relationship until November 2014. He said¹²⁵⁶ that the fall-out between him and Mr Molefe was not because the Board had tried to hold

¹²⁵⁴ From page 44 of the Transcript of the first day he gave evidence

¹²⁵⁵ Page 87

¹²⁵⁶ From page 173 onwards

management accountable, but because he [Mr Montana] had instructed PRASA not only not to pay one of its contractors, SA Fence and Gate (Pty) Ltd (SA Fence and Gate), but also to terminate PRASA's contract with the company and to recover all monies from it. He said that SA Fence and Gate had sponsored a golf day hosted by Mr Molefe's Foundation, the Popo Molefe Foundation, and that Mr Molefe and his Foundation had received benefits from SA Fence and Gate that were corrupt. He asked the Commission to subpoena the accounts of Mr Molefe and his Foundation.¹²⁵⁷

1741. Mr Molefe responded to Mr Montana's evidence in respect of SA Fence and Gate in an affidavit that he submitted to the Commission. What he said in his affidavit may be summarised as follows: his Foundation is a Trust created for charitable purposes, one of which is to focus on the plight of disadvantaged youth; the Trust is independently audited; and its bank and other accounts are managed by at least three of the Trustees. As regards Mr Montana's evidence that SA Fence and Gate had sponsored a Golf Day hosted by his Foundation, Mr Molefe said in his affidavit: SA Fence and Gate had purchased golf shirts, directly from the supplier, that had been used by the golfers on one of the two days of the event; it had however not donated any funds to the Foundation; there was no link between the purchase of the golf shirts and any contract or litigation between SA Fence and Gate and PRASA; and in any case the relationship between SA Fence and Gate and PRASA pre-dated his appointment to PRASA's Board. Mr Molefe also disputed Mr Montana's evidence that PRASA had not defended a claim brought against it by SA Fence and Gate. In support of this denial Mr Molefe annexed to his affidavit papers that showed that PRASA had instituted a counter-claim against SA Fence and Gate for the payment of some R45 million.

1742. Mr Molefe testified that at his Board's first substantive meeting, on 27 November 2014, Mr Buthelezi, who was then the chairperson of the Board's Finance Capital Investment and Procurement Committee (FCIP), announced that he was resigning from the Board. However, Mr Molefe pointed out that the FCIP had recommended the appointment of service providers for two quite major contracts. The one was for the Braamfontein Depot Modernization project and the other for the purchase of Rails and Turnouts, which the FCIP said were urgent. The tenders had a combined value of some R4 billion.

1743. Mr Molefe said that the Board was concerned that there was no probity report confirming that applicable procurement prescripts and processes had been properly followed. As a result, the Board gave only provisional approval in respect of the awards. Mr Molefe testified that Mr Montana however assured the Board that a probity report was available and that he would make it available to the Board. The report however was never produced. It turned out that there could not have been such a report as the contract of the probity officer had expired at least 12 months earlier. Thereafter, PRASA's internal auditors had conducted a probity assessment of the tender processes and found that the SCM policy and the provisions of the PFMA had not been complied with. As a result, on 26 February 2015, the Board cancelled the award of the tenders and asked management to re-issue requests for proposals. In his evidence,¹²⁵⁸ Mr Montana made the following points in respect of the foregoing matters: Mr Buthelezi had not pushed for the tenders to be awarded; he [Mr Montana] had not been asked for a probity report, which he however accepted did not exist for the reason given by Mr Molefe; although the awards of the tenders were cancelled, it was not because of corruption. He also said that the Molefe Board had "destroyed" PRASA in less than three years.¹²⁵⁹ In an

¹²⁵⁸ From page 93 of the first day's transcript

¹²⁵⁹ Page 113

affidavit in response to what Mr Molefe had said in his evidence, Mr Buthelezi said there was nothing untoward about his resignation from the Board.

1744. Mr Molefe testified that in December 2014 he became aware that the Public Protector would soon be releasing a report on her investigations into the affairs of PRASA, following certain complaints that had been lodged with her office. He said that he also became aware that the Public Protector's Interim Report had been shared with PRASA's management but the Board had not been told of its existence. Mr Molefe testified that when Mr Montana was asked about the interim report of the Public Protector, he confirmed to Mr Molefe that he had received the Public Protector's Interim Report. Around that time, Mr Montana told the Board that, for personal reasons, he would not be renewing his contract when it expired at the end of March 2015. The Board accepted Mr Montana's "resignation" but asked him to stay on while it searched for a replacement. It, however, limited his powers.

1745. At a meeting with Mr Molefe in Knysna on 4 April 2015, Mr Montana presented a "litany of complaints" against Mr Molefe and the new members of the Board. He accused them of conspiring with Minister Dipuo Peters¹²⁶⁰ against him and said that the Board had been appointed with the express purpose of getting rid of him, an accusation Mr Molefe denied. In his response,¹²⁶¹ Mr Montana said that Mr Molefe had an agenda, which he began to detect with time. He also said that it was Mr Molefe who had "leaked" the Public Protector's Interim Report to the Press and that he had told Mr Molefe this at their Knysna meeting.¹²⁶²

¹²⁶⁰ Ms Peters was the Minister of Transport at the time. As such, oversight of PRASA fell under her Portfolio. It appears that it was she who had submitted to Cabinet the names of the members of the new Board and recommended that Mr Molefe be appointed its Chair.

¹²⁶¹ From page 93 of the Transcript

¹²⁶² Page 135

1746. After the Knysna meeting the relationship between Mr Montana and the Molefe Board deteriorated even further and soon spilled into the public arena with Mr Montana and Mr Molefe publicly making accusations against each other.

1747. Towards the end of August 2015, the Public Protector released her [final] Report, *Derailed*, though as has been noted above, a copy of the Interim Report had already been made available to PRASA's management and later to its Board. At that time the Public Protector was Adv T Madonsela.

1748. In his affidavit and during his evidence, Mr Molefe highlighted several findings contained in the Public Protector's Final Report and the remedial actions that the Public Protector said must be taken. Among the findings that related to Mr Montana were that in a number of cases PRASA had extended the scope of tenders, which the Public Protector found constituted maladministration and improper conduct. In one case, a tender for two train stations was later improperly extended to seven stations.¹²⁶³

1749. The Public Protector's Report was critical of Mr Montana and PRASA. Among the findings and observations made in the Report were the following:

"[I]t was difficult to get information from PRASA, with this being a main causal factor behind the delay in finalising this investigation which was lodged in 2012. Promises for documents were not kept and even a request for assistance from the [old] Board yielded very few source documents. It was also discomfoting that Mr Montana boasted about the failure of complainants to provide documentary evidence on some allegations and asked that I adjudicate those matters in his favour when he failed to provide legitimately requested documents."¹²⁶⁴

¹²⁶³ Page 358-9, para 8.2 of her Report

¹²⁶⁴ Page 63, para 3.5

1750. The Public Protector also found that the allegation that the Group CEO [Mr Montana] suspended some employees without following proper disciplinary procedures¹²⁶⁵ and that the conduct of PRASA of habitually suspending employees contravened PRASA's disciplinary code,¹²⁶⁶ amounted to fruitless and wasteful expenditure,¹²⁶⁷ and that such improper suspensions constituted maladministration and improper conduct.¹²⁶⁸ The Report also noted that there was a culture of poor information management or hiding of information that could provide evidence of maladministration.¹²⁶⁹

1751. Among the specific remedial actions that the Public Protector said should be taken are that the Board had to:

- 1751.1. take cognizance of the findings of maladministration and improper conduct by Mr Montana and other functionaries;¹²⁷⁰
- 1751.2. report to National Treasury and the Auditor-General particulars of the alleged financial misconduct and the steps it took;
- 1751.3. support National Treasury in conducting a forensic investigation into all PRASA contracts above R10 million from 2012; and
- 1751.4. then take appropriate measures to address the findings.¹²⁷¹

¹²⁶⁵ Page 375, para 8.25.1

¹²⁶⁶ Page 376, para 8.25.4

¹²⁶⁷ Page 376, para 8.25.6

¹²⁶⁸ Page 377, para 8.25.7

¹²⁶⁹ Page 382, para 8.33.2

¹²⁷⁰ Page 383, para 9.2.1

¹²⁷¹ Page 384, para 9.2.5.

1752. Mr Montana's reaction to the Public Protector's Report may be summarised as follows.¹²⁷² He stressed that there were no findings of corruption and that there were not many instances where he featured. He later pointed out that he has challenged the Report and had applied to the High Court for the Report to be reviewed and set aside. He also stressed that there was no connection between his resignation and the Report, saying that he had resigned in March 2015 and had left PRASA on 15 July 2015, while the Report was released only in late August 2015. He said his proposed review of the Public Protector's Report was based in part on the fact that the Public Protector did not have an "understanding" of PRASA and had applied legal prescripts that are not applicable to PRASA.

1753. Mr Montana again stressed that the Public Protector had made findings of "maladministration, [abuse of] power and employees [being suspended] without following of procedures", but she had not mentioned "a single finding of . . . corruption".¹²⁷³ In addition, he said, the then Public Protector [Ms Madonsela] had dealt with only about half the complaints. The present Public Protector [Ms Busisiwe Mkwabane] had dealt with the rest of the complaints and in her report had made only one adverse finding. Mr Montana also denied that he had not co-operated with Adv Madonsela and said that her finding that he had not provided information was "really uncalled for". Finally, on the issue of Adv Madonsela's Report, he said, in respect of the application to have the Report reviewed and set aside, Report, he was still to decide whether or not to pursue that application. Mr Montana conceded that he had allowed that review application to remain pending in the High Court for a number of years. I do not think that Mr Montana intends pursuing that application. There is no reason why he

¹²⁷² It appears at page 161 and thereafter from page 274 of the Transcript

¹²⁷³ Page 284

would not have taken the necessary steps all these years for it to be heard and decided if he thought he had a good case.

1754. Mr Molefe testified that it was also around the time of the release of the Public Protector's *Derailed* Report that he became aware that Mr Mashaba had stated that, after Swifambo had been awarded the R3,5 billion locomotives contract, he [Mr Mashaba] had, on instruction, paid a total of some R79 million to people who were to have then paid the money over to the ANC.

1755. It is against the backdrop of what has been summarised above that the meeting between Mr Molefe and the ANC's Top 6, which is dealt with immediately hereunder, must be considered.

Mr Molefe's meeting with the ANC's Top 6

1756. Mr Molefe's meeting with the ANC Top 6, which has already been mentioned earlier, took place in July or August 2015. It appears that the meeting was preceded by a meeting Mr Molefe had had with the ANC's Treasury General at the time, Dr Zweli Mkhize, with whom he had discussed some of his concerns about the Mashaba payments and the contracts PRASA had awarded to companies connected with Mr Roy Moodley, such as Siyangena, Prodigy and Strawberry Worx. The only member of the Top 6 who was not present at the meeting was the then the National Chairperson of the ANC, Ms Baleka Mbete.

1757. What Mr Molefe said he told the five members of the Top 6 who were present at the meeting may be summarised as follows. The ANC is the ruling party. SOEs are governed by the laws of the country. The ANC leadership had approved his appointment as Chair of the PRASA Board. In a sense, they had deployed him and the other appointees to the Board, which oversaw PRASA on behalf of the country. That

Board was being subjected to sustained attacks by Mr Montana, yet none of the Top 6 had raised a voice in defence of Mr Molefe or the Board. Mr Molefe told them that he had been quiet for a long time, but he was going to act and would use the legal instruments with which the Board was armed, such as the PFMA.

1758. Among the other matters that Mr Molefe raised at the meeting were the following: the malfeasance and corruption at PRASA which had been identified by the Public Protector in her Interim Report, with the Final Report due to be released soon; the amounts involved were significant, for example, the Report had mentioned a figure of some R1,9 billion relating to contracts with Siyangena, and his Board had directed that new procurement processes for the Braamfontein Depot Modernisation contract and also the contract for the purchase of Rails and Turnouts be conducted; these tenders together involved an amount of some R4 billion; and, following the award of the R3,5 billion locomotives contract to Swifambo, its chairperson, Mr Mashaba, had alleged that he had paid money to people who were purporting to be collecting it on behalf of the ANC.

1759. Mr Molefe added that he also told the meeting this: the Top 6 was doing nothing because it was waiting to see if Mr Montana's campaigns would lead to the defeat or the collapse of the Board, but that was not happening.

1760. Asked what the reaction of the Top Six was to what he told them, Mr Molefe said that they said he had not given them time to think about what he had said. They implied that they wanted time to think about it. They said that they would have another meeting. However, Mr Molefe said that there was no further meeting: they never reverted to him.

1761. When he gave evidence on this issue, President Cyril Ramaphosa admitted that the meeting about which Mr Molefe testified did take place and that Mr Molefe had mentioned that he would be required to utilise the PFMA against wrongdoers. He said

the ANC leadership was quite satisfied with that approach. However, he denied that Mr Molefe had mentioned the alleged payment of R79 million to the ANC. He also denied that they had asked for more time to think about the issues that Mr Molefe had raised at the meeting.

1762. No matter how one looks at the meeting that Mr Popo Molefe had with five of the six officials of the ANC including the then President Zuma and the then Deputy President Ramaphosa, what is quite clear is that Mr Popo Molefe had approached the ANC officials in order to inform them of the problems of corruption at PRASA and to seek support from them. What is equally clear is that the ANC officials did not quite give him any support. On Mr Molefe's version, they said that he had not given them time to think about the matter and he understood that they were going to reflect on the issues he had raised with them and revert to him but not a single one of the officials ever reverted to him or ever contacted him to find out how he was doing in his fight against corruption at PRASA. On President Ramaphosa's version, all the officials did was to state that he should use the PFMA. Even on President Ramaphosa's version there is no suggestion that the officials of the ANC did anything to give Mr Molefe support. Not even a single one of them ever contacted Mr Molefe to find out how he was doing in his fight against corruption. Already by that time PRASA had for some time been in the media about allegations of corruption. South Africans would not have been surprised if President Zuma did not give Mr Molefe support for his fight against corruption but I believe they would have expected Deputy President Ramaphosa's reaction and attitude to be different from that of President Zuma.

1763. Of all the officials of the ANC who were at the meeting with Mr Molefe, the then Deputy President Ramaphosa was one official from whom it would have been expected that he would have sought to give Mr Molefe support. President Ramaphosa should have at least followed-up later and contacted Mr Molefe and his Board could he given in their

fight against corruption PRASA. I believe that in how he and the rest of the officials handled this matter President Ramaphosa fell short of the standard that would have been expected from him in a matter involving fighting corruption. The rest of the officials also failed to give support to Mr Molefe. The attitude of the ANC officials towards Mr Molefe's plea for support may well be consistent with the attitude displayed by various Ministers of Transport and both President Zuma and President Ramaphosa towards PRASA not having a permanent GCEO for close to six years.

1764. In his affidavit and evidence, Mr Molefe referred to a further meeting relating to the dispute between Mr Montana and the Molefe Board, which took place at the Presidential Guest House in Pretoria. That meeting is dealt with in the section immediately hereunder.

The meeting with former President Zuma

1765. Mr Molefe said that after the Board had accepted Mr Montana's "resignation", Mr Montana had publicly announced that, if the Minister and the Board wanted him back, he was still available to stay on as PRASA's Group CEO. However, given that the already strained relationship between Mr Montana and the Board had deteriorated quite substantially and had even become publicly acrimonious, the Board showed no interest in having Mr Montana back. According to Mr Molefe, in early August 2015 President Zuma and Minister Jeff Radebe, the Minister in the Presidency, invited him to a meeting at the Presidential Guest House. Minister Peters was also invited, and so was Mr Montana, although Mr Molefe became aware of this only during the meeting. The meeting took place on 20 August 2015. It started late: it was scheduled to begin at 15:00 but started only at about 18:00.

1766. Whilst it was common cause that a meeting attended by President Zuma, Ministers Peters and Radebe, Mr Molefe and Mr Montana took place on 20 August 2015 there

are different versions about the contents of the discussions. Mr Molefe, Minister Peters and Mr Montana gave evidence about the meeting. Former Minister Radebe tendered an affidavit. It will be instructive to set out their respective versions, in the following order: Mr Molefe's, Minister Peters', Mr Montana's and Minister Radebe's. Mr Zuma did not give evidence on the meeting as he elected to boycott the Commission.

Mr Molefe's version

1767. At the start of the meeting, only President Zuma, Minister Radebe, Minister Peters and Mr Molefe were present: Mr Montana was only called in later. President Zuma said the on-going conflict between Mr Molefe and Mr Montana, in which they were publicly attacking each other, was a matter of concern to him. It is for that reason that he had suggested to Minister Peters that Mr Molefe and Mr Montana meet with him.

1768. According to Mr Molefe, after a few preliminary matters were discussed, President Zuma said: "I have invited that boy, Lucky Montana." He then asked Minister Radebe to call Mr Montana into the meeting. After Mr Montana had joined the meeting, President Zuma said that the public spat between Mr Molefe and Mr Montana was embarrassing to the ANC, of which both Mr Molefe and Mr Montana were members. He said that Mr Montana was very knowledgeable about commuter rail matters and he should not be lost to the country. He said the two should sort out their differences. He also said that senior members of the ANC were concerned that Mr Montana and Mr Molefe had been making unpleasant statements about and against each other in the media.

1769. Mr Montana, who, according to Mr Molefe, appeared to have been briefed about the meeting, then criticised the Board and Minister Peters. One of his complaints was that

he had not been consulted before the Molefe Board was appointed.¹²⁷⁴ However, Minister Peters pointed out that he was an employee of PRASA and had no right to be consulted on the composition of the Board.

1770. Mr Molefe said that the comments made by President Zuma at the meeting gave him the impression that President Zuma wanted Mr Montana reinstated as PRASA's Group CEO. Mr Molefe said he invited President Zuma to address the Board and tell the Board why its acceptance of Mr Montana's "resignation" was "a problem". It did not please President Zuma that Mr Molefe was not prepared to simply reinstate Mr Montana as PRASA's Group CEO. He said the meeting took many hours and ended at about 2 am on 21 August 2015, when President Zuma had fallen asleep whilst they were talking.

1771. Despite what President Zuma had said at the meeting, the Board did not re-visit its decision on accepting Mr Montana's resignation.

1772. As regards the status of the meeting, Mr Molefe said that President Zuma had described it as a meeting of "comrades of the ANC". However, Mr Molefe told the Commission that he was deeply concerned that the President of the country was personally interfering in the operations of PRASA.

¹²⁷⁴ It appears that this is not the first occasion on which Mr Montana complained about not being consulted before the appointment of the new Board in 2014. According to an affidavit that he submitted to the Commission, Dr Zwele Mkhize said Mr Montana made that same complaint to him in 2014. [At the time, Dr Mkhize was the ANC's Treasurer General.] Dr Mkhize's allegation relating to that complaint came before the Commission in the following circumstances. In a letter to Parliament's Portfolio Committee on Public Enterprises dated 26 February 2018, Dr Mkhize responded to several allegations that Mr Montana had made against him [Dr Mkhize]. One of Mr Montana's allegations against Dr Mkhize was that he had had some influence in the appointment of the new PRASA Board in 2014. In answer to that allegation, Dr Mkhize said that Mr Montana had told him [Dr Mkhize] the following: Minister Peters had told him [Mr Montana] that she was in the process of appointing a new Board and she was consulting "Luthuli House"; however, he was "very concerned" that as the [Group] CEO of PRASA he had never been consulted about these appointments; the Minister was running a unilateral process; and this concerned him [Mr Montana]. It would appear that the fact that he was not consulted before the Molefe Board was appointed was quite irksome to Mr Montana. Dr Mkhize's letter to the Portfolio Committee on Public Enterprises was annexed to his affidavit to the Commission.

Minister Peters' version¹²⁷⁵

1773. In her affidavit and when she testified, Minister Peters said that the meeting had been arranged after she had requested President Zuma to ask Mr Montana and Mr Molefe to stop their public spat. President Zuma told her that he knew that Minister Radebe was very close to Mr Montana and that he would ask him to speak to Mr Montana. Based on what Mr Montana said at the meeting, she had gained the impression that Mr Montana wanted his job back. However, it did not appear to her that there had been "a conscious decision" by President Zuma that Mr Montana must return to PRASA. She agreed with Mr Molefe on the following: Mr Montana was not present when the meeting started and that the meeting had been inconclusive because the President was exhausted and had fallen asleep. She said she did not see anything wrong with being called to the meeting, nor did she recall that President Zuma had said that Mr Montana was knowledgeable about rail matters. She agreed that Mr Molefe had invited President Zuma to address the Board on why it had agreed to release Mr Montana early but said that the invitation was also extended to enable President Zuma to "see" PRASA. She said she could understand the concern Mr Molefe had expressed about "interference" [by President Zuma in PRASA's affairs]. She also said that Mr Montana had spoken for long and was building a case for why the organisation needed him. She also said that the meeting had ended only at about 2 am the following morning.

Mr Montana's version¹²⁷⁶

1774. In his evidence, Mr Montana said he had no interest in going back to PRASA. He said he had been invited to the meeting by President Zuma and Minister Radebe. He was told the meeting would start at 6 pm, and it started at about that time. He said the

¹²⁷⁵ As appears from the transcript of her evidence of 22 February 2021, from page 32

¹²⁷⁶ As appears from the transcript of the first day of his evidence, from page 290

backdrop against which the meeting had been called was that there had been a public spat between him and Mr Molefe. He also said that they were all present at the start of the meeting. He denied that the President had said he was very knowledgeable about the rail industry and should not be lost to the country: it was Mr Molefe who had said that he (Mr Montana) was knowledgeable. He said that after a while he and Mr Molefe were asked to leave the meeting because the President wanted to talk to the two Ministers. He denied that the President had said "bring Montana back". He said the meeting ended on "a very positive and a jovial note" when he and Mr Molefe left. He said it had lasted about four, probably five hours. It had ended at about midnight. He had not spoken for long. He also denied he had compiled a document entitled "PRASA in Turmoil". He denied that the meeting ended because the former President dozed off. However, he accepted the following: "the war" between him and Mr Molefe continued after the meeting; and at the meeting itself no clear pronouncement was made of what "the outcome" was.

Minister Radebe's version

1775. Minister Radebe submitted an affidavit dealing with among other matters the meeting of 20 August 2015. He did not apply for leave to give oral evidence which he could have done in terms of the Rules of the Commission if he wished to give oral evidence and subject himself to questioning. He said he had called the meeting because he was concerned about the public spat between Mr Montana and Mr Molefe. He had asked President Zuma to intervene, and had invited Mr Montana, Mr Molefe and Minister Peters. He also said the following: "The meeting was cordial and the resolution amicable to the satisfaction of everyone at the meeting, including Mr Molefe." He added that it was regrettable that Mr Molefe now painted a different picture. He denied that the meeting finished at about 2 am. He said that it finished way before midnight. He denied

that President Zuma wanted Mr Montana reinstated and that President Zuma had fallen asleep during the meeting.

Analysis

1776. As emerges from what has been summarised above, it is clear that the versions of Mr Molefe and Mr Montana differ in various respects and that the version of Minister Peters lends some support to that of Mr Molefe, while the version of Minister Radebe lends some support to that of Mr Montana. It is neither possible nor necessary to decide all the issues that arise from the different versions: it would suffice to consider the following two fundamental but related issues. First, why was it called; and second, did it end amicably. The evidence of Mr Montana and the affidavit of Minister Radebe give the following answers: the meeting was called to end the public spat between Mr Montana and Mr Molefe; and it ended amicably.

1777. While it was clear to Mr Molefe that the purpose of the meeting was to get the PRASA Board to take Mr Montana back, Minister Peters was of the view that Mr Montana used the meeting to make a case for his return to PRASA. Nevertheless, both agreed that Mr Molefe had invited President Zuma to address the Board. That invitation could have been for only one purpose: to give President Zuma an opportunity to persuade the Board to retract its acceptance of Mr Montana's resignation. Moreover, the fact that the "war" between Mr Montana and Mr Molefe did not end after the meeting, a fact acknowledged by Mr Montana, suggests strongly that the meeting did not end on a positive, jovial or amicable note, as stated by Mr Montana and Minister Radebe. In addition, the continuation of the "war" between Mr Montana and Mr Molefe supports the versions of Mr Molefe and Minister Peters that the meeting ended inconclusively – and when President Zuma fell asleep.

1778. Having regard to the probabilities, it would appear that the following conclusions can be drawn: whether or not it was the purpose of the meeting, President Zuma attempted to persuade Mr Molefe to take Mr Montana back; Mr Molefe invited President Zuma to address the Board on its decision to accept Mr Montana's resignation; and the meeting ended late and inconclusively – because President Zuma fell asleep.

1779. Mr Molefe's evidence that the reason why he invited President Zuma to go and address the Board was because President Zuma wanted him or the Board to take Mr Montana back is, on the probabilities, true. I therefore find that that is what happened because nobody else has suggested why Mr Molefe issued that invitation to Mr Zuma if the reason he gives was not the reason. It needs to be pointed out that by the time Minister Peters ceased to be Minister of Transport, her relationship with Mr Molefe was no longer good. They were fighting about, among other things, the continued investigations conducted by Werksmans. That being the case, there would have been no reason for her to corroborate Mr Molefe's version about Mr Molefe having invited Mr Zuma to go to PRASA and address the Board if Mr Molefe had not issued such an invitation to Mr Zuma. There would also have been no reason for her to corroborate Mr Molefe's version that the meeting ended because Mr Zuma had fallen asleep if that is not what happened.

1780. President Zuma did not testify or respond to Mr Molefe's affidavit or evidence. Accordingly, his version is not known. However, as regards the calling of the meeting, the following intriguing issue arises: given that this meeting took place about a week after Mr Molefe's meeting with the ANC's Top Six, which was dealt with above and at which President Zuma was present, was there a link between the two meetings. President Zuma was in a position to answer that. But he chose not to deal with this issue. Be that as it may, one can appreciate Mr Molefe's concerns that the President would involve himself in the affairs of an SOE but characterise the meeting as one

among “ANC comrades”. It worryingly blurs the distinction between affairs of the Ruling Party and those of an SOE to whom the Party deploys its cadres.

Developments soon after the meeting

1781. A number of significant developments that took place about the time of or soon after Mr Molefe's meeting with the ANC Top 6 and his meeting with President Zuma and Ministers Peters and Radebe and Mr Montana. These developments are considered immediately hereunder.

1782. The Public Protector's Report [*Derailed*] was released about a week after the meeting of 20 August 2015. Just prior to that, the AG had also issued some adverse findings in respect of PRASA. It has already been stated above that in August 2015, the Board appointed Werksmans to conduct certain forensic investigations that the AG's report had required. Thereafter, Werksmans' scope of work was broadened to include matters that arose from the Public Protector's Report.¹²⁷⁷ Mr Molefe said that, as a result of the investigations that Werksmans undertook, many irregularities and acts of maladministration at PRASA were uncovered. However, as is detailed later in this Report, his Board's appointment of Werksmans was criticised by, among others, Mr Montana, Minister Peters and Parliament's Portfolio Committee on Transport. In addition, the Auditor-General later found that the appointment of Werksmans was irregular as the panel from which Werksmans had been selected had not been renewed by PRASA for a lengthy period. However, in a letter written to then Minister of Transport in June 2017, when there was a threat to terminate the appointment of Board members,

¹²⁷⁷ It bears reiterating that the Public Protector's Report required the Board to: take cognizance of the findings of maladministration and improper conduct by Mr Montana and other functionaries; report to the National Treasury and the Auditor-General particulars of the alleged financial misconduct and the steps it took; support National Treasury in conducting a forensic investigation into all PRASA contracts above R10 million from 2012; and then take appropriate measures to address the findings.

a leading law firm in Johannesburg expressed the opinion that there was nothing amiss about the appointment of Werksmans.

1783. In defending his Board's appointment of Werksmans, Mr Molefe expressed the view that a lawful and proper procedure had been followed before Werksmans was appointed.^{127B} He also said that Werksmans' investigations had enabled the Board to institute legal proceedings which resulted in Courts setting aside major contracts that were found to be tainted with corruption the R3,5 billion contract that PRASA had awarded to Swifambo; and two substantial contracts that PRASA had awarded to Siyangena totalling some R2,8 billion. It will be necessary to consider the concerns that raised about the appointment of Werksmans. This is done later in this Report.

The vilification of Mr Molefe and his Board

1784. On 25 August 2016, Mr Molefe deposed to his Replying Affidavit in PRASA's application to have PRASA's R3,5 billion locomotives contract with Swifambo reviewed and set aside. In that affidavit, he set out what Mr Mashaba had told him about the award of the locomotives tender to Swifambo and payments he made after the award.

1785. In essence, in that affidavit Mr Molefe said that Mr Mashaba had told him the following: he [Mr Mashaba] was aware that PRASA's award of the locomotives tender to Swifambo in 2012 was being investigated by the Molefe Board; he wished to come clean; he had bid for the locomotives tender after he had been approached to do so by Mr Makhensa Mabunda, a known associate of Mr Montana; after Swifambo had been awarded the contract, Angolan businesswoman Ms Maria Gomes [who was known to be a "fund raiser" for the ANC] told him that 10% of the value of the contract should be paid to the ANC. Mr Mashaba later furnished documents indicating that a total of some

^{127B} The cogency of this view is considered later, in the section of this Report that deals with the appointment of Werksmans and the reaction to it.

R79 million was paid to persons or entities who it was said would pay the money over to the ANC.

1786. Not surprisingly, this bombshell disclosure, made in Court papers, was widely reported in the media. What Mr Mashaba told Mr Molefe suggested strongly that the award of the tender to Swifambo was tainted by corruption. It would be expected that all relevant state entities would want to get to the bottom of this serious allegation, especially given the massive value of the contract and the allegation that the ANC had apparently received some R79 million from the head of Swifambo after the locomotives contract was awarded to Swifambo.

1787. Mr Molefe pointed out, with disappointment, that that was not how state bodies dealt with the matter. Instead, it was Mr Molefe and his Board who were painted as villains by Parliament's Portfolio Committee on Transport ("the Portfolio Committee"). He and his Board were vilified by ANC members of the Portfolio Committee when they appeared before it in Parliament. As regards those allegations, the record of the proceedings of the Portfolio Committee that were made available to the Commission suggests the following.

1787.1. First, the PRASA Board appeared before the Portfolio Committee on 31 August 2016, about a week after the media had reported on the allegations in Mr Molefe's replying affidavit in the Swifambo review application. Accordingly, this was the Board's first appearance before the Portfolio Committee after Mr Molefe's bombshell disclosure of alleged payments that were to be or to have been made to the ANC.

1787.2. Just how antagonistic the ANC members of the Portfolio Committee were towards Mr Molefe and his Board appears from the following. One of the issues that was raised by PRASA's Acting Group CEO, Mr Collins Letsoalo, at the

Portfolio Committee meeting of 31 August 2016 when responding to why there was a low level of compliance with attending to problems that the Auditor-General had raised, was that PRASA had a dysfunctional administrative system. For example, he said, PRASA needed only 20 executives but it had a complement of 65 executives. This meant that PRASA was paying for three times more than the number of executives it required.

1787.3. There can be few clearer examples of on-going fruitless and wasteful expenditure. One would expect dedicated public representatives to take this matter up vigorously. That, however, is not what the summary of what transpired at the Portfolio Committee proceedings of 31 August 2016 reflects. Instead of dealing with the massive wastage of public funds, one ANC member focused on the allegation that Mr Molefe had made in his replying affidavit about money being paid to the ANC. It will be remembered that, as part of her remedial action, the Public Protector had required that the PRASA Board support National Treasury in conducting a forensic investigation of all contracts above R10 million that PRASA had concluded after 2012.

1787.4. Second, the record of the subsequent meetings of the Portfolio Committee indicates that the approach of ANC members was to target those who sought to rid PRASA of wrongdoing, in this case Mr Molefe and his Board, rather than ascertaining how it came about that the tender was awarded to Swifambo and identifying the beneficiaries so that money paid out by PRASA corruptly could be recovered.

1788. The issues addressed in the paragraph immediately above concerning Mr Molefe's evidence that he and his Board were vilified by the Portfolio Committee were responded

to in an affidavit made on 21 October 2020 by Ms Phillistus Dikeledi Magadzi,¹²⁷⁹ an ANC Member of Parliament, who chaired the Portfolio Committee between 2014 and 2019. However, it should be noted that the affidavit of Ms Magadzi, who is now the Deputy Minister of Transport, was submitted to the Commission in response to an invitation by the Commission to the ANC to set out how Parliament carried out its oversight obligations over the Executive and held it accountable. Among the matters that she addressed in her affidavit was Mr Molefe's evidence that the Portfolio Committee vilified him and his Board.

1789. As regards those matters, in essence Ms Magadzi's affidavit was to the following effect: the Portfolio Committee consisted of 12 members (seven from the ANC, two from the Democratic Alliance and one each from the Inkatha Freedom Party, Economic Freedom Fighters and National Freedom Party); she understood that the role of the Committee was to oversee the operations of the Department of Transport, which had 12 State-owned Entities (SOEs), including PRASA, under its jurisdiction; overall, the Committee performed its oversight obligation well; save for PRASA, the other SOEs were relatively stable; and during her tenure, the Committee focused its attention on PRASA, which was undergoing a modernisation process. In respect of PRASA, the affidavit highlighted the following.

1789.1. First, a factor that contributed to the instability at PRASA was the high turnover of Executives, CEOs, Board members [and Ministers] after 2015. While she was Chairperson of the Portfolio Committee, PRASA had three Ministers,¹²⁸⁰ four Boards and numerous CEOs. The instability at PRASA "hampered" the Committee's efforts "to follow up" on allegations in the media that the locomotives that were purchased were not fit for purpose, especially since the

¹²⁷⁹ At the time she made the affidavit, Ms Magadzi was the Deputy Minister of Transport.

¹²⁸⁰ Minister Peters, Minister Joe Masangwani and Minister Blade Nzimande

Rail Safety Regulator in its report indicated that the trains could be used and gave the project its nod. However, despite the high turnover of Ministers, she “did not experience any pushback from the Executive Authority” or the ANC; and “there was alignment” between her and the different Ministers.

1789.2. Second, the Committee’s task of exercising oversight over PRASA was “made difficult” because the Committee and the PRASA Board had different approaches on how the challenges at PRASA should be dealt with. The Committee wanted state institutions such as the Auditor-General, National Treasury, the Hawks and the South African Police Services to investigate the irregular procurement of the locomotives, but the Board led by Mr Molefe “saw it fit to engage a private law firm, Werksmans”, to conduct the investigations. The Committee wanted to know how much would be spent and where the money would come from, which is when it was told there had not been a bid [before Werksmans had been appointed] and the cost could not be estimated. The Committee proposed “regularisation”, but this was not done, although the procurement was “irregular” and the cost then had reached R120 million.

1789.3. Third, the Auditor-General had made findings of irregular, unauthorised and wasteful expenditure at PRASA and had recommended consequence management. The Committee also wanted disciplinary steps to be taken but this did not happen.

1789.4. Fourth, the Committee also “wanted to pursue” Mr Molefe’s allegation that “PRASA had donated R80 million to the ANC”.¹²⁸¹ [Emphasis added.] To that end, Ms Magadzi said, “[t]he Committee demanded invoices and evidence from

¹²⁸¹ As noted above, Mr Molefe had not alleged that PRASA had made payments to the ANC: the allegation was that Swifambo’s chairperson, Mr Mashaba, had told Mr Molefe that after Swifambo had received the tender he [Mr Mashaba] had been asked to make payments totalling R79 million to persons who it was said would pay it to the ANC and it was he who had made the payments.

PRASA to support this allegation because it fell within the purview of oversight". It was her "personal observation" that Mr Molefe "was angered by this request". She said that another allegation that the Committee "wanted to explore" was the [alleged] appointment of Mr Molefe's son to work at Werksmans.¹²⁸²

1789.5. Fifth, Ms Magadzi stated that the following matters were indicative of the "rigorous manner" in which the Committee pursued its oversight obligation: in March 2016, it asked for a report from PRASA on actions taken to recover money lost on account of irregular and fruitless expenditure and asked why additional expenditure of about R250 million to pay SA Gate and Fence was not reflected in briefing documents; and in February 2018 it was given a status report that said due process was not followed in the appointment of Werksmans and that governance processes had been flouted.

1789.6. Sixth, she also said that, when allegations of procurement impropriety at PRASA surfaced in the media, the Committee conducted oversight visits and was assured by the Regulator that the trains were "fit for purpose". She also said that the "ANC Study Group" was "very forceful in demanding that the allegations of impropriety be investigated" and "only disengaged" after the Regulator provided assurances "that all was well".

1790. In an affidavit responding to the evidence of Ms Magadzi, against him, Mr Molefe denied that he had been asked to provide invoices in respect of the payments allegedly made to the ANC. He also denied that his son worked for Werksmans. In this connection, he

¹²⁸² In an affidavit in response to these allegations, Mr Molefe denied them. He denied he had been asked to provide receipts. He also said his son was not employed by Werksmans. He said his son was not involved in law: he worked for a firm that was involved in the transport sector.

said that his son was not in the field of law: he worked for a company that manufactured buses and trucks.

1791. Mr Molefe said that it appeared that there was a plan by those with influence to make it impossible for the Board to operate effectively or at all.

1792. Mr Molefe stated that, after Mr Montana's departure from PRASA, the Board sought to appoint a new CEO. To this end, it embarked on a rigorous recruitment process and interviewed various candidates. A list of its preferred appointees was then compiled. The Board sent the list to the Minister and recommended to the Minister that the candidate at the top of the list be appointed. That candidate was a black woman who was well-qualified: she was well versed in rail matters and had worked for Metrorail and Transnet. In terms of clause 15.8 of the Board Charter, the Group CEO is appointed by the Minister, on the recommendation of the Board. However, according to Mr Molefe, the Minister did not make the appointment and thus frustrated the Board's attempts to have a permanent Group CEO appointed.

1793. Mr Molefe testified that, instead, the Minister insisted that Mr Collins Letsoalo, the then Chief Financial Officer of the Department of Transport, be seconded as an Acting Group CEO. However, according to Mr Molefe, Mr Letsoalo appeared to have been instructed to stop or significantly curtail the Werksmans investigations: he insisted that it was he who should take charge of the investigations. This soon led to tensions with the Werksmans investigation team. Mr Molefe testified that, thereafter, in a letter to the Board, Minister Peters herself attempted to stop the investigations, but the Board refused to stop the investigations.

1794. Among the steps that the Board took pursuant to those investigations were the following: on 27 November 2015, it applied to the High Court for the review and setting aside of the contract that PRASA had concluded with Swifambo; and on 1 February

2016, it instituted an application for contracts that PRASA had concluded with Siyangena to be reviewed and set aside on the basis that the awards were irregular and possibly corrupt.¹²⁸³ The applications to have the contract between PRASA and Swifambo, on the one hand, and the contracts between PRASA and Siyangena, on the other hand, reviewed and set aside were successful.¹²⁸⁴ However, the details of those review applications are more conveniently considered separately – after summarising how the Board's operations were in effect subsequently rendered unworkable.

1795. In her affidavit and her evidence, former Minister Peters denied frustrating the Board's attempt to appoint a permanent Group CEO to replace Mr Montana. She also said that the decision to appoint Mr Letsoalo was not unilaterally imposed on the Board. She said that the decision had been discussed with Mr Molefe, who had not only written the letter appointing Mr Letsoalo, but had also congratulated him on his appointment.

1796. She denied attempting to stop the Werksmans investigation. She said that all that she did was repeatedly demand that an explanation be given as to when the investigation undertaken by Werksmans was likely to be concluded. She said that she had raised this concern because she was mindful of the ever-increasing legal fees, which were close to R200 million at the time and which had not been budgeted for. This latter issue, she said, had been flagged by the AG.

1797. Mr Molefe said in evidence that he had made several attempts to seek protection from Parliament. Some of those efforts follow. On 8 March 2017, he wrote to the Speaker of the National Assembly, Ms Baleka Mbete, requesting Parliamentary intervention, raising among other matters, the Public Protector's Report and the matters that were

¹²⁸³ It needs to be noted that an earlier Court review application against Siyangena, instituted while the Molefe Board was still in office, was dismissed on court [procedural] basis that it had not been instituted timeously. However, PRASA thereafter instituted a second application, on 5 March 2018, that is, after term of office of Mr Molefe's Board had expired, in which it sought similar relief.

¹²⁸⁴ In respect of the Siyangena contracts, it was the second application that was successful.

being investigated by Werksmans. That letter is very important because of what Mr Molefe conveyed to the Speaker of Parliament, Ms Baleka Mbete. It reads:

"Dear Madame Speaker,

REQUEST FOR A PARLIAMENTARY INQUIRY INTO THE OPERATIONS AND GOVERNANCE OF PRASA

1. I write to you on behalf of the Board of Control of Passenger Rail Agency of South Africa (PRASA) to request the National Assembly to institute an inquiry into the operations, governance, and intergovernmental relations of PRASA.
2. As you may be aware the full extent of the failure of governance was revealed in the Public Protector's report titled "Derailed (August 2015). Subsequently, the Auditor General's report on PRASA for the 2014/2015 financial year indicated that about R550 million was irregular expenditure. As required under the PFMA, the investigations mandated by the board showed that the true extent of fruitless, wasteful and irregular expenditure was approximately R14.7bn.
3. In addition to the identified failures in governance and the resultant prejudice to the fiscus, PRASA operations were in a state of disrepair and continued to decline during our tenure.
4. The Board has made strenuous effort to arrest the decline in PRASA operations, strengthen controls within the organization and to investigate financial misconduct as required under the PFMA. On various occasions, the Board has apprised the National Assembly, through the relevant committees, of these efforts. We have also apprised the Minister, the Chairman of SCOPA and the Chairperson of the PCOT of progress on these efforts.
5. For the sake of brevity, I will only highlight the following:
 - a. The Board instituted a recruitment process for a new Chief Executive Officer for PRASA which was concluded during February 2016. We submitted the preferred candidates for ratification by the Minister of Transport during March 2016. To date, there has been no progress the Board has not received a response from the Minister.

- b. PRASA has instituted civil proceedings in contracts involving over R7bn to review and set them aside. Further, we have instituted proceedings to recoup monies lost to PRASA and disciplinary steps against employees involved. These matters are now before the courts or relevant forums.
 - c. We laid criminal complaints with the DPCI as required under Prevention of Corrupt Activities Act (PRECAA) and hired forensic auditors to assist the DPCI in analysing the illicit cash flow. To the board's dismay, the law enforcement authorities have not acted with the requisite or due diligence on any of the complaints. For ease of reference, I have attached to this correspondence several letters I have addressed to the head of the DPCI and the NPA. Please note that, when sending these letters, I copied them to the chairman of SCOPA. A comprehensive table of all cases with the DPCI was provided to the SCOPA.
 - d. In the most recent instance, the Minister seconded to PRASA the CFO in her department, Mr Collins Letsoale, to act as the Group CEO while a permanent replacement is being sought. Among the Minister's and the Board's expectations were that Mr Letsoale would stabilise PRASA operations and draft a turnaround plan. Mr Letsoale awarded himself a 350% salary.
6. Operationally, the investigations assisted PRASA to identify those contracts that were awarded to people who had neither the capacity nor the ability to carry out the contracts that were awarded to them. These contractors are the reasons for the constant failures in operations.
 7. It is very easy for any person who is oblivious to the amount of rot, corruption and incompetence that we discovered in the wake of the departure of the former Group CEO to assume that all the challenges of PRASA were caused by the Board. We have frankly and honestly shared our frustrations and challenges with the PCOT. As stated above, it is through our investigations that we have uncovered almost R14 billion in irregular expenditure, this is almost 90% of PRASA's annual expenditure. It is almost impossible to assure quality services where almost all the expenditure is irregular.
 8. The Board has implored management to proceed with the quality assurance of the draft turnaround strategy and process it as per the discussions of November 2016. We believe that once this has been adopted, PRASA will be in a position to show the positive and quality fruits of the money that is spent by the fiscus to support the work of this important cog in our economy.
 9. We implore you to ensure that the PCOT avoids sensational, narrow, side shows of individuals and focus on constructively interrogating the presentation

on Metrorail Operations as per the invitation. We value any constructive engagement that is meant to improve the experience of millions of commuters that PRASA is mandated to move every day. We had expected that the PCOT will focus on this and not on a matter that concerns a tri-partite agreement that has lapsed.

Yours truly,

Dr Popo Molefe

Chairman: PRASA Board of Control"

1798. On the same day Mr Molefe also wrote to Ms Magadzi in her capacity of Chairperson of the Portfolio Committee on Transport, expressing concern about the humiliating treatment meted out to Board members by her Committee. That letter, too, is very important. It records some of the complaints that the Board had against the Portfolio Committee on Transport. It reads:

"Dear Chairperson

BRIEFING BY THE PASSENGER RAIL AGENCY OF SOUTH AFRICA ON SERVICE DELIVERY AT METRORAIL

1. As you are aware, I sent my apology to the Portfolio Committee on Transport ("the PCOT") indicating that I was not in a position to travel to Cape Town. I however followed the proceedings of the PCOT. I was shocked to learn that the entire first day of the PCOT's proceedings was about a matter that the Board of Control ("the BoC") of PRASA was not asked to bring to the attention of the PCOT. We were invited to appear before the PCOT under the guise that we were going to discuss Metrorail Operations. We prepared a presentation for the PCOT on this basis and spent money ensuring the presence of PRASA officials critical to operations to appear before the PCOT.
2. The leadership of PRASA is aggrieved that the BoC and key officials of PRASA were brought into the august chambers of Parliament to discuss a matter that should not occupy the time and attention of the PCOT, and were subjected to a barrage of false accusations, grossly unfair innuendo and assassinations of character under your watch. I request the Chairperson of the PCOT to urge members to desist from abusing their Parliamentary privileges and immunity by

assailing the characters of the leadership of PRASA by unfounded and spurious accusations without producing any evidence.

3. As the Accounting Authority of PRASA, the Board appreciates that Parliament in general and your committee in particular, is one of the most important stakeholders that PRASA has to account to. However, in the interest of proper accounting and mutual respect, the Board cannot be ambushed with that topic that does not add value to the work of PRASA and be subjected to a situation where that topic is treated in a way that is grossly unfair and is a distraction from the work of your Committee.

The matter of Mr Letsoale is a very simple one and has been dealt with and finalised by the Board and the minister. In accordance with good governance, the Minister has received a comprehensive report on the 3rd of March 2017. On 1 March 2017, the Minister terminated the secondment of Mr Letsoale.

4. You and your Committee accused the Board of being involved in “dispute after dispute”. The Board has been engaged in a difficult process of restoring order, good corporate governance and enforcing controls in an institution where these have been deliberately and systematically destroyed over several years. In this regard, we urge you to familiarise yourself with:
 - a. the Auditor-General's report of 2014 /15 financial year which identified irregular expenditure to the tune of R550 million. According to the PFMA, the Board is obliged to investigate the instances of irregular expenditure; and
 - b. the Public Protector's Report entitled Derailed which found wide spread maladministration and breakdown of processes and systems and recommend that the Board of National Treasury investigate every contract above R10 million and concluded between 2012 and 2015.
 - c. the Auditor-General's report of 2015/16 financial year which identified irregular expenditure to the tune of R14 billion. This irregular expenditure was uncovered by the investigations that were conducted under the purview of the Board of PRASA.
5. The above investigations have revealed more irregularities and corruption and obliged the Board to take the following steps:
 - a. Provided about 69 reports in terms of section 34 of the Prevention and Combatting of Corrupt Activities Act;
 - b. Assisted the Hawks in their investigation of the alleged corruption and money laundering in the Swifambo and Siyangena contracts

- c. Launched Review Applications in respect of the Siyangena and Swifambo Contracts.
6. Operationally, the investigations assisted PRASA to identify those contracts that were awarded to people who had neither the capacity nor the ability to carry out the contracts that were awarded to them. These contractors are the reasons for the constant failures in operations.
 7. It is very easy for any person who is oblivious to the amount of rot, corruption and incompetence that we discovered in the wake of the departure of the former Group CEO to assume that all the challenges of PRASA were caused by the Board. We have frankly and honestly shared our frustrations and challenges with the PCOT. As stated above, it is through our investigation that we have uncovered almost R14 billion in irregular expenditure, this is almost 90% of PRASA's annual expenditure. It is almost impossible to assure quality services where almost all the expenditure is irregular.
 8. The Board has implored management to proceed with the quality assurance of the draft turn-around strategy and process it as per the discussions of November 2016. We believe that once this has been adopted, PRASA will be in a position to show the positive and quality fruits of the money that is spent by the fiscus to support the work of important cog in our economy.
 9. We implore you to ensure that the PCOT avoids sensational, narrow, side shows of individuals and focus on constructively interrogating the presentation on Metrorail Operations as per the invitation. We value any constructive engagement that is meant to improve the experience of millions of commuters that PRASA is mandated to move every day. We had expected that the PCOT will focus on this and not on a matter that concerns a tri-partite agreement that has lapsed.

Yours truly

Dr Popo Molefe

Chairman: PRASA Board of Control".

1799. Both these letters, he said, went unanswered.

1800. Mr Molefe said that, instead, in what appears to have been an indication of contempt for the Board and the entities that were required to hold the Minister to account, on the same day that he had written to the Speaker and the Chairperson of the Portfolio

Committee, namely 8 March 2017, a letter was read during the Portfolio Committee's meeting that Minister Peters had dismissed the Molefe Board. No reasons were given. Shortly thereafter, Minister Peters appointed an Interim Board. However, the dismissed Board Directors approached the High Court to have reviewed and set aside their dismissals. Minister Peters opposed the application. She lost with costs and the Molefe Board was reinstated.

1801. A few weeks after she had dismissed the Board, Minister Peters herself was relieved of her Cabinet position.

1802. As regards the decision of the High Court to set aside her dismissal of Board members, in her affidavit¹²⁸⁵ and evidence, former Minister Peters said that she was mindful of lodging an appeal against the High Court's decision setting aside her dismissal of the members of the Molefe Board, as it was based on a procedural point, namely that she had not given the Board members a hearing before dismissing them.

1803. Minister Peters was replaced by Minister Mkhacani Joseph Maswanganyi as Minister of Transport. Mr Molefe said Minister Maswanganyi, who had been a member of the Portfolio Committee on Transport, avoided meeting with the Board, despite several requests. It appeared to Mr Molefe that from the outset that Minister Maswanganyi's agenda was to dissolve the Board.

1804. In letters dated 5 June 2017 Minister Maswanganyi asked Board members to show cause why they should not be dismissed. Again the "irregular" appointment of Werkmans was raised as a significant reason for the decision. In their response to the Minister, the Board members disputed that there was a basis for them to be removed from their position as Board members. Minister Maswanganyi did not follow through on

¹²⁸⁵ This is the former Minister's affidavit dated 16 October 2020

his threat to dismiss the Board. Mr Molefe said that it appeared that there were moves to achieve the same result through a different route: to weaken the Board by ensuring that it did not have a quorum. In this regard, some Board members were encouraged to resign. While some did, others did not. However, those who resigned were not replaced. In addition, the nominee of the Department of Transport stopped attending Board meetings. These developments left the Board ineffective, as a quorum could not be formed for valid meetings to be held.

1805. Mr Maswanganyi responded to Mr Molefe's evidence against him by way of a declaration. What he said in his declaration may be summarised as follows: prior to his appointment as Minister of Transport, he had been a member of the Portfolio Committee on Transport; that Committee had discussed the PRASA Board's "poor performance and financial management"; he "strongly" denied that he had refused to meet with the Board; in any case, it was not "compulsory" for the Minister to meet with the Board; he accepted that on 5 June 2017 he had asked each of the remaining Board members to make representations as to why he should not terminate their appointment. He also set out the following as his reasons for wishing to dissolve the Board: their alleged poor performance and financial management; and their appointment of Werksmans without following PRASA's supply chain management policy, without a Board resolution and without a contract and/or mandate. In addition, he said: "[It was] a Parliamentary decision to dissolve...the Board...and a Minister cannot go against a decision made by the Parliament of South Africa."¹²⁸⁵

1806. In the light of the foregoing, Mr Molefe was of the view that as he and his Board got their claws sunk deeper into the roots of corruption at PRASA, the Board could not rely on the Parliament's Portfolio Committee on Transport for support. He alleged that the

¹²⁸⁵ As is pointed out later, the power to dismiss the Board lies with the Minister, not with Parliament.

Committee did not take its responsibility of oversight in respect public assets seriously. It appeared to him that they would rather turn a blind eye to the malfeasance and protect the culprits, than work zealously in defence of the public purse. He could not comprehend why public representatives would give scant or no attention to the matters that affected the interests of the public which they purported to represent.

Other entities also did not act

1807. On 13 May 2016, pursuant to the investigations by Werksmans, Mr Molefe wrote to General Berning Ntlemeza, the Head of the Directorate of Priority Crime Investigation (DPCI, which is known colloquially as "the Hawks"), and to Advocate Shawn Abrahams, the National Director of Public Prosecutions (NDPP) at the time. In the letters, he set out the grave revelations that had been uncovered by investigations that had already been undertaken and the cases that had been reported to the Central Reporting Office in terms of the Prevention and Combating of Corrupt Activities Act (PRECCA) for further investigation. The letter to General Ntlemeza noted that several cases concerning PRASA had been registered with the police, but seemingly no progress had been made. Mr Molefe asked the DPCI to allocate dedicated resources to process the cases, especially those registered as serious offences. Mr Molefe said that the DPCI refused to discharge its statutory mandate.

1808. Ultimately, on 29 May 2017, the Board applied to the High Court for an order compelling the DPCI to act on the criminal complaints lodged with the DPCI. The DPCI opposed the application but instead of dealing with the merits of the Board's application, it raised two technical objections. The DPCI disputed Mr Molefe's authority and the authority of PRASA's Board to launch the application and required further affidavits to be filed. In the meantime, the Organisation Undoing Tax Abuse (OUTA) intervened. The Court,

however, dismissed those technical objections and marked its disapproval of the approach adopted by the DPCI by awarding costs on an attorney and client scale.

1809. Thereafter, the DPCI filed its answering affidavit in respect of the substantive issues raised by the Board in its founding affidavit. PRASA filed its replying affidavit. The matter has however not been taken further. That even at the time of the preparation of this Report the matter has not been pursued since the end of the term of office of the Molefe Board and that the DPCI has not completed its investigation reveals quite clearly that the Boards that came after the Molefe Board may have lacked the commitment that the Molefe Board had to hold the DPCI accountable and to force them to do their job. I suspect that even the costs that were awarded by the Court against the DPCI's have not been recovered. The Boards that came after the Molefe Board seem to have done nothing to put any pressure on the DPCI to expedite its investigations. I also would not be surprised if the Boards of PRASA that came after the Molefe Board as well as the management have never over all these years done anything to recover from the DPCI the legal costs that the Court granted PRASA.

1810. In response to a request from the Commission to deal with the allegations by among others Mr Molefe relating to the failure of the DPCI to act, Lieutenant General Seswantsho Godfrey Lebeya, who was appointed as National Head of the DPCI on 1 June 2018, submitted an affidavit dated 23 August 2021. His response may be summarised as set out hereunder.

1811. The DPCI was investigating 20 cases relating to PRASA; the first docket, which was opened in July 2015 on the basis of a complaint by Mr Mamabolo, an assistant manager (special operations) at PRASA, related to the award of the locomotives contract to Swifambo; the next docket, which concerned the extension of the scope of work in respect of contracts awarded to Siyangena was opened in September 2015 following a

complaint by Mr Paul O'Sullivan, though Mr Mamabolo, representing PRASA, also submitted a statement; thereafter, following the Public Protector's "Derailed" Report, 18 further cases were opened – on 16 August 2019.

1812. Lt General Lebeya said that there were four main reasons for the delay in finalising the Swifambo and Siyangena investigations. These are considered separately hereunder:

1812.1. First, he said he was told the following: details regarding the Swifambo complaints were not provided by the complainant or other PRASA employees when these were requested; several meetings were held with among others two senior members of PRASA's legal section (Ms Ngoye and Mr Dingiswayo) but the further statements and documents that were requested from PRASA were not forthcoming; and although PRASA had approached the High Court to get the DPCI to "do its work" the DPCI's requests were not complied with.

1812.2. Second, he had been told that certain documents relating to contracts and the bases on which they were awarded were not made available by PRASA. He referred to letters that had been written to senior PRASA employees and in one case a subpoena being served. However, he then went on to point out that from the time of his appointment on 1 June 2018, he had met with the previous Board, the Administrator and the current Board on nine occasions, with the last being a virtual meeting on 7 April 2021.

1812.3. Third, there was a lack of cooperation from PRASA employees, especially Ms Ngoye and Mr Dingiswayo, who insisted on being part of every interview with PRASA employees. However, the investigators wished to interview Mr Mamabolo on his own in terms of an investigation plan compiled by the investigators and the prosecutor guiding the case.

1813. After tracing the various steps taken by the parties in PRASA's application against the DPCI, Lt General Lebeya confirmed that the matter had not been concluded at the time he deposed to his affidavit.

1814. As regards the status of the investigations at the time he deposed to his affidavit, Lt General Lebeya, provided the following summary: the Swifambo case (in respect of which 383 statements had been taken) was still under investigation, though the investigation was "90% complete"; the Siyangena investigation (with 185 statements taken) was 75% complete; of the remaining 18 cases, four [investigations] had been finalised, while the other 14 are still under investigation.

1815. He then said: "[T]he unsound relationship between the DPCI and PRASA between 2015 and 2018 contributed to the delay in completing the investigations."

1816. The allegations that PRASA's legal section did not co-operate with the DPCI was denied by Ms Ngoye and Mr Dingiswayo. Given that what Lt General Lebeya said in his affidavit is for the most part hearsay, there is no reason to reject their denials. The dilatoriness of the DPCI is a matter that is dealt with again later in this Report. The DPCI has scored an own goal in the way it has failed to act diligently to investigate the criminal complaints laid many years ago by PRASA. It has managed whatever may have been left of its reputation. It is difficult to resist the temptation to think that one possible reason why it has dragged its feet the way it has in investigating the criminal complaints by PRASA many years ago may be connected with the risk or fear that any proper investigation may well lead to the ANC or to certain figures within the ANC.

1817. Apart from the fact that this investigation has dragged on for so many years, DPCI has behaved very strangely in regard to investigating the PRASA complaints. First an SOE had to resort to Court to try and force the DPCI to do its job in this regard. Instead of feeling ashamed of this and undertaking to do its job, DPCI decided to oppose PRASA's

application, not on the merits but on the baseless technical points which led to the Court not only dismissing their technical points but also awarding a punitive costs order against the DPCI to show its disapproval of the DPCI's conduct. One would have thought that once they had suffered this defeat, DPCI would focus on doing its work and focusing on conducting the investigation. Not DPCI. It proceeded to deliver opposing papers in Court.

THE SWIFAMBO AWARD

General Introduction to the award in the locomotives tender

1818. On 23 March 2013, PRASA and Swifambo Rail Leasing (Pty) Ltd concluded a contract in terms of which PRASA would purchase 70 locomotives from Swifambo for R3,5 billion.¹²⁸⁷ The conclusion of the contract was preceded by a procurement process that culminated in the appointment of Swifambo by PRASA's Board on 24 July 2012 to provide the locomotives.

1819. On 27 November 2015, some 16 months after the Molefe Board had taken office, PRASA approached the High Court's Gauteng Local Division, Johannesburg, to have its contract with Swifambo and other decisions made in respect of the locomotives tender reviewed and set aside. PRASA alleged that the procurement process in terms of which Swifambo had been appointed the preferred bidder was highly irregular and possibly corrupt. On 3 July 2017, the High Court concluded that the procurement process was deeply flawed and corruption was involved. Similar findings were made by

¹²⁸⁷ Swifambo's holding company was Railpro Holdings (Pty) Ltd (Railpro Holdings). However, in some of the documents, the holding company is referred to as "Swifambo Holdings (Pty) Ltd" ("Swifambo Holdings"). Nevertheless, a consideration of all relevant documents confirms that "Railpro Holdings" and "Swifambo Holdings" is one and the same entity. So as to facilitate referencing, in the remainder of this Report the following approach will be used: where a document being considered refers to the holding company as "Railpro Holdings" that is how it will be described and where the document being considered refers to the holding company as "Swifambo Holdings" that is how it will be described.

the Supreme Court of Appeal when it dismissed Swifambo's appeal on 30 November 2019. The Constitutional Court refused to grant Swifambo leave to appeal. The bases on which the High Court and Supreme Court of Appeal arrived at this conclusion are more conveniently dealt with in this Report after I set out the information presented to the Court in PRASA's review papers.

1820. On 18 December 2018, Swifambo Leasing was liquidated by way of a special resolution. On the same day, its "holding company", Railpro Holdings (Pty) Ltd¹²⁸⁸ (Railpro Holdings) was also liquidated by way of a special resolution.

1821. The evidence of irregularity and impropriety in the founding affidavit of the Swifambo review application, together with the documents annexed thereto, make for quite disturbing reading. They suggest that the procurement process followed, virtually from start to finish, was designed to achieve a pre-determined outcome, namely to award the tender to a company which had little or no experience in the rail industry and was for all practical purposes a front for a foreign company. Moreover, whilst the Request for Proposals in essence envisaged PRASA leasing the locomotives from the winning tenderer, a decision was made at a very late stage in the procurement process for the locomotives to be purchased – at a cost of R3,5 billion. A proper consideration of the PRASA affidavits and the documents annexed to those affidavits suggests that the process was so flawed that it must have been clear to any reasonable person acting with the requisite diligence and integrity that something was seriously amiss. In the light of the foregoing, it will be instructive to consider in some detail how it came about that Swifambo was awarded the locomotives tender. Those considerations will constitute a fair amount of this part of this Report.

¹²⁸⁸ As just noted, Railpro Holdings is referred to in some of the documents as "Swifambo Holdings". However, they are one and the same entity.

1822. In addition to setting out what was said in the review papers and matters arising therefrom, two further issues will also be considered. The one is the outcome of a forensic investigation. The other is the Report of the Liquidators, which identified individuals to whom and entities to which payments were made from the R2,65 billion that PRASA had already paid to Swifambo, despite the fact that only 20 locomotives (out of 70) have been delivered and which in any case are said to be "not fit for purpose".

1823. The forensic investigation was requested by the DPCI, which was furnished with a draft report 19 April 2017. The report suggests that some of the persons identified therein may have unduly received large sums of money from the R2,65 billion that PRASA had already paid to Swifambo. However, as has already been noted above, until recently the DPCI did not take the matter further. In addition, it must be remembered how harshly the Portfolio Committee on Transport treated the Board as they questioned it about Mr Molefe's affidavit that revealed what Mr Mashaba had said about R79 million and the ANC.

1824. In the last part of this section of the Report, more recent evidence of other possible irregularities relating to the locomotives tender will be considered. The evidence includes evidence about those allegations are the following: an allegation that the minutes of a meeting of one of the Committees that recommended the appointment of Swifambo as the preferred bidder were inaccurate, if not forged; a denial of that evidence; with reliance on documents that were submitted to the Commission at a late stage; and a Committee re-visited its decision after being urged to do so by a senior person at PRASA.

1825. The matters that emerge from the foregoing issues make for quite depressing reading. Having regard to the information that was available to them, as is detailed later in this Report, Parliament's Portfolio Committee on Transport ought to have conducted its own

investigation or inquiry into the award of the tender to Swifambo as well as into why the DPCI was either not pursuing the investigation of the criminal complaints lodged by PRASA or why the DPCI was taking as long as it was in conducting the required investigation in regard to the criminal complaints lodged with them by PRASA. It did not do so. Had it done so, it is safe to conclude that they would also have uncovered at least some of further matters that emerged when evidence on PRASA was heard by the Commission and possibly even the further matters that have come to light only recently.

1826. Unfortunately, due to fact that these later matters had not been uncovered until the Commission's investigations, in order to place in proper perspective, the blameworthiness of the Portfolio Committee and the DPCI in respect of their inaction on the locomotives contract, it will be instructive to consider the revelations as they emerged chronologically. In the circumstances, the order in which the broad issues relating to the award of the locomotives contract to Swifambo will be addressed is as follows: the relevant facts that emerge from the evidence made in the papers in PRASA's review application; the findings of the High Court and the SCA; the forensic report; the liquidators report; evidence led at the Commission alleging that not all the documents that were said to have been generated "during the procurement process" are genuine; and documents recently forwarded to the Commission by the Chairperson of PRASA's present Board that challenge the correctness and perhaps even the truthfulness of at least some of that evidence.

1827. In order to consider systematically the contents of PRASA's review papers, it will be helpful to consider them under the following headings: the events preceding the procurement process; the procurement process itself; details of the alleged irregularities; and the main grounds on which PRASA sought to have the contract

reviewed and set aside. Thereafter, the main findings or conclusions of the High Court and the Supreme Court of Appeal will be briefly set out.

Brief overview of events preceding the procurement process

1828. In order to properly appreciate the irregularities and why they are significant it will be instructive to begin by setting out certain events that occurred and decisions that were taken even before the procurement process in respect of the locomotives tender was initiated. As will emerge later in this section, some of the entities which and individuals who featured in the Swifambo procurement process also featured in those prior events and decisions. In summary, the significant prior events and decisions were the following.

- 1828.1. **First**, in July 2009 PRASA published a request for expressions of interest in the supply of locomotives for the haulage of passenger trains on various national routes as it had a shortfall of locomotives and wanted to lease locomotives.
- 1828.2. **Second**, in May 2011, a Spanish company, Vossloh Espana SAU (Vossloh) inspected PRASA's fleet of locomotives and made recommendations on what PRASA needed in the short, medium and long terms.
- 1828.3. **Third**, in a development that appears to be unrelated to locomotives, but concerns an entity with the name Vossloh, PRASA's then Executive Manager: Engineering Services, Mr Daniel Mtimkulu, recommended that PRASA acquire air-conditioning systems from Vossloh Kiepe Ges.mbh.H (a subsidiary of Vossloh incorporated in Germany). Mr Mtimkulu also authorised the payment that was made in terms of the contract of €3 631 090 [being about R24,6 million at the time].

1828.4. **Fourth**, in July 2011, Mr Mthimkulu sent a memorandum to Mr Montana about PRASA's needs. He indicated that PRASA's fleet was outdated and that this impacted on the reliability of the services that PRASA was supposed to provide. He estimated that it would cost R5 billion over a period of six years and recommended that Mr Montana and the Board approve the sourcing of 100 locomotives.

1829. It is considered that the foregoing matters form part of and are an integral backdrop to the procurement process that PRASA then followed in respect of the acquisition of the locomotives.

The procurement process

1830. The milestones that led to a contract being concluded for the purchase of 70 locomotives by PRASA from Swifambo are detailed in PRASA's founding papers in its review application. It perhaps should be noted that in the founding affidavit Mr Molefe stated several times that documents could not be found and that there was a general lack of co-operation from some employees. Moreover, most of the minutes that were attached to the founding affidavit were unsigned.

1831. In the High Court application, Mr Molefe deposed to the founding affidavit and the replying affidavit. Mr Philemon Makgatlela Mamabolo deposed to two affidavits. Mr Massero¹²⁸⁹ deposed to Swifambo's answering affidavit, and Mr Mashaba deposed to a supplementary affidavit in response to Mr Molefe's replying affidavit.

1832. The principal case made in PRASA's founding papers may be summarised as follows.

¹²⁸⁹ According to CIPC records, Mr Massero was appointed as a director of Swifambo on 31 May 2016, six days before he deposed to Swifambo's answering affidavit.

- 1832.1. **First**, PRASA published the RFP [under tender number HO/SCM/223/11/2011] on 27 and 28 November 2011 and issued the RFP on 2 December 2011. As regards Swifambo, documents annexed to the papers indicated that the tender document was collected by someone from the “S Group” and that S Group Holdings paid for the tender documents using the reference “Swifambo”. On 9 December 2011, PRASA held a compulsory briefing session for potential bidders. Swifambo was not one of the companies in attendance, but its holding company Swifambo Holdings [or as noted above, Railpro Holdings] was present. Some two months thereafter, on 7 February 2012, Swifambo Holdings acquired a company known as Mafori Finance Vryheid (Pty) Ltd. [Its name was later changed to Swifambo Rail Leasing (Pty) Ltd, which as noted above is referred to as Swifambo in this Report.]
- 1832.2. **Second**, six bidders responded by the closing date: Mafori Financing t/a Swifambo Rail Leasing (Pty) Ltd; Havdap Investment Solution (Pty) Ltd; Thelo Rolling Stock Leasing (Pty) Ltd; CRM Consortium; RRL Grindod; and GE South Africa. Swifambo submitted its bid, with Vossloh Espana SAU (Vossloh) as its supply partner, on 27 February 2012.
- 1832.3. **Third**, while there ought to have been a record of what steps had been taken and by whom prior to the bids serving before the committees that were tasked with evaluating and adjudicating the bids, the founding papers revealed that there was no documentary evidence identifying the persons who were initially responsible for the compliance assessment of the bid proposals.
- 1832.4. **Fourth**, according to unsigned minutes of PRASA’s Bid Evaluation Committee (BEC) that were annexed to the founding affidavit, the BEC met on 27 March 2012. In a report that was compiled later, the BEC recorded that only Swifambo

achieved the threshold compliance of 70% and it recommended that Swifambo be appointed as a preferred bidder.

1832.5. **Fifth**, thereafter according to the unsigned minutes of PRASA's Corporate Tender and Procurement Committee (CTPC) that were annexed to the founding affidavit, the CTPC met on 11 July 2012. Those minutes record that the CTPC agreed with the recommendation [presumably by the BEC] that Swifambo be appointed as the successful bidder.

1832.6. **Sixth**, according to an unsigned report purportedly compiled by the "Bid Adjudication Committee" (BAC), "the BAC" met on 12 July 2012.¹²⁹⁰ The "BAC report" records the following: the BAC adjudicated the tender and approved the BEC's recommendations; however, it went on to recommend that Swifambo's appointment as a preferred bidder "be based on outright purchase option".

1832.7. **Seventh**, the "BAC Report" appears to have been forwarded to Mr Montana in his capacity of Group CEO. The GCEO's report, which was unsigned, was also annexed to the founding affidavit. It simply repeats the recommendation set out in the BAC Report.

1832.8. **Eighth**, the Board's Finance Capital Investment and Procurement Committee (FCIP) met on 19 July 2012. It recommended to the Board that Swifambo be appointed as the preferred bidder for the provision of 67 dual electric diesel

¹²⁹⁰ It is necessary at this stage to point out the following. What is reflected in these paragraphs is what was alleged in the Swifambo review papers and the annexures thereto. However, as is detailed later in this Report, two witnesses, who were members of the CTPC in 2012, told the Commission that in 2012 the position was as follows. The committee that "adjudicated" upon the "evaluation" conducted by the BEC was known as the CTPC, whose recommendations would then be forwarded to the Group CEO. The two witnesses were emphatic that in 2012 there was no committee at PRASA called the BAC. The CTPC, they said in evidence, became known as "the BAC" only after 2012. The effect of their evidence was this: there could not have been minutes of "the BAC", as there was no BAC in 2012; and in any case there could not have been minutes or reports of the CTPC and the BAC, as these were in substance one and the same committee. These matters are dealt with more fully later in this Report.

locomotives (hybrids) and that a separate procurement process be entered into for the remainder of the required 25 diesel locomotives.

1832.9. **Ninth**, according to the minutes of the PRASA Board's meeting of 24 July 2012, the Board approved Swifambo as the preferred bidder for the procurement of dual diesel electric locomotives.

1832.10. **Tenth**, on 27 July 2012, PRASA notified Swifambo of its appointment for the provision of the "diesel-electric (hybrid) locomotives".

1832.11. **Eleventh**, on 25 March 2013, PRASA and Swifambo concluded the main contract. The contract was signed by Mr Montana on behalf of PRASA, and Mr Mashaba, on behalf of Swifambo. It was for the purchase of 20 Euro 4000 locomotives and 50 Euro Dual locomotives, with a contract value of R35 billion (including VAT).

1832.12. **Twelfth**, on 11 April 2014 Mr Montana approved a recommendation by Mr Mthimkulu that the "rudimentary" systems that came with locomotives needed to be upgraded, at a cost of some R335 million. This, however, met with resistance from PRASA's [internal] legal unit and it was not approved by the Board.

The alleged irregularities

1833. In the founding papers, Mr Molefe stated that a range of irregularities had been committed during the procurement process. In a number of instances, he also refers to irregularities that appear on the face of some of the documents that were annexed to the founding affidavit. The irregularities are patent on the face of the documents. However, it is not necessary to deal with all of them. Instead, those that appear

significant for the purposes of this Report are set out hereunder. The irregularities related to the following: the designing of the specifications; the non-compliance of Swifambo's bid with certain requirements set out in the RFP; and flaws in the consideration of the bids by the different committees and officials. Each of these is considered in turn.

The designing of the specifications

1834. PRASA's Procurement Policy required the following in respect of specifications: specifications were to be designed or drawn up by a Cross Functional Sourcing Committee (CFSC)¹²⁹¹, which would consist of at least three members; specifications ought to promote the broadest possible competition; and they should be based on relevant characteristics or performance requirements and avoid brand names or similar classifications.

1835. In the founding affidavit it was stated that those requirements were not met in respect of the specifications for the locomotives in question. In substantiation of this, the following were highlighted:

1835.1. First, the specifications for the locomotives were not designed by a committee: they were authored by a single individual, Mr Mtimkulu. It is perhaps relevant to reiterate at this point that it was Mr Mtimkulu who in July 2011 had told Mr Montana that PRASA's fleet of locomotives was outdated and had recommended the sourcing of 100 locomotives.

¹²⁹¹ Clause 9.9 of the Procurement Policy applicable at the time stated that CFSCs were appointed by the CPO [Chief Procurement Officer] in consultation with end-user managers, and consisted of at least three members, at least one of whom should be an SCM practitioner and the other specialists from end-user departments.

1835.2. Second, the specifications appeared to have required features of the locomotives that Swifambo would offer when it later submitted its bid, namely the EURO 3000 diesel-electric locomotive.

1836. In this regard, among the matters that the founding papers raised were that the specifications included items that were irrelevant. As an illustration, it was pointed out that in relation to locomotive engines, the power output of the engine is the relevant consideration. Neither the manner in which the output is achieved, nor the identity of the manufacturer is relevant. However, these considerations were ignored in at least the following respect: the specifications stipulated that the manufacturer of the engine had to be EMD, which is the brand for which Vossloh had expressed a preference after its May 2011 inspection. Among other irrelevant requirements that were set out in the specifications were the following, which were either a precise match for or a nearly exact match for Vossloh's locomotives: the number of cylinders (V12); the bore and stroke (230, 19mm x 279,4 mm); the engine speed (904 rpm); and a multi-traction control with 27 pins.

1837. In addition, the following further requirements contained in the specifications were an exact match or a nearly exact match for Vossloh's locomotives: a track gauge of 1065 mm (Vossloh's was 1067 mm); locomotive weight of 88 tons; and a traction effort of 305KN. Moreover, the following further features, which Vossloh's locomotives had, were also specified: two cabs, which were not required, but had added cost implications as all the driver controls and displays had to be duplicated; a monocoque structure, which is more difficult to service as access to components for maintenance is made more difficult; and the UIC standard, which applied in Europe, while in South Africa, the Association of American Railroads standards are applied.

1838. Mr Molefe said in the founding papers: the inclusion of the identity of a manufacturer and of irrelevant considerations and of some requirements that would not be advantageous and tailoring some requirements to the Vossloh locomotive had the effect that Swifambo's bid enjoyed a decisive advantage when the different bids were evaluated. He stated that the requirements were included in order to ensure that Swifambo was awarded more points in the technical evaluation phase, and, as noted above, it was the only bidder that met the 70% threshold when the bids were evaluated by the BEC.

RFP requirements and Swifambo's non-compliance

1839. The RFP stipulated a number of requirements of matters with which bids were required to comply. It said that failure to do so would lead to disqualification of the bid. The founding papers identified some of those requirements and stated that Swifambo's bid did not meet them. In this regard, they pointed out the following:

1839.1. **First**, the RFP expressly stated: bids would be checked for completeness, whether all the required documents and certificates had been provided and for compliance with other formalities; incomplete and non-compliant bids would be disqualified; bids would also be checked for compliance with the essential RFP requirements and non-compliant bids would be disqualified; and the technical ability of bidders to deliver the locomotives in accordance with the prescribed specifications was a threshold criterion, with bidders being required to achieve a minimum of 70% in order to qualify for further evaluation.

1839.2. **Second**, in terms of the RFP or PRASA's Tender Conditions, each bid had to meet at least the following requirements: demonstrate previous experience in the supply and leasing of locomotives and the bidder's capacity to handle a project of this magnitude; submit letters of references from at least three

previous clients for whom they had done similar work; and to provide, within 10 days of appointment, an unconditional performance bond of 10% of the value of the project price offered by the preferred bidder.

1839.3. **Third**, the purpose of the RFP was to enable PRASA to select a final bidder who was technically and financially qualified and had sufficient experience in similar projects.

1840. The founding papers then went on to state that Swifambo's bid did not comply with some of the requirements set out in the RFP. Among the material respects in which Swifambo's bid did not comply with the requirements were the following:¹²⁹² bidders were required to supply tax clearance certificates but the certificate that Swifambo submitted did not have a VAT number, and no tax clearance certificate had been submitted in respect of Vossloh, which according to the bid, was a sub-contractor; the bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain; even though the RFP required that the final bidder be technically and financially qualified to provide the locomotives that PRASA required, Swifambo's bid did not contain evidence to support Swifambo's claim that it and its shareholders had previous experience in the rail industry: its bid did not demonstrate that it had experience in the supply of locomotives or the capacity to manage a tender of the size in question; whilst it furnished reference letters, they all related to Vossloh, not Swifambo, as was required by the RFP; in addition, Swifambo had indicated in its bid that it would rely entirely on Vossloh to fulfil its obligation, but Vossloh was not a co-bidder and at the time of the bid had no contractual relationship with Swifambo.

¹²⁹² The founding papers itemise a number of other respects in which the requirements of the RFP had not been met. However, the factors mentioned in this Report are set out as the SCA in its judgment in the appeal found they had been established and were material. In fact, the SCA pointed out, at paragraph [14] of its judgment, that Swifambo did not in its papers deny the irregularities in the bidding process.

Flaws in the considerations of the bids

1841. The bids were considered by different committees before the Board made its decision. However, as has already been noted above, there was no documentary evidence indicating the identity of the individuals who had considered whether the bids formally met the requirements of the RFP. Be that as it may, the founding papers set out and examined the regularity and propriety of the processes that were followed and the decisions that were taken by the different committees and individuals who considered the bids. They raised the following matters of concern:

1841.1. **First**, it would appear that two documents were produced by the BEC: a set of minutes and a report.

1841.2. The minutes, which are neither signed nor dated, record that the BEC met on 27 March 2012. They also note the following: the RFP had requested bidders to submit proposals for two options: a five-year renewable lease with full maintenance programme; and a 10-year lease¹²⁹³ with a full transfer of ownership thereafter. In addition, the minutes note that those responsible for checking compliance with the supply chain management policy by the bid had not satisfactorily checked compliance. According to the minutes, the following persons were present: Ms Ntombeziningi Shezi, Mr Benedict Khumalo, Mr Thabo Mahlobogwane, Mr Jabulani Nkosi, Mr Peter Stow and Mr Joseph Magoro; and Ms Jerita Motshologane was absent and had tendered an apology.

1841.3. However, the founding affidavit records that Mr Molefe was told the following by a member of the BEC (whose confirmatory affidavit was annexed): some

¹²⁹³ However, the second option set out in the RFP was for a 15-year lease, not a 10-year lease.

BEC members had raised concerns about the compliance of Swifambo's bid but the chairperson, Ms Ntombeziningi Shezi, had told them that the Chief Procurement Officer, Mr Chris Mbatha, had instructed that the BEC should not concern itself with compliance issues, as SCM had performed the compliance check; and the BEC had been constituted merely to perform a technical evaluation of the bids. In an affidavit submitted by Mr Mbatha, he denied that he had given such an instruction to Ms Shezi.

1841.4. The BEC Report was signed by Ms Shezi in her capacity as Chairperson of the BEC. The Report lists "as members of the BEC" the six persons, who according to the minutes were present at the meeting of 27 March 2012 but makes no mention of Ms Jerita Motshologane at all and, in particular does not record that she was absent or had tendered an apology. Contradicting the minutes of the BEC, the Report said the bids had been checked for completeness and compliance. It also noted "the scope of work" as being the provision of locomotives on lease and correctly reflected that the periods of lease were either five years or 15 years (and not 10 years as recorded in the minutes). The Report recorded that the RFP required a minimum technical threshold of 70% and that only Swifambo's bid had achieved that threshold. As a result, only Swifambo's bid was "financially evaluated". The report also noted that Swifambo's bid provided three options: a five-year lease, a 15-year lease and the cost of purchasing the locomotives.

1841.5. Intriguingly, the date on which Ms Shezi signed the Report is not reflected under her signature, although there is space therefor. However, there are two insertions at the foot of each page of the 13-page report: on the left-hand side, the words "Bid Evaluation Committee" and in the centre, the page number. In

addition, the date 23 June 2012 appears on the right-hand side of the first seven pages of the Report, and the words “[insert date]” on the last three pages.

- 1841.6. In the founding papers, Mr Molefe said that PRASA's procurement policy required that the CFSC, not the BEC, should prepare the scoring sheet and allocate the weighting for different items.¹²⁹⁴ In this case, however, it was the BEC that had prepared the scoring sheet in which the items it considered material to the RFP were listed.
- 1841.7. As noted above, according to its Report, the BEC found that only Swifambo's bid achieved the threshold compliance of 70% and only its bid was financially evaluated. Mr Molefe attributed this in part to the fact that the specifications were tailored to suit Swifambo's product. He added that there were other irregularities in the scoring process. Among the examples he gave were the following: a member of the BEC who participated in the first scoring exercise on 27 March 2012 was replaced for the next sitting on 15 May 2012, but the scores that he gave on 27 March 2012, which were favourable to Swifambo, were used in the final calculation; and the bids were not scored in accordance with the weighting allocated.
- 1841.8. One further point needs to be made. If, as recorded in the Report that was signed by Ms Shezi, a proper compliance check had been done in respect of Swifambo's bid, the check inexplicably overlooked the obvious deficiencies in the Swifambo bid that have been detailed above, including the following: Swifambo's tax clearance certificate did not include a VAT number and no such certificate had been submitted for Vossloh; Swifambo's bid did not contain

¹²⁹⁴ As noted above, the specifications ought to have been drawn up by a CFSC. However, given that it was Mr Mtshkulu who had designed the specifications, it would appear that no CFSC had been appointed to allocate weightings and prepare a scoring sheet.

evidence to support its claims that it and its shareholders had previous experience in the rail industry; and Swifambo's bid did not contain documents confirming that it had entered into a joint venture with Vossloh Southern Africa, on whose experience and technical capabilities it would rely to fulfil its contractual obligations to PRASA. Documentary evidence of the existence of such an agreement would have been critical if Swifambo was to be awarded the contract on the basis not of its own experience and expertise but that of Vossloh as its alleged partner.

1841.9. The BEC's Report recommended as follows: Swifambo be appointed as the successful bidder; and the CPO appoint a negotiation team to enter into negotiations with Swifambo and if the negotiations were successful, the negotiated agreement be submitted to the Group CEO for a recommendation to the Board's FCIP.

1841.10. Second, according to a set of minutes annexed to the founding papers, PRASA's Corporate Tender and Procurement Committee (CTPC) held an "extra-ordinary" meeting on 11 July 2012. The minutes record that the following persons were present at the meeting: at the meeting: Mr Tiro Holele (the chairperson), Mr Chris Mbatha, Mr Sipiwe Mathobela, Ms Jerita Mothshologane¹²⁹⁵, Mr Maishe Bopape, Ms Martha Ngoye, Ms Ntombezingi Shezi¹²⁹⁶ and Mr Sidney Khuzwayo. According to the minutes, the resolution taken at the meeting was that the CTPC concurred in the recommendation [presumably by the BEC] that: Swifambo be appointed as the successful bidder;

¹²⁹⁵ This appears to be the same Jerita Mothshologane who tendered was absent from the BEC meeting of 27 March 2012 and had tendered her apology.

¹²⁹⁶ This appears to be the same Ntombezingi Shezi who was the Chairperson of the BEC. The fact that she was the Chairperson of the BEC and then participated as a member of the CTPC in a meeting at which it resolved to concur in the recommendation of the BEC, demonstrates just how irregular the process was that PRASA followed in its consideration of the Swifambo tender.

and the Group CEO appoint a negotiations team to negotiate with Swifambo and, if the negotiations were successful, the negotiated agreement be submitted to the GCEO for recommendation to the FCIP. Significantly, however, although there are spaces for the signature of the chairperson and the date [thereof], these were left blank in the copy annexed to the founding affidavit. There appears to be no copy that is dated or signed.

1841.11. **Third**, the next document that is annexed to the founding affidavit is titled "Bid Adjudication Report". That Report noted the following: "On 12 July 2012, the Bid Adjudication Committee of PRASA (CTPC) adjudicated and approved the recommendations of the Bid Evaluation Committee." The Report was neither signed nor dated, although there is a space for the signature of the "Chairperson of the BAC" and the date of insertion thereof.

1841.12. As regards "the Report of the BAC", for the most part, it repeats almost word for word, what was said in the BEC's report of [presumably] 23 June 2011. (In fact, at the foot of each page of the BAC Report are the words: *Bid Evaluation Report*. In addition, the first seven pages reflect the date: 23 June 2011, as do the first seven pages of the BEC report.) A consideration of the "BAC Report" suggests that, save for a few additions, for the most part it simply reproduces the BEC Report but effects changes only to the page numbers. However, unlike the re-produced BEC Report that it incorporates, the "BAC Report" does not identify the members (in this case of the BAC) who were present at its meeting of 12 July 2011. In addition, it includes some additions to the BEC Report. Among those additions are the following. At the end of paragraph 1 (which sets out the background), after repeating what was said in the BEC Report, the following sentence is added: "On 12 July 2012, the Bid Adjudication Committee of PRASA (CTPC) adjudicated and approved the recommendation of the BEC."

Thereafter, at paragraph 6 (which sets out its recommendations), prior to repeating the BEC's further recommendations, it states that Swifambo be appointed as a preferred bidder for the dual and the E300¹²⁹⁷ locomotives; and that its appointment "be based on outright purchase option". There was a space for Mr Holele to sign in the capacity of "the Chairperson of the Bid Adjudication Committee", but no signature was affixed.

1841.13. **Fourth**, also annexed to the founding affidavit is a document titled "Report of the Group CEO". The report has Mr Montana's name, but it is neither signed nor dated. In the section of the report titled "recommendation", the following is said: "The GCEO has reviewed the report of the *Bid Adjudication Committee* and makes the following recommendation . . ." The recommendation made simply repeats, virtually word for word, the recommendation of the BAC as set out in its report.

1841.14. In his founding affidavit, Mr Molefe said: when comparing the contents of the BAC report and the GCEO report, it is clear that the two documents were clearly generated from the same template.

1841.15. **Fifth**, in his affidavit Mr Molefe said that the Board's FCIP, which was tasked with focusing on the Board's responsibilities in respect of finance, capital investments and procurement, met on 19 July 2012. The FCIP recommended to the Board that Swifambo be appointed as the preferred bidder for the provision of 67 dual electric diesel locomotives (hybrids) and that a separate procurement process be entered into for the remainder of the required 25 diesel locomotives.

¹²⁹⁷ It bears recording that Swifambo had offered the Euro 3000 diesel model

- 1841.16. **Sixth**, according to its minutes annexed to the founding affidavit, PRASA's Board met on 24 July 2012. The attendees were: Mr Sfiso Buthelezi, Dr Bridgette Gasa, Mr Nkosinathi Khena, Ms Marissa Moore, Mr Ntebo Nkoenyane, Mr Mfanyana Salanje and Mr Montana (who were members the Board) and the following non-members: Mr Lindikaya Zide, Mr Goggi Ngakane, Mr Gastin and Mr Sebola.
- 1841.17. The tender was discussed under the item "diesel-electric locomotives". The minutes simply noted that the Board approved Swifambo as the preferred bidder for the procurement of dual diesel electric locomotives.
- 1841.18. **Seventh**, on 27 July 2012, PRASA notified Swifambo of its [Swifambo's] appointment as a preferred bidder for the provision of the "diesel-electric (hybrid) locomotives".
- 1841.19. **Eighth**, the following matters are perhaps worth keeping in mind. The value of the contract was some R3,5 billion. (That is the reason it had to be approved by the Board.) In these circumstances, one would expect that properly dated and signed documents would be produced at each stage of the process to enable one to ascertain at least the following in respect of decisions taken or recommendations made on the locomotives tender: precisely what decisions were taken or recommendations made; when they were taken or made; who was present on each occasion; signed registers; and the reasons for the decisions and recommendations. In this matter, however, only the Report of the BEC was signed. Quite how the bids passed through the successive committees and individuals without the omissions being detected and commented upon is quite a serious matter affecting not only the regularity of

the process but its integrity as well. These are issues that will be considered later in this Report.

1841.20. **Ninth**, there is a further worrying aspect that is raised in the founding papers. It is this. After the Board had approved the award of the tender to Swifambo on 24 July 2012 but before the contract was signed, the Board's then chairperson, Mr Buthelezi, and Mr Montana were told that concerns had been raised about Swifambo. The concerns are reflected in emails annexed to the founding papers. Among them are the following two. First, on 6 November 2012, Dr Gasá (the chair of the FCIP) sent an email to, among others, Mr Buthelezi (the Board's then chairperson) and Mr Montana. In the email, Dr Gasá said: "I have just received intelligence information about Swifambo Rail Leasing.... Failure to follow this up, would sink the organization (sic). Should the intelligence report prove true, we need immediate intervention as the Board. Second, on 20 November 2012, Dr Gasá sent a further email, this time to the Chief Procurement Officer, Mr Chris Mbatha, but on which Mr Buthelezi was copied. Part of this email said: "There are concerns that have been raised around [Swifambo Rail Leasing] and the FCIP is needing you to confirm that indeed a capacity check was properly done in relation to this contract and that you have satisfied yourselves that the necessary checks and balances have been done." In this email, Dr Gasá emphasised that time was of the essence as it would be "an anomaly to proceed to conclude contract negotiations in light of the seriousness of the matters we'd raised for which we have not received a response from you". Despite those concerns, the contractual negotiations proceeded. It is perhaps necessary to record that there appear to be no written responses to these emails or the serious concerns that Dr Gasá raised in them.

1841.21. **Tenth**, moreover, on 25 March 2013, PRASA and Swifambo concluded the main contract. The contract was signed by Mr Montana on behalf of PRASA. The contract was for the purchase of 20 Euro 4000 locomotives and 50 Euro Dual locomotives, with a contract value of R3.5 billion (including VAT).

1841.22. **Eleventh**, on 11 April 2014, Mr Mtimkulu sent a memorandum to Mr Montana in which he requested a variation to the Swifambo contract to include certain systems. The variation was required, according to Mr Mtimkulu, because “the systems that came with the locomotives per the Swifambo proposal to PRASA were rudimentary and therefore needed to be upgraded to ensure that the locomotives are fitted and assembled with the latest technology”. The additional cost to PRASA was R335 million. The request was approved by Mr Montana on 11 April 2014 [even though he had no authority to do so as the amount exceeded R100 million]. In his affidavit in the review application, Mr Molefe said that the suggestion that the systems that came with the locomotives were rudimentary was nonsensical. He went on to say that the locomotives offered by Swifambo were state of the art and the systems mentioned in the Report were standard features.

Main grounds of review

1842. In support of its review application, PRASA relied on numerous irregularities and on improper conduct on the part of certain people. Some of them have already been mentioned above. These included the following: the specifications had been designed by Mr Mthimkulu as opposed to a CFSC; and Swifambo's bid was non-compliant as it did not meet some of the requirements set out in the RFP.

1843. In addition, the review papers stated that the following matters rendered the award made to Swifambo unlawful or irregular.

- 1843.1. **First**, the main contract that PRASA concluded with Swifambo deviated materially from the terms of the RFP: the RFP required a lease of locomotives but the main contract was for the purchase of the locomotives. The main contract however stated that the RFP had invited proposals for three options, with one being an outright sale of locomotives to PRASA, which Mr Molefe said was incorrect as the RFP did not provide for an outright purchase. As a result, competing bidders were not afforded an opportunity to bid on an outright sale as one of the options. Accordingly, Mr Molefe contended that this change (in procurement strategy) was fundamentally flawed and unlawful.¹²⁹⁸
- 1843.2. **Second**, the award of the tender to Swifambo and the conclusion of the main contract without the contractual involvement of Vossloh constituted a material irregularity. Swifambo had no technical capacity, and Vossloh had no contractual obligation to design, manufacture and deliver the locomotives in terms of the main contract. The risk to PRASA, he said, was palpable. It is difficult to understand how anybody who was in a senior management position at PRASA or who was a member of the Board could have thought that it was appropriate to award the contract to Swifambo when it had no capacity and it had no contract with Vossloh.
- 1843.3. **Third**, the conclusion of the main contract without the submission of an unconditional performance bond by Swifambo within the time period prescribed in the RFP was irregular.

¹²⁹⁸ In the founding papers Mr Molefe pointed out that it appeared that the change in strategy was prompted by a Report that indicated it would be cheaper and less of a strain on available operational resources for PRASA to consider purchasing the locomotives outright. But this was inconsistent with the RFP and the procurement process.

1843.4. **Fourth**, Swifambo had offered the Euro 3000 diesel locomotive in its bid, and that was the model that had been evaluated. However, PRASA acquired the Euro 4000 diesel model, which had not been evaluated.

1843.5. **Fifth**, in terms of the main contract, the first 20 locomotives to be delivered were the Euro 4000 locomotives. But the Euro 4000 did not comply with the specification as set out in the RFP in several material respects. Moreover, the Euro 4000 was designed for the European rail network, not for South Africa. It is not compliant with the vehicle gauge specifications designed to ensure that the locomotives were able to operate on the rail networks safely and effectively: it had an overall vehicle gauge height of 4 140mm, whilst the RFP specifications required that the maximum vehicle gauge height be 3 965mm. The consequence was that PRASA was saddled with locomotives that were not fit for purpose and unsafe to operate on the South African rail network.

1843.6. **Sixth**, approval from the Minister of Transport had not been obtained.

1843.7. **Seventh**, there was no indication that National Treasury had received a written submission.

1843.8. **Eighth**, the purchase of the locomotives had not been budgeted for, and;

1843.9. **Ninth**, Mr Mtimkulu had forged his qualifications, going so far as alleging that he held a doctorate, when he did not.

1844. What has been set out above is a bare summary of PRASA's case as set out in its founding papers in its Court application.

1845. Swifambo's answer to the case was quite telling: in essence, the deponent, to its answering affidavit, who was not initially involved in its bid, Mr Massaro, did not dispute

that the irregularities that were identified in the founding affidavit had occurred. His approach was that those were internal decisions that PRASA had made and that, accordingly, Swifambo ought not to be prejudiced by decisions that PRASA itself had taken.

1846. Mr Montana appears to share the same view. When asked about the irregularities, he said that irregularities had to be distinguished from corruption. He said that, while there may have been certain irregularities, that did not justify the order handed down by the High Court or the Supreme Court of Appeal, namely the setting aside of the award and contract, as this had caused grave prejudice to PRASA. While it is true that not every irregularity in a tender process necessarily means that there is or was corruption, there are irregularities which necessarily entail corruption. In this case the irregularities show corruption.

1847. It is perhaps not inappropriate to make the following observation at this stage: the irregularities detailed in the founding papers make it clear that the award of the locomotives tender to Swifambo was due to much more than incompetence or negligence. They suggested a pre-determined plan that involved a number of people of various levels of seniority at PRASA.

1848. It is Mr Molefe's replying affidavit that appears to provide a possible explanation as to why, despite its patent non-compliance with a number of requirements, Swifambo's bid was not disqualified, as it ought to have been. What Mr Molefe said in his replying affidavit, read with a confirmatory affidavit by Mr Mamabolo, regarding interactions with Mr Mashaba may be summarised as set out in the paragraphs that follow.

Bombshell evidence in the Replying Affidavit

1849. In mid-August 2015 Mr Mashaba met Mr Mamabolo. Mr Mashaba told Mr Mamabolo that he was aware that PRASA was investigating the award of the Swifambo tender and asked Mr Mamabolo to arrange a meeting for him (i.e. Mr Mashaba) to meet with Mr Molefe. That meeting was arranged for 31 August 2015. Present at the meeting were the following: Mr Mashaba, Mr Molefe, Mr Mamabolo and Ms Mashila Mtala, a member of PRASA's Board and the then chairperson of its FCIP Committee.

1850. Based on Mr Molefe's affidavit, what Mr Mashaba told the meeting may be summarised as follows: Mr Mabunda had asked him to participate in the locomotives tender; he was aware that the award of the tender was being investigated; through his involvement with Mr Mabunda, he had been in contact with Ms Gomes, whom he had met; she had told him that she knew that the locomotives tender was worth billions and she could not understand why 10% of the value of the bid could not be paid to the ANC; Mr Mabunda had instructed him to pay some of the money received from PRASA into specified accounts and this would "benefit the movement"; and while it was a pity that he did not have documents with him reflecting the payments he had made, he would provide the documents.¹²⁹⁹

1851. Mr Mashaba later did indeed hand over some documents to Mr Mamabolo. As regards the payments, the documents reflected that, through his company, AM Consulting Engineers (Pty) Ltd, Mr Mashaba had paid a total of some R79 million¹³⁰⁰ and had charged a "handling fee" of 10%.¹³⁰¹ At subsequent meetings between Mr Mashaba and

¹²⁹⁹ In a statement dated 23 October 2020 that he submitted to the Commission, Mr Mabunda denied each of the allegations insofar as they involved him.

¹³⁰⁰ R79 040 000

¹³⁰¹ Mr Mashaba did not indicate from which accounts the payments were made. However, in an affidavit that he furnished to the liquidators of Railpro Holdings, Mr Mashaba gave the following schedule of payments that he or entities had made to entities who would then pay those amounts to the ANC: Nkosi Sebelo Inc – a total of

Mr Mamabolo, Mr Mashaba told Mr Mamabolo that, after PRASA had made payments to Swifambo or Swifambo Holdings, Ms Gomes would instruct him to make payments to certain entities. These were: Simitex (Pty) Ltd, Nkosi Sabelo Incorporated and Knowles Hussain Lindsay Incorporated. None was a creditor of Swifambo or Swifambo Holdings. He said that he had also made two cash payments to Ms Gomes. Based on the schedule in his affidavit to the liquidators of Railpro, one payment was for just over R2 million and the other for R90 000. Mr Mashaba said Ms Gomes would then distribute the funds.

1852. In his replying papers, Mr Molefe also mentioned two sets of documents that he suggested were relevant to what has been set out above. **First**, a document ostensibly prepared by Siyaya Rail Solutions (Pty) Ltd, a subsidiary of Mr Mabunda's S Group. This document appears to have been submitted to PRASA in response to the request by PRASA for Expressions of Interest (EOI) to lease locomotives to PRASA. In the document, Siyaya Rail Solutions said that for the purposes of the Expressions of Interest (EOI), it had entered into a partnership with two international companies, one of which was Vossloh Espania, to provide turnkey solutions to PRASA for the leasing of locomotives.¹³⁰² **Second**, emails exchanged between Mr Montana and Ms Gomes on 16 and 17 December 2013, which Mr Molefe stated alarmingly indicated the following: the familiarity between them and the fact that they referred to each other as "comrades"; and that Mr Montana gave Ms Gomes details of various projects within PRASA.

1853. Swifambo filed an affidavit by Mr Mashaba responding to the bombshell evidence in Mr Molefe's replying affidavit. What emerges from Mr Mashaba's affidavit may be

R28,5 million; R10,4 million to Knowles Hussain Lindsay Inc [to be paid to Nkosi Sabelo Inc]; and a total of R40,14 million to Simitex (Pty) Ltd.

¹³⁰² In his statement dated 23 October 2020, Mr Mabunda said that he provided consultancy services to "the Swifambo consortium" in respect of the 2011 RFP.

summarised as follows. First, he denied that Mr Mabunda had told him that he was friends with Mr Montana.¹³⁰³ Second, he denied that he did not have experience in the rail industry; he said that he had three years' experience. Third, he said that the purpose of the meeting of 31 August 2105 was to "amicably iron out difference between Swifambo and PRASA emanating from the contract". Fourth, he said that at the meeting Mr Molefe had asked him if he supported the ANC financially. Mr Mashaba does not say in his affidavit what his answer to Mr Molefe was. Fifth, however, his affidavit sets out contributions he made to the ANC. He made them, according to the affidavit, after he was contacted by Mr Sabelo, who professed to be an ANC "fundraiser". He said that it was Mr Sabelo who had introduced him to Ms Gomes, who, he said, was also an ANC fundraiser. The payments were not made by Swifambo or from its account. Sixth, he later gave documents to Mr Mamabolo¹³⁰⁴ to demonstrate that he supported the ANC, "as requested during the meeting by Molefe".

1854. Mr Mashaba made two other points. The one point was that by the time the payments referred to by him were made, the contract had already been awarded to Swifambo. It is not clear why Mr Mashaba thought that the fact that the payments were made after the contract between PRASA and Swifambo had been concluded counted in his or Swifambo's favour. The point is that plans were put in place to ensure money obtained from PRASA, an SOE, in a corrupt transaction was allegedly paid to the ANC, the ruling party. The other point that Mr Mashaba made in his affidavit was this:

"I honestly believe that if Mr Molefe dealt with this matter at an arm's length basis, a commercial solution could easily have been found in a manner that would permit PRASA's technical issues to be addressed, and costly protracted litigation avoided. The public would now have state of the art locomotives."

¹³⁰³ In his statement Mr Mabunda also denied that he had told Mr Mashaba that he was friends with Mr Montana.

¹³⁰⁴ He however denied that he had given Mr Mamabolo all the documents that Mr Mamabolo alleged Mr Mashaba gave him.

The point that Mr Mashaba sought to make in the above quotation is not clear.

1855. In any case, the complaints that Mr Molefe's affidavit raised about the unlawfulness of the contract that PRASA had concluded with Swifambo for the purchase of the locomotives were considered by the High Court and the Supreme Court of Appeal.

1856. In the High Court, the review application was heard by Judge Francis. The Judge reviewed and set aside the contract on the basis that it was tainted by serious irregularities, some of which related to corruption and fronting.

1857. Swifambo appealed to the Supreme Court of Appeal against Judge Francis' judgment. On appeal, the Supreme Court of Appeal confirmed Judge Francis' order and also concluded that there was corruption. The Constitutional Court refused Swifambo leave to appeal to it.

1858. Having regard to the contents of PRASA's papers in support of the review application, it is important to refer to what the Supreme Court of Appeal concluded and said in its judgment. In essence, about the tender and its outcome the Supreme Court of Appeal made the following findings.

1858.1. **First**, in respect of Mr Mtimkulu, it said that it was Mr Mtimkulu who had in July 2011 recommended that PRASA sources 100 locomotives at a cost of R5 billion;¹³⁰⁵ it also said that it was he who had drawn up the specifications of the locomotives to be supplied;¹³⁰⁶ he had no expertise in the subject, but had been appointed to a position in PRASA by Mr Montana in 2010 and had a meteoric rise through the ranks, with a meteoric salary hike to match it; he claimed to

¹³⁰⁵ At paragraph [4] of its judgment.

¹³⁰⁶ At [6]

have diplomas in engineering and later a doctorate; in fact he had no qualification at all.¹³⁰⁷ He resigned before disciplinary proceedings could be instituted against him.¹³⁰⁸

1858.2. **Second**, the Supreme Court of Appeal then noted that the specifications drawn up by Mr Mthimkulu contravened various requirements of PRASA's procurement policy but, interestingly, they matched those of the locomotives manufactured by Vossloh Espana SAU (which had made recommendations on PRASA's needs in May 2011) and were tailored to include several features that were of no relevance to PRASA's needs, so as to benefit Vossloh and thus Swifambo. The Supreme Court of Appeal, accordingly, concluded that the High Court had correctly found that this was a factor that justified the conclusion that the tender process was corrupt.¹³⁰⁹

1858.3. **Third**, no proper assessment of PRASA's needs had been undertaken, and the normal financial procedures required by the procurement policy were not followed. For example, it appeared that the National Treasury's approval, which was required by the PFMA, had not been obtained.¹³¹⁰

1858.4. **Fourth**, the Supreme Court of Appeal also found that Swifambo's bid did not comply with the requirements of the RFP in at least the following respects: Swifambo's tax clearance certificate did not have a VAT number and no such certificate was submitted for Vossloh;¹³¹¹ Swifambo's bid did not comply with the local content requirement as the locomotives were to be designed and

¹³⁰⁷ At [7]

¹³⁰⁸ At [8]

¹³⁰⁹ At [24]

¹³¹⁰ At [5]

¹³¹¹ At [10]

manufactured in Spain, and it had not provided evidence of previous experience in the rail industry;¹³¹² Swifambo's bid did not demonstrate that Swifambo had experience in the supply of locomotives or its capacity to manage a project of the size put out to tender.¹³¹³

1858.5. **Fifth**, the Supreme Court of Appeal also noted that, although the contract between PRASA and Swifambo was concluded on 25 March 2013, it was only on 4 July 2013 that a contract for the supply of locomotives was concluded between Swifambo and Vossloh.¹³¹⁴ In other words, when PRASA and Swifambo concluded the contract, Vossloh had no legal obligation to Swifambo or PRASA and Swifambo had no capacity whatsoever to provide PRASA with the locomotives.

1858.6. **Sixth**, like the High Court, the Supreme Court of Appeal found that Swifambo had engaged in fronting.¹³¹⁵

1858.7. **Seventh**, the Supreme Court of Appeal also found that Mr Montana had been a party to Mr Mthimkulu's conduct.¹³¹⁶ About Mr Montana, it also said: "He controlled PRASA and its staff, was obstructive and attempted to cover up his role in various corrupt transactions, including the award of the tender to Swifambo.... The Public Protector had experienced similar obstruction in her investigation".¹³¹⁷

¹³¹² At [11]

¹³¹³ At [9]

¹³¹⁴ At [28]

¹³¹⁵ At [30]

¹³¹⁶ At [8]

¹³¹⁷ At [34]

1859. Mr Montana's response to what Mr Molefe had said in his affidavit in the review application relating to the Swifambo contract, may be summarised as follows:¹³¹⁸ all the facts had not been placed before the Court; there were serious misrepresentations in PRASA's papers; there had been no change in procurement strategy, from lease to sale; it was not true that Mr Mthimkulu had written the specification; it was unfair to expect Swifambo to know about PRASA's internal matters; he said that there were no irregularities in the tender process; he said that he had not played any part in this bid. He said that Mr Holele and Ms Ngoye were part of "the BAC", which had made the recommendation to the FCIP that the tender be awarded to Swifambo. He also denied that Mr Mashaba did not have capacity.

1860. Mr Montana agreed that Courts have a responsibility to fight corruption. However, in regard to the Swifambo matter, he said that the Courts went beyond their duty in declaring the contract corrupt. He said that it was important that, as regards corruption, even Mr Sacks had not found that any money had gone to "PRASA people". He said he rejected both judgments and attacked both Judge Francis and the Justices of the Supreme Court of Appeal who were involved in the Swifambo matter. His attacks on Judge Francis and the Justices of the Supreme Court of Appeal were completely unfounded.¹³¹⁹

1861. It is convenient now to consider two Reports that were compiled after the review application had been launched, namely the Report compiled by Mr Ryan Sacks and that compiled by the Liquidators of Swifambo.

¹³¹⁸ It appears from page 217 of the Transcript

¹³¹⁹ It perhaps should be noted that Mr Montana made personal attacks on Francis J and the Justices of the SCA who had heard Swifambo's appeal against the High Court's order reviewing and setting aside PRASA's contract with Swifambo. The matters were considered and it is found that there is no substance in either complaint. Out of sensitivity for Francis J and the Justices of the SCA, the details of Mr Montana's attacks are not set out in this Report.

The Sacks Report

1862. The circumstances in which Mr Ryan Sacks came to prepare his report were as follows.

Mr Sacks is a Chartered Account and a director of Crowe Forensics SA (Pty) Ltd (Crowe Forensics), which was formerly known as Horwarth Forensics SA (Pty) Ltd (Horwarth Forensics). Horwarth Forensics was appointed by Werksmans to perform expert forensic investigations relating to certain expenditures incurred by PRASA, one of which was in respect of the Swifambo contract. Thereafter, on 28 December 2015, the DPCI appointed Horwarth Forensics, represented by Mr Sacks, to perform a cash flow analysis investigation pertaining to the Swifambo tender.¹³²⁰ In his report,¹³²¹ which is dated 20 April 2017 and is described as a "preliminary report", Mr Sacks sets out how it came about that he had compiled his report. On this issue, in summary, Mr Sacks' report said the following. On 8 July 2015, Mr Mamabolo reported a number of corrupt activities at PRASA to the Hillbrow Police Station, under Case number 405/07/2015. In a supplementary affidavit, Mr Mamabolo stated that the award of the locomotives contract to Swifambo was irregular and could amount to fraud or corruption. On 27 November 2015, PRASA launched its court review application to have the contract that PRASA had concluded with Swifambo reviewed and set aside. On 28 December 2015, Horwarth Forensics, represented by Mr Sacks, was appointed by the State to perform a forensic investigation into the allegations of irregularity in the Swifambo transaction. The scope of the investigation included all identified bank account details and individuals implicated in the process of the award of the tender and the entities that benefitted therefrom and to conduct a forensic investigation of certain bank accounts and to trace

¹³²⁰ in his evidence to the Commission, Mr Sacks said that it was envisaged that the firm's mandate would be extended to include other cases, such as Siyangena.

¹³²¹ Mr Sacks' Report is Annexure "RS3" to his affidavit, which was admitted as PRASA Bundle L: Exhibit SS4. The page references hereafter are to the red numbers on the right hand side of each page.

the flow of funds and establish any individuals (including PRASA employees) or entities that benefitted from the award of the tender to Swifambo.

1863. The objective of the audit was to analyse payments that PRASA had made to Swifambo, which payments were made into bank accounts of Swifambo Rail Leasing (Pty) Ltd and Swifambo Rail Holdings (Pty) Ltd,¹³²² and then the subsequent utilisation of those funds by Swifambo (both Swifambo Leasing and Swifambo Holdings).

1864. In his report, relying on the information in PRASA's review application papers, Mr Sacks analysed the entire tender process. Part of what he said is reflected in the earlier part of this section when identifying the irregularities highlighted by Mr Molefe in the review papers. In the remainder of this part of the Report, the focus will be on the part of his report that relates to the flow of funds analysis that he conducted in respect of payments by PRASA to Swifambo.

Summary of main findings of Sacks' Report

1865. The report notes that the contract between Swifambo and Vossloh reflected the following.

1865.1. **First**, in terms of the contract, Vossloh was to sell 70 locomotives to Swifambo at €255 993 640, or for €3 657 052 each, while the price at which Swifambo sold the 70 locomotives to PRASA was €267 603 000 or €3 822 900 each. This means that Swifambo's profit margin was €165 848 per locomotive or

¹³²² In his Report, seemingly relying on what was said in PRASA's review papers, Mr Sacks refers to the "holding company" as Swifambo Rail Holdings (Pty) Ltd. However, according to the report of the Liquidators, the name of the "holding" company is Railpro Holdings (Pty) Ltd. It appears that this is correct, though this is one and the same entity. As noted earlier, for ease of reference to the source documents, the name "Swifambo Holdings" as well as Railpro Holdings will be used, as utilised by the authors of the documents concerned.

€11 609 360 for 70.¹³²³ Using an exchange rate of R10,18 per Euro, the Report continues, Swifambo would earn more than R118 million.¹³²⁴

1865.2. **Second**, PRASA's first payment to Swifambo Leasing was on 6 December 2013, being an amount of R64 473 684 and PRASA's first payment to Swifambo Holdings was on 5 April 2013, being an amount of R460 526 315,79.¹³²⁵

1865.3. **Third**, prior to PRASA's first payment to Swifambo Leasing's account [on 6 December 2013], there was evidently no transactional or operational activity on the account, save for bank charges and insignificant receipts with a description of "Musa".¹³²⁶

1865.4. **Fourth**, between 1 January 2011 and 5 April 2013 [when PRASA made its first payment to Swifambo Holdings], the call account of Swifambo Holdings was evidently used to pay for various operating costs. Of the R1 043 865,40 received into this account: a total of R690 000 was received from an entity called Siyaya Rail Solutions; and a total of R257 265,40 was received from Vossloh SA and Vossloh Track. During that period, an amount of R1 008 516,23 was paid mainly for rent and furnishings for Swifambo's offices.¹³²⁷

1865.5. **Fifth**, based on the foregoing, the Report draws the following conclusions:¹³²⁸
Swifambo had no trading activity prior to receipts from PRASA; it was not an

¹³²³ Paragraph 11.5.5 (page 160)

¹³²⁴ R118 183 285.

¹³²⁵ Paragraphs 13.1 and 13.2 (page 177)

¹³²⁶ Paragraph 13.1.3

¹³²⁷ Paragraph 13.2.4 (page 178)

¹³²⁸ Paragraph 13.3 (pages 179-180)

operating or trading company; the only expense it had incurred appears to have been for start-up costs and bank charges. This would confirm that Swifambo was a company that was specifically set up for PRASA's locomotive tender.

1866. In the Report, Mr Sacks also set out his preliminary findings based on his analysis of the flow of funds in Swifambo's bank accounts.¹³²⁹ He emphasised that those were "Level 1" findings. He explained that that meant that they pertained only to the flow of funds to and from bank accounts of Swifambo Leasing and Swifambo Holdings into which PRASA made payments. He cautioned though that each of these entities held several bank accounts and that he had not been able to identify all their accounts. In his "Level 2" findings he would have dealt with the flow of funds from entities that or individuals who received payments from Swifambo. The analysis took into account descriptions in Swifambo's bank statement, as confirmed by beneficiary bank statements. However, the DPCI or the Hawks did not allow him to continue with that leg of his investigations.

Swifambo's accounts after PRASA had made payments to it

1867. The outcome of Mr Sacks' analysis suggests that, as at 30 November 2015 the receipts into, disbursements from, and balances in, the accounts of both Swifambo Leasing and Swifambo Holdings may be summarised as follows.

1867.1. **First**, in all, Swifambo received more than R2,65 billion¹³³⁰ from PRASA.¹³³¹

¹³²⁹ The findings are set out in paragraph 14 (which begins at page 180).

¹³³⁰ R2 605 207 950,29. Not surprisingly, in the same amount is reflected by the Liquidators in their "Report to Stakeholders", which is further considered hereunder.

¹³³¹ This summary is set out in Table 5 of the Sacks Report: p 184

1867.2. **Second**, Swifambo made total payments to Vossloh of more than R1,8 billion [R1 873 474 161,62] and of R237 021 909,04 to SARS and as at 30 November 2015 it had R111 376 943,89 as balances in its accounts.¹³³²

1867.3. **Third**, Mr Sacks also set out in tabular form the dates when Swifambo received payments from PRASA and the dates when it made payments to Vossloh.¹³³³ The essence of what is set out in the table is re-produced hereunder: the first and second columns reflect the dates on which PRASA (P) paid Swifambo (S) and the amount paid; the third and fourth columns reflect the dates on which Swifambo (S) paid Vossloh (V) and the amount thereof and the last column reflects the difference between what Swifambo was paid and what it paid Vossloh.

P pays S		Spays V		Difference
05/04/13	R460 526 316	01/08/13	R288 750 000	R171 776 316
06/12/13	R64 473 684	02/01 /14	R5 211 880 5	R12 354 879
24/12/13	R468 672 881	17/01/14	R320 000 000	R148 672 881
13/05/14	R335 308 062	19/05/14	R241 565 356	R93 742 706
01/07/14	R430 166 417	08/07//14	R375 040 000	R55126417

¹³³² Table 5

¹³³³ Table 6, (paragraph 14.3, page 186)

12/01/15	R444 565 614	20/01/15	R307 000 000	R137 565 614
05/06/15	R182 424 652	15/06/15	R114 000 000	R68 424 652
07/07/15	R264 070 325	10/07/15	R175000 000	R89 070 325

1867.4. **Fourth**, commenting on the payments reflected in the paragraph immediately above, Mr Sacks said Swifambo made the first payment to Vossloh 116 days after it had received its first payment from PRASA. He also noted that the details in respect of five of the payments that Swifambo made to Vossloh were obtained from a letter that Swifambo had written to the National Treasury. The bank accounts however were not available to Mr Sacks. Accordingly, he was not in a position to confirm those payments, until he was able to have access to the bank accounts.¹³³⁴

1867.5. **Fifth**, Mr Sacks testified that the bank accounts also indicated that Swifambo received five payments from Vossloh totalling R811 508,59. The reasons for these payments were not clear. However, as indicated earlier, even before the contract between PRASA and Swifambo was signed, Swifambo had received three payments from Vossloh SA/Vossloh Track totalling R257 265, seemingly to fund the set-up costs for Swifambo's office.

1868. It is convenient now to consider the more significant payments that Swifambo made from the R2,65 billion that it received from PRASA. As noted above, it paid a total of

¹³³⁴ Page 189

R1,8 billion to Vossloh and some R237 million to SARS. In his Report, Mr Sacks identified the persons and entities to whom significant payments were made. However, as noted above, his report was compiled in April 2017, some 20 months before Swifambo was placed under liquidation. A more up-to-date picture of the flow of those funds emerges from the report prepared by the Liquidators. That report is dated 18 February 2020 and is titled "Report to Stakeholders". For the purposes of this Report, the more significant matters that arise from the Liquidators' Report may be summarised as set out hereunder.

Report of the Liquidators

1869. The Liquidators' Report was signed by Mr JZ H Muller, one of the joint liquidators, who also gave evidence at the Commission.

1870. Before dealing with the Liquidators' Report the following should be placed on record. Mr Mashaba was summoned, in terms of section 3(2) of the Commissions Act,¹³³⁵ to appear before the Commission as a witness on 24 February 2021 and answer questions on among other matters the Liquidators' Report, his interactions with Mr Molefe and the payments he made to certain entities out of the proceeds of the contract between PRASA and Swifambo. In response to the summons, Mr Mashaba's attorney wrote to the Commission to the effect that Mr Mashaba "does not recognise and accept the lawfulness and/or legal validity" of the summons and would not be appearing at the Commission. Indeed, he did not appear. As failure to comply with a summons issued by the Commission without sufficient cause constitutes a criminal offence, the Commission's Secretary laid a criminal complaint against Mr Mashaba with the Police. That matter has not yet been finalised.

¹³³⁵ No 8 of 1947

1871. The Liquidators Report records that in total the highest beneficiaries of payments made by Swifambo were Mr Mashaba (and entities “under his control”) and Mr Mabunda (and “entities under his control”). These payments are considered in the paragraphs immediately hereunder.

1872. Before considering the payments made to Mr Mashaba or entities under his control, it will be instructive to reiterate the following. Mr Mashaba was appointed as a director of Swifambo Leasing on 7 March 2012. As noted above, Mr Molefe stated that Mr Mashaba had told him at the meeting of 31 August 2015 that Mr Mabunda had persuaded him to tender for the locomotives contract.

Payments to Mr Mashaba

1873. According to the flow of funds analysis conducted by the Liquidators, **Railpro Holdings**¹³³⁶ made payments totalling more than **R146 million**¹³³⁷ to **Mr Mashaba** or “entities under his control”. The payments were as follows:¹³³⁸

1873.1. **R1 680 000** to Mr Mashaba

1873.2. **R9 293 000** to Britewave

1873.3. **R31 066 859,88** to AM Investments;

1873.4. **R29 816 020,28** to AMCE;

1873.5. **R50 million** to MM Trust; and

¹³³⁶ As has already been noted, while Mr Sacks refers to the holding company as “Swifambo Holdings” in their Report the Liquidators refer to the holding company as “Railpro Holdings”.

¹³³⁷ R146 375 880,16

¹³³⁸ Paragraph 5.2.2.2 and 5.2.2.3 of the Liquidators’ Report

1873.6. **R26 200 000** to Manaroko Makol.

1874. The Liquidators' Report also records that **Swifambo Leasing** made payments totalling more than **R22 million**¹³³⁹ to entities "under the control of [Mr] Mashaba". The payments were as follows:¹³⁴⁰

1874.1. **R7,5 million** to Bahn Wheels;

1874.2. **R5 859 658,03** to Mizana

1874.3. **R399 256** to Mizana

1874.4. **R10 870** to Am Luxury Lodge; and

1874.5. **R9 million** to Manoroko Makol.

1875. Mr Mashaba furnished the Commission with an affidavit in response to a Directive served on him in terms of Regulation 10(6) of the Commission's Regulations. That was long before the summons was issued to him to appear before the Commission, which he defied.

1876. In his affidavit, Mr Mashaba said the following: at all material times and until Railpro Holdings and Swifambo Leasing were liquidated, he was the managing director of each of the two companies; Mr Muller had laid charges against him in respect of several offences, including racketeering and money laundering; should he respond to the contents of the Liquidators' Report, he ran the risk of possibly incriminating himself; he was challenging the lawfulness of the appointment of the Liquidators of Railpro Holdings and Swifambo Leasing; there was on-going litigation between him and the Liquidators;

¹³³⁹ R22 769 784,03

¹³⁴⁰ Paragraph 5.2.3.3

and an application was to be made to the Master [of the High Court] to remove Mr Muller as a final liquidator of Swifambo Leasing; he was exercising his right not to respond to allegations made in the Report relating to monies received by him or the entities referred in the Liquidators' Report.

1877. Turning now to Mr Mabunda, it is worth reiterating that according to evidence led at the Commission, Mr Mabunda is a known associate of Mr Montana: Mr Montana had worked for the Ministry of Public Enterprises, whilst Mr Mabunda had worked at the Department of Public Enterprises. Mr Mabunda appears to control the "S-Group" of companies that go by the name Siyaya. According to the evidence of witnesses, the Siyaya companies have been paid more than R1 billion by PRASA for work performed by them.

1878. The flow of funds analysis conducted by the Liquidators indicates that **Railpro Holdings**¹³⁴¹ made payments totalling more than **R63 million**¹³⁴² to **Mr Mabunda** or "entities under his control". The payments were as follows:¹³⁴³

1879. **R22 664 000** to Mr Mabunda;

1879.1. **R2 030 515** to Siyaya Energy;

1879.2. **R5 140 000** to Siyaya Rail Infrastructure;

1880. **R28 320 000** to Bahn Wheels; and

¹³⁴¹ In their Report, the Liquidators refer to this entity as Railpro Holdings

¹³⁴² R63 370 515

¹³⁴³ Paragraph 5.2.2.4 and 5.2.2.5 of the Liquidators' Report

1880.1. **R27 888 000** to Enerwaste.

1881. The Liquidators' Report also records that **Swifambo Leasing** made payments totalling more than **R17 million**¹³⁴⁴ to **Mr Mabunda** or entities "under his control". The payments were as follows:¹³⁴⁵

1881.1. **R6 076 895,48** to Siyaya DB Con (in liquidation);

1881.2. **R1 870 949,38** to the S Group;

1881.3. **R1 273 511,52** to Nsovo Holdings ;

1881.4. **R1 631 290,07** to Rishi Rishile Investments;

1881.5. **R1710000** to Ntshovelo Logistics; and

1881.6. **R5 million** to Sterlings Living.

1882. In a statement submitted to the Commission, Mr Mabunda responded to the allegations that payment was made to him or his entities as follows. As regards the payments made by Railpro Holdings, he said: the payments made to him were noted and were for "service rendered"; the payments to the entities mentioned, except for Bahn Wheels, were noted and were for "service rendered"; and the payment to Bahn Wheels was made after he had "sold" the company to Swifambo. As regards the payments made by Swifambo Leasing, he said: the payments made to him were noted and were for "service rendered"; the payments to Siyaya DB and the S Group were noted and were for service

¹³⁴⁴ R17 562 646,45

¹³⁴⁵ Paragraph 5.2.3.1 and 5.2.3.2

rendered; the payments to Nsovo Holdings were for rental for offices; however, the payments to Ntshovele Logistics and Sterlings "had nothing to do" with him.

1883. As has been noted above, in his report Mr Sacks also dealt with the flow of funds from Swifambo to third parties such as Mr Mashaba and Mr Mabunda and entities with which they were associated. Although his flow of funds analysis considered what the position was as at 30 November 2015, his findings on the persons or entities who received money from Swifambo and how much is broadly consistent with the findings of the Liquidators. In the circumstances, it is necessary to consider the reasons that the DPCI gave for not acting on Mr Sacks' Report.

1884. It is against the backdrop of the foregoing information that it is instructive to consider what steps the police took after they received the Sacks Report.

1885. The steps taken by the police was not contained in Mr Sacks' report, but Mr Sacks dealt with it in his affidavit to the Commission and the oral evidence that he gave thereafter. According to Mr Sacks, in summary the following happened.

1886. He was asked to meet with the Directorate for Priority Crime Investigation (DPCI) to present his Report [on his investigation into Swifambo] before the DPCI met with prosecutors on 20 April 2017. He presented his Report to Brigadier Makinyane and another member of General Khana's team on 19 April 2017. After that he heard nothing further from the DPCI. This is despite the fact that, as is noted in the paragraph immediately hereunder it had been envisaged that his firm would also perform a Level 2 investigation in respect of Swifambo and would later be engaged to perform a forensic investigation into the Siyangena contracts.

1887. Mr Sacks stated in his affidavit that, when his firm, then known as Howarth Forensics,¹³⁴⁶ was appointed by the DPCI on 28 December 2015, the DPCI team under General Mosipi had envisaged extending the firm's mandate as and when it was deemed appropriate. It was envisaged that the next investigation would be into the award of certain contracts to Siyangena. However, General Khana took over the investigations from General Mosipi. From then on, Mr Sacks said his firm did not receive any further appointments. In particular, he was not even asked to conduct the Second Level analysis in respect of the Swifambo tender, so as to conduct a flow of funds analysis to determine what the individuals and entities who received monies from Swifambo had utilised those funds for.

1888. In response to Mr Molefe's evidence that the DPCI had been dilatory in their investigations into PRASA-related matters, Lt General Lebeja laid the blame for the delay on PRASA and its employees. He did this in his affidavit. He also sought, in that affidavit, to explain why Mr Sacks' services had not been retained. His explanation may be summarised as follows. Following a complaint by Mr Mashaba, the chairperson of Swifambo, the mandate of Howarth Forensics in respect of the Swifambo investigation had been withdrawn. Howarth Forensics had been appointed as "Forensics Accountants" as opposed to as a "Forensic Investigating Company".

1889. In addition, after Howarth Forensics' preliminary report was discussed with the prosecutors, they prosecutors allegedly "raised a concern and discomfort" about the "objectivity" of the Sacks Report and advised that an "independent report" by a different services provider should be sourced and "as such the investigation team did not continue with Crowe Forensics' services". No names of the prosecutors were disclosed to the Commission. It is also not clear why the matter would have been taken to the

¹³⁴⁶ As noted above, his firm is now known as Crowe Forensics

prosecutors before the investigation was completed. No factual basis was advanced for the statement that Mr Sacks' firm was not impartial. If this is what happened and if it was genuine, the DPCI would have asked Mr Sacks' firm to comment on the accusation of bias but they did not. In fact, the DPCI never told Mr Sacks' firm why they were not continuing with them. All this suggests that the explanation is false and there is something more to the DPCI's conduct. I reject their explanation.

1890. At this stage it is appropriate to go back to Lt General's Lebeya's explanation as to why the investigation into the Swifambo tender had not been finalised. Two points must be made about his explanation. It is totally hearsay. He relies on what he had been told, without saying by whom and without attacking the relevant people's confirmatory affidavits. However, given that more than six years had passed since the complaints were lodged with the police, his explanation does not stand scrutiny. What is disturbing is that, even after he took over in 2018, not much has happened. In particular, it does not appear that there was any urgency in securing an "objective" report on the flow of money received by Swifambo as a replacement to Mr Sacks' Report.

1891. In addition, he does not even seek to explain why Mr Sacks was not told about the concerns that had been raised about his Report. The explanation tendered by Lt General Lebeya does not dispel the impression entertained by Mr Molefe, Ms Ngoye and Mr Dingiswayo, that there was a reluctance on the part of law-enforcement authorities to investigate and prosecute persons who may have committed offences during the tender process and even before it was actually initiated. If anything, Lt General Lebeya's explanation not only gives force to the impression but leads one to conclude that that reluctance persists even now.

1892. It is convenient now to consider the final issue relating to the Swifambo tender to which reference was made earlier, namely recent allegations of other possible irregularities

relating to the locomotives tender. Among those allegations are the following: minutes of a meeting of one of the Committees that recommended the appointment of Swifambo as the preferred bidder were inaccurate, if not forged; a denial of those allegations with reliance on documents that were presented to the Commission at a late stage; and that the CTPC re-visited part of a decision it had taken after it had been urged to do so by a senior person at PRASA.

Evidence of other irregularities

1893. In the earlier part of this section of the Report, reference was made to the various committees which appeared to have considered the tender and made recommendations on the award of the locomotives tender.

1894. There may well be other serious irregularities that further tainted the process that was allegedly followed by PRASA but was not set out in PRASA's review papers. In respect of one of those irregularities, it appears that in 2012 there was no Committee at PRASA that was called the Bid Adjudication Committee. Despite this, one of the documents that Mr Molefe annexed to his founding affidavit was what purported to be a "Report of the BAC". It would appear that at the time he made his founding affidavit, neither Mr Molefe nor those assisting him in the preparation of the review papers were made aware of the following: at the time that the Swifambo tender was being considered, the BEC would submit its recommendation to the CTPC, *which became known as the BAC only a year or so later*. Accordingly, the Swifambo tender could not have been considered by the CTPC *and* the BAC as there was no BAC at the time. How this was discovered and what emerges from the evidence heard by the Commission on these matters is set out hereunder. It bears reiterating that in dealing with the different committees that considered the bids, the founding affidavit in the review application assumed that the

committee to which the BEC's recommendation would be forwarded was "the Bid Adjudication Committee".

1895. However, based on minutes of the CTPC that were annexed to it, the founding affidavit went on to say that the BEC's recommendation was *also* considered by the Corporate Tender and Procurement Committee (CTPC). A three-page document was attached to the Founding Affidavit as being the "minutes" of the meeting of the CTPC. This document has already been considered above. What needs to be added is this. The document that was annexed as being the "minutes" of the CTPC meeting simply recorded the names of the persons who were present and that presentations had been made in respect of certain "items" [presumably reflected in the minutes]. In addition, the "resolution" taken was recorded in the minutes. That is the sum total of what is recorded in the document that is said to be the "minutes" of the CTPC.

1896. The next document that was annexed to the Founding Affidavit was titled "Bid Adjudication Report". This document, too, has already been discussed above. As noted there, however, in support of the allegations made about the role of the BEC in the procurement process, Mr Molefe relied in part on the minutes of the BEC meeting held on 27 March 2012 and an undated and unsigned Report of the BEC, which reflected the date 23 June 2012 at the foot of some of its pages. Mr Molefe also relied on what he was told by Mr Peter Stow, who attended the BEC meeting of 27 March 2012, in saying that the BEC minutes and Report were misleading in certain respects.

1897. Significantly, there was no similar allegation by Mr Molefe relating to the minutes of CTPC meeting or the BAC Report being misleading. However, towards the end of the Commission's scheduled hearings, questions were raised about what was reflected in those two documents, which were annexed to the founding affidavit.

1898. Quite ironically, the questions arose in the following circumstances. During the course of his testimony before the Commission, Mr Montana made a number of serious allegations against Ms Martha Ngoye and Mr Tiro Holele. Those that are relevant for present purposes are the following. Mr Montana said that Ms Ngoye and Mr Holele had accused him of wrongdoing, but they could not escape blame in respect of the award of the locomotives tender to Swifambo. He testified that this was because they were members of *the BAC* that supported the recommendation that Swifambo be appointed as the preferred bidder. After Mr Montana had made these accusations against Ms Ngoye and Mr Holele, the Commission called upon the two to furnish the Commission with affidavits and respond to Mr Montana's evidence.

1899. In response to Montana's allegations against them, Ms Ngoye and Mr Holele filed affidavits and were thereafter given an opportunity to respond to Mr Montana's evidence against them. What they said in their affidavits and oral evidence in this regard may be summarised as follows:

1899.1. **First**, in July 2012 when, according to the documents that were annexed to Mr Molefe's founding affidavit as the "minutes" of the CTPC and BAC meetings,¹³⁴⁷ Mr Holele and Ms Ngoye were members of the CTPC, appointments to that committee being made on an annual basis.

1899.2. **Second**, at that time Mr Holele was the chairperson of the CTPC.

1899.3. **Third**, however neither could recall being at a CTPC meeting on 11 (or a "BAC meeting" on 12 July 2012, given that there was no BAC at the time). Given the sheer size of the tender [R3,5 billion], they said they would remember having been part of the process if they had been attended the meetings. In short, they

¹³⁴⁷ The annexed documents reflect that the CTPC met on 11 July 2012 and that the BAC met on 12 July 2012.

said that they no recollection of having played any role in the tender process for locomotives.

1899.4. **Fourth**, Ms Ngoye and/or Mr Holele also pointed out the following. In 2012, recommendations from the BEC were considered by the CTPC: at that time there was no committee known as the BAC. The CTPC was "converted" into, and became known as, "the BAC" a year or so after the locomotives tender had been considered by the BEC in March 2012. Accordingly, the locomotives tender *could not* have been considered by a PRASA BAC. Significantly, the minutes of the CTPC meeting are not signed (or dated), nor is the BAC Report signed, notwithstanding that there is a space in the respective documents for the Chairperson to sign. (According to the annexed documents, Mr Holele was chairperson of the CTPC and he was also chairperson of the BAC.) Ms Ngoye and Mr Holele also noted that there would also have been recordings of the meetings, duly signed attendance registers and duly signed minutes but these were not included in any of the papers.

1900. Ms Ngoye and Mr Holele said that the matters they pointed out as set out above are evidence of fraudulent and corrupt conduct that was associated with the locomotives contract. They in effect suggested that the minutes (of the CTPC) and the Report (of the BAC) were forged.

1901. Soon after Ms Ngoye and Mr Holele had testified, PRASA decided to institute disciplinary proceedings against them. Some of the charges they were facing included that they participated in the locomotives tender and awarded it to Swifambo, despite the shortcomings in its bid. In affidavits furnished to the Commission, Ms Ngoye and Mr Holele complained that they were being victimised by PRASA because they had testified in the Commission. However, the Chairperson of PRASA's new Board, Mr

Leonard Ramatlakane, disputed that in an affidavit that he submitted to the Commission. This led to further affidavits from Ms Ngoye and Mr Holele and further responding affidavits with accompanying documents from Mr Ramatlakane. The affidavits referred to herein deal with a number of issues. However, for the purposes of this Report, and to ensure that the focus remains on alleged irregularities in the locomotives tendering process, it will suffice to place on record the essence of what is said in the affidavits about the alleged participation of Ms Ngoye and Mr Holele in the consideration of the locomotives tender.

1902. In his affidavits to the Commission, Mr Ramatlakane denied that the institution of disciplinary proceedings against Ms Ngoye and Mr Holele was in any way related to their giving evidence at the Commission. In support of that denial, he said that his Board was concerned about several issues that had arisen at PRASA, among which were the following: there had not been consequences for management and compliance failures at PRASA; there was inadequate record keeping, and in some instances no records at all; and an increase in irregular expenditure. As a result, he said, his Board had undertaken various investigations to get to the root cause of the concerns. Among the matters that it investigated was the role of different PRASA employees in the award of the locomotives tender to Swifambo, including the roles of Ms Ngoye and Mr Holele.

1903. On the issue of the involvement of Ms Ngoye and Mr Holele, the essential dispute between Mr Ramatlakane, on the one hand, and Ms Ngoye and Mr Holele, on the other may be summarised as follows. Mr Ramatlakane said that the evidence that is now at the disposal of his Board confirms that Ms Ngoye and Mr Holele attended the CTPC meeting of 11 July 2012. In support of that allegation, he relied on an affidavit by Mr Sydney Khuzwayo, who was the temporary secretary of the CTPC/BAC during 2012. In his affidavit, which was also submitted to the Commission, Mr Khuzwayo said he was a member of the CTPC that met on 11 July 2012. He said he had made handwritten

notes of what had transpired at the meeting and annexed a copy of those notes to his affidavit. According to his notes, the eight persons who, according to the unsigned minutes of the CTPC annexed to Mr Molefe's affidavit, attended the meeting were in fact present. Mr Khuzwayo also said that Ms Ngoye and Mr Holele had signed the declaration of interest forms on 11 July 2012 and annexed those to his affidavit.

1904. There is one further matter that arises from Mr Ramatlakane's affidavit. It concerns a formal transcript of a tape recording of a meeting of the CTPC that was allegedly held on 19 July 2012 and at which the locomotives tender was again discussed. According to the transcript, the following persons were present at this meeting: Mr Mbatha, Mr Holele, Mr Khuzwayo, Mr Mathobela and Ms Shezi. Insofar as the transcript is concerned, the following needs to be stressed: this is the first and only indication that there was a further meeting of the CTPC after 11 July 2012 at which the locomotives tender was considered.

1905. From what is recorded to have been said at the meeting, it is difficult to piece together precisely why it was called and what the final outcome was, as there appears to be no formal resolution that was adopted. However, it would appear that, after Mr Mbatha had conveyed the resolution of 11 July 2012 to someone senior at PRASA, he was urged to ask the CTPC to modify, to some extent, the resolution it had adopted on 11 July 2012. It appears from the transcript that that is what was done at the meeting of 19 July 2012. However, there is no written record of the resolution adopted at the meeting of 19 July 2012.

1906. In their responses to the foregoing allegations, Ms Ngoye again denied that she was present at the CTPC meeting of 11 July 2012. She challenged the correctness of what was recorded in Mr Khuzwayo's notes about the meeting. Mr Holele reiterated his denial

that he was present at the CTPC meeting of 11 July 2012. He also appears to deny being present at the CTPC meeting of 19 July.

1907. It is regrettable that new evidence relating to the meeting of the CTPC was received only as late as it was and after Ms Ngoye and Mr Holele had testified that they had not attended the meeting. None of the evidence relating to the CTPC meetings of 11 or 19 July 2012 has been tested by questioning: though Ms Ngoye and Mr Holele gave oral evidence and they were questioned, they were not questioned about the matters raised in Ramatlakane's affidavit. Moreover, whilst the new evidence from PRASA appears to be supported by documents, such as the contemporaneous notes of Mr Khuzwayo and the transcript of the CTPC meeting of 19 July 2012, it is still only contained in affidavits and the deponents thereto have not been questioned.

1908. In the light of the foregoing, it is not possible to make a firm decision on whether or not Ms Ngoye and Mr Holele attended the meeting of the CTPC on 11 July 2012 and whether Mr Holele attended the CTPC meeting of 19 July 2012. Nevertheless, it must be accepted that the new evidence presented appears to cast doubt on their version that they were not part of the process that recommended that Swifambo be the preferred bidder for the locomotives contract. However, it may well be that cross-examination of Mr Khuzwayo and a proper investigation of the new evidence would reveal that all this new evidence is a fabrication. One simply does not know. It could be that they did attend the meetings. If, indeed, they did attend those meetings that would be very inconsistent with the way that, particularly Ms Ngoye, has put up a fight against corruption at PRASA on other occasions.

1909. Be that as it may, the new evidence considered in the paragraphs above reinforces the contentions set out in Mr Molefe's affidavits in the Swifambo review application that the procurement process followed by PRASA to acquire the locomotives was seriously

flawed and its integrity was gravely compromised. Certainly, the new evidence confirms that not much reliance can be placed on the documents that was relied upon by PRASA's then Board in approving the recommendation that Swifambo be approved as the preferred bidder. In addition, the transcript suggests that on 19 July 2012 the CTPC re-visited the decision that it had taken on 11 July 2012 – after being urged to do so by someone senior.

1910. In the light of the foregoing, it is clear that all those who were involved in the procurement process for the acquisition of the locomotives should be made to account for their actions. This is an issue that is considered again later in this Report.

1911. This provides a useful point of departure from which to consider the other mega-tender that, on the initiative of the Molefe Board was reviewed and set aside by the High Court.

Background to review application

1912. The more important developments that culminated in the launch of the review applications may be summarised as follows.

1912.1. **First**, in 2009, in preparation of the Confederation Cup of 2009, as a "pilot project", two railway stations were to be developed by a subsidiary of PRASA, Intersite;¹³⁴⁸ those at Nasrec and at Doornfontein. Intersite awarded to a company called Enzo the contract to upgrade Nasrec and to a company called Rainbow the contract to upgrade the Doornfontein station. These companies appointed Siyangena as a sub-contractor to instal speed gates. That process

¹³⁴⁸ Intersite was responsible for real estate management, facilities management and development of PRASA's property portfolio.

was run by the consultants who had been appointed for these construction projects. There were no complaints about the process.

1912.2. **Second**, for the World Cup preparations in 2010, Siyangena's "contract" was extended to an additional five stations. Ms Ngoye testified that there were several fundamental problems with this "extension". Primarily, Ms Ngoye said that no procurement process preceded the "extension", although a procurement process should have preceded it. In addition, Siyangena had not been a contractor on the Nasrec and Doornfontein stations: it had only been a sub-contractor to the entities which had been appointed as the contractors. Accordingly, there was no legal basis for an "extension" of Siyangena's contract when the contract of the main contractor had not been extended.

1912.3. Ms Ngoye also stated that, in addition to being unlawful for non-compliance with section 217 of the Constitution, what took place prior to the extension was improper and irregular. In this regard, she stated that in a report that Mr Gantsho sent to Mr Montana on 22 February 2010, the following was said:

1912.3.1. the gates being offered were not suitable; an associated company of Siyangena, ESS, was asked for a quotation, but their gates were "very expensive";

1912.3.2. the extension had not been budgeted for;

1912.3.3. however, following a telephone call with Mr Montana in which Mr Montana advised him to contract with Siyangena, Mr Gantsho requested that Mr Montana approve the "extension" of the Confed Cup contracts to seven further stations;

- 1912.3.4. PRASA had no funds for the project, but the engagement of Siyangena should nevertheless proceed.
- 1912.4. Ms Ngoye said that Mr Montana appeared to have approved the request, subject to engagement with the Finance Department on the availability of the funds. Siyangena submitted a written proposal. However, Mr Piet Sebola, the Senior Manager: Projects raised several concerns about the process followed and the proposal. Instead of addressing the issues that were raised, it was decided that the project would not proceed under PRASA, but would be implemented by Intersite, meaning Mr Sebola would no longer be involved. Thereafter, Mr Sindane requested the approval of the "extension". This was refused on the basis that it was the approval of Intersite's Board that was required. Ms Ngoye states that there is no record that Intersite's Board gave its approval. Despite this, Siyangena was appointed to install access gates at the train stations close to these stadia. Ms Ngoye went on to say that it was Mr Gantsho who championed Siyangena's cause and that Mr Montana gave his approval.
- 1912.5. **Third**, as regards Phase 1 of the project Ms Ngoye said the following. PRASA's Chief Procurement Officer ("CPO"), Mr Chris Mbatha, decided that eight companies be invited to a briefing session. It however emerged that the selected invitees had not been given copies of the RFPs. Nevertheless, the Bid Evaluation Committee ("BEC") sat for two days in December 2010. It awarded Siyangena the highest points, although another bidder Protea Coin, had quoted a lower price. However, Mr Montana decided that PRASA would not proceed with the transaction. However, Mr Gantsho assured "the team" not to relent and requested clarity on the reasons for Mr Montana's decision.

1912.6. **Fourth**, the matter suddenly came back to life on the eve of a sitting of the Corporate Tender and Procurement Committee (CTPC) of 14 February 2011.¹³⁴⁹ There, according to a submission made to the CTPC it was a contest between two companies, Siyangena and Protea Coin; but Protea Coin had failed because it had not provided a “funding model” that it was required to have provided. The submission requested the CTPC to recommend to the FCIP the appointment of Siyangena for a project called ISAMS¹³⁵⁰ for a tendered amount of R1,1 billion and for a period of five months. Having deliberated on the submission, the BAC decided not to recommend the award to Siyangena. However, PRASA documents show a document with a signature that purports to be that of the BAC's then Chairperson, Ms Tara Ngubane, on minutes of the BAC that records a decision recommending the award to Siyangena for an amount of R1,1 billion.

1912.7. **Fifth**, on 17 February 2011, just three days after the BAC meeting, the matter came before the Board's Finance, Capital Investment and Procurement (FCIP) Committee, which was requested to recommend to the Board the appointment of Siyangena for the ISAMS project for an amount of R1,9 billion. According to the minutes of this meeting that were found, the FCIP recommended to the Board the award of this contract to Siyangena at a sum of R1,9 billion. There is no indication in the minutes that the views of the CTPC were shared with the FCIP or how the FCIP would have found its way clear to recommending this award.

¹³⁴⁹ It perhaps bears reiterating that as at that time the committee to which the BEC sent its recommendation was the CTPC, which, as already noted during the discussion of the Swifambo tender above, was “transferred into” and became known as the Bid Adjudication Committee (BAC).

¹³⁵⁰ Integrated Security and Access Management System.

- 1912.8. **Sixth**, what was also strange was that one of the items on the agenda of the meeting related to PRASA's Medium-Term Expenditure Framework ("MTEF") budget. According to the MTEF budget that was recommended by the FCIP Committee at the meeting, the project had been allocated R317 million over the period of the MTEF. Despite this, the FCIP Committee recommended the award of a contract for R1,9 billion over a period of 18 months, which was half of the MTEF period.
- 1912.9. **Seventh**, the Board approved the recommendation of the FCIP but did not indicate the contract amount. The Board mandated management to negotiate with Siyangena. As the CPO, Mr Mbatha initiated discussions with Siyangena.
- 1912.10. **Eighth**, according to Ms Ngoye, the irregularities in the award of the nearly R2 billion contract with Siyangena, may be summarized as follows: there was no open tender process and no request to deviate from the normal open tender process was made; there was no RFP and no evaluation criteria: bidders were asked to make a "shot in the dark" and hope that PRASA would be happy with it; for example, although Protea Coin's tendered contract price was R1,3 billion, which was much cheaper than Siyangena's one, it lost because it did not have a "funding model"; the minutes of the CTPC and of the Board were forged; if the minutes of the FCIP recommending the award and the tendered amount are true, they are self-contradictory: they approve one amount on the MTEF budget and another one for the contract amount.
1913. Ms Ngoye stated in her affidavit that, after the conclusion of the R1,9 billion contract, PRASA and Siyangena concluded further contracts, being the extension of Phase 1 and, thereafter, Phase 2. They are considered hereunder.

PRASA'S REVIEW APPLICATION IN RESPECT OF SIYANGENA

1914. Ms Martha Ngoye deposed to the founding affidavit in the application that PRASA instituted in the High Court to have certain contracts that PRASA had concluded with Siyangena Technologies (Pty) Ltd ("Siyangena") reviewed and set aside. That application was instituted on 5 March 2018.

1915. In respect of the awards of tenders to Siyangena and the contracts that PRASA concluded with Siyangena, Ms Ngoye was not able to give a complete picture of what precisely had happened or what decisions were taken. According to her, there was a number of reasons for this. Various versions of documents and what supposedly transpired at meetings existed. In addition, PRASA had immense difficulties in getting people within PRASA to assist in piecing together what had happened. Obtaining information from within PRASA proved to be very difficult. A number of persons actively impeded the investigations by removing hard copies of documents from PRASA's premises and deleting electronic copies from their computers. Moreover, Mr Othusitse Mogolelwa, one of PRASA's IT Specialists was found to have deliberately deleted information from Mr Montana's computer on the instruction of Mr Montana. Following an arbitration, he was dismissed.

1916. However, for the purposes of her evidence to the Commission, Ms Ngoye prepared a further affidavit which she deposed to on 15 March 2020. In that affidavit, Ms Ngoye summarised the evidence she had given in her affidavit in support of PRASA's review application. In her evidence, in addition to dealing with the evidence in support of the review application, she also responded to evidence given in Siyangena's answering affidavit in the review application. What she said in evidence may be summarised as follows.

1917. The review application that was considered by the High Court was the second application by PRASA to have certain contracts that it had concluded with Siyangena reviewed and set aside. The first review application was dismissed on a procedural point: PRASA had not complied with the 180-day period presented by the Promotion of Administrative Justice Act¹³⁵¹ (PAJA) for the institution of a review application. However, following a decision by the Constitutional Court that an application brought by an organ of state to review and set aside its own decision is based on the legality principle, as opposed to a review under PAJA, PRASA instituted a new application, in March 2018, in which it sought the same or similar relief as it had sought in the application that had been dismissed.

1918. In both review applications, PRASA applied for various contracts between it and Siyangena, and extensions and amendments thereto, to be reviewed and set aside. In brief, the bases on which PRASA applied for the review and setting aside of the contracts were that they were concluded without the requisite authority, and/or in breach of s 217 of the Constitution, the Preferential Procurement Policy Framework Act¹³⁵² (PPPPFA) and PRASA's SCM policies and procedures. In addition, it was pointed out that there were property dealings between an attorney associated with Siyangena and two PRASA officials, one of whom was Mr Montana himself. The implication was that the award of some of the contracts to Siyangena may have been influenced by the property dealings.

1919. In its answering papers, the general bases on which Siyangena opposed the review application may be summarised as follows: the bulk of PRASA's founding affidavit consisted of inadmissible hearsay evidence and inadmissible documentary evidence; the institution of the review application was unauthorized and PRASA had unduly

¹³⁵¹ No 3 of 2000

¹³⁵² No 5 of 2000

delayed in prosecuting it. Siyangena also contended that even if it were to be found that the review application should succeed, Siyangena ought not to be deprived of what was due to it under the contracts, because Siyangena was not a party to nor involved in what transpired within PRASA in relation to the tender processes. Siyangena also noted that, notwithstanding that charges had been laid against those in and outside of PRASA who were allegedly involved in corruption, at the core of the attack on the contracts was a power-play between Mr Molefe and Mr Montana.

1920. It is not without significance that in its answering papers, Siyangena relied in part on what it had been told by two former PRASA employees: by Mr Luyanda Gantsho, who was the other employee involved in a property deal with an attorney who had acted for Siyangena, and by Mr Jabu Sindane.

Extension of Phase 1 and Phase 2

1921. Phase 1 was followed by an extension of Phase 1. In the extension, 12 stations were selected under the guise of filling gaps in the corridors of the 69 stations that were part of the Phase 1 tender. However, all that happened in this extension was that Siyangena was requested to install the ISAMS on 12 stations for an amount of R350 million. Siyangena agreed to do so. The patent irregularity with the request and Siyangena's agreeing to comply was that there simply was no procurement process that preceded this "extension" and there should have been a procurement process.

1922. This irregular extension was followed by what was referred to as Phase 2. This Phase had a number of stops and starts. However, it is not necessary to refer to all of them, save for one that goes to the heart of the irregularity of this award.

1923. In her affidavit and evidence, Ms Ngoye pointed out that for a change there was an RFP before a contract was concluded. However, instead of requiring functionality, the RFP

required that the parties be accredited to procure and install certain branded equipment. One or two of the parties which submitted a tender complained that this made the requirement restrictive. In her affidavit, Ms Ngoye pointed out that PRASA's SCM Policy discourages the use of branded products in RFPs and prefers the requirement for functionality. It was difficult to understand why PRASA had to use branded products in the RFP. Not surprisingly, given that the specifications were tailor-made for Siyangena, Siyangena was awarded the contract.

1924. Thereafter, there was an addendum to the contract. What was strange about the addendum was that it made its appearance in the midst of an urgent interdict application that Siyangena had launched after PRASA had instructed it to stop working. No PRASA employee knew, or was aware, of the "addendum". However, Siyangena produced it as part of its interdict papers. The "addendum" purported to engage Siyangena to replace some equipment with newer versions and to maintain equipment installed under the Phase 1 contract for a period of three years. It was signed by Mr Montana on behalf of PRASA.

1925. Considering the amounts it obliged PRASA to pay, it was a strange document: it consisted of only five pages and did not include a service level agreement regulating Siyangena's maintenance obligations. It required PRASA to pay Siyangena some R10 million a month.

1926. The obvious irregularity about the addendum was that no procurement process was followed before Siyangena was appointed to undertake the services and replace the old equipment.

1927. As regards all the contracts dealt with above, in addition to setting out the irregularities noted above, Ms Ngoye stressed the following. PRASA was simply not authorised to proceed with works contemplated in Phase 1 and Phase 2 and the addendum. This was

because the transactions had not been budgeted for and no approval had been obtained from the Minister of Transport.

1928. A Full Bench of the High Court reviewed set aside the contracts on account of the irregularities identified by PRASA and also on account of the property dealings referred to earlier that involved Mr Van der Walt, on the one hand, and, Mr Gantsho or Mr Montana, on the other.

1929. Ms Ngoye said in her affidavit that a disciplinary hearing was held into Mr Gantsho's conduct and Mr Gantsho was dismissed by PRASA.

1930. Ms Ngoye said that PRASA has reported the irregularities relating to the Siyangena contracts and allegations regarding the property dealings to the DPCI. To the extent that this investigation has moved, it has moved at a snail's pace. Among the allegations are that Siyangena paid some R550 million to a company called Hail Way Trading, which shares a registered address with Royal Security and in which Mr Roy Moodley is a director. In addition, criminal charges in respect of the above matters were laid at the Brooklyn Police Station. However, despite a lapse of more than five years, not much appears to have been done.

1931. Mr Montana filed an "intervening witness statement" in the review application. In this affidavit, he noted an earlier order of the Full Bench that said that he had a right to respond to the allegations made in PRASA's papers, as he had been accused of wrongdoing and had a right to put his version before the Court. The thrust of what he stated in that affidavit may be summarised as set out hereunder.

1931.1. **First**, he noted that three investigations formed the bases of PRASA's allegations in the Siyangena review application. One was by the Public Protector whose findings on about half the matters that were referred to her are

set out in her Report titled "Derailed". Then there were investigations by the National Treasury, which had not been completed. He had seen draft reports that had been compiled but had not been given an opportunity to respond to them. In any case, he said that these reports did not make any finding of fraud or corruption. The third investigation was conducted by Werksmans. He said that he did not "recognise" this investigation because of, among other things, the following: Werksmans had been irregularly appointed; it had utilised "illegal measures" against him; its investigation was a "witch-hunt" against him; and it and PRASA claim that "irregular appointments automatically translate into corruption".

1931.2. **Second**, the two contracts awarded to Siyangena in 2011 and 2014 went through a competitive bidding process and were awarded by the Board and not by him, as the amounts involved were beyond his delegated authority [of R100 million]. Despite this, the Board members were not joined as parties to the review application. He denied receiving any gratification, alleging that reports to that effect were made by a journalist who linked him to Mr Van der Walt. Mr Montana said that Mr Van der Walt was not an employee or director of Siyangena, had not done work for PRASA and had not been involved with the Siyangena tenders in question.

1931.3. **Third**, Mr Montana said that the review application was part of a "political vendetta" in which organs of state are used to further personal political interests. He accused Mr Molefe of a range of illegal or improper conduct, including "laundering" money from PRASA for his personal benefit, being conflicted, unduly and unlawfully favouring a service provider, SA Fence and Gate, at huge cost to PRASA; as a director claiming remuneration not due to him, which he was instructed to pay back; and irregularly using a PRASA motor

vehicle for personal purposes. However, these matters were not investigated by Werksmans.

1931.4. **Fourth**, Mr Montana also said that Ms Ngoye, made the affidavits in the second Siyangena review application, was bitter because he had removed her as the CEO of Intersite and she had a personal vendetta against him. He said that she had also irregularly approved a large payment to SA Fence and Gate without Board approval in circumstances where she did not have authority to approve and needed the approval of the Board.

1931.5. **Fifth**, Mr Montana challenged the merits of PRASA's application for the review and setting aside of the contracts on, among others, the following bases:

1931.5.1. the allegation that the requisite needs assessments had not been undertaken was false; in fact, a business case had been developed for the ISAMS project;

1931.5.2. Mr Montana said that the documentary search tool used by Ms Ngoye was selective and supported her "narrative";

1931.5.3. he also said that the specifications that were mooted by Ms Ngoye had not been approved by PRASA; as demonstrated by an examination of the background and "true facts", it was not correct that PRASA needed to obtain approval from the Minister of Transport for the ISAMS programme, as it did not constitute the acquisition of a significant asset;

1931.5.4. Mr Montana disputed Ms Ngoye's evidence that the Group CEO was "intimately" involved in the procurement process;

1931.5.5. he also disputed her evidence that the appointment of Siyangena was at R1,1 billion and that this was changed to R1,9 billion, stating that the sum of R1,1 billion was for the capital amount only for the supply and installation of the speed gates, while the R1,9 billion also included rates of exchange, warranties and maintenance;

1931.5.6. he said that PRASA's SCM policy provided for deviations from competitive bidding where there was a proper motivation.

1932. As was pointed out earlier, among the bases on which the Full Bench reviewed and set aside the Siyangena contracts were the property dealings between Mr Van der Walt and Mr Montana. The Commission itself conducted an investigation into property transactions in which Mr Van der Walt and Mr Montana were involved. To that end, its lead investigator in respect of PRASA matters, Mr Clint Oellermann, compiled a report ("the Oellermann Report"). That report was based mainly on documents and statements that the Commission was able to gather. The Report is considered in the next section of this Report.

The Oellermann Report

1933. The backdrop against which the property transactions between Mr Montana and Mr Van der Walt took place is of significance, when considering the evidence that Ms Ngoye gave in respect of PRASA's awards of contracts to Siyangena and the prism through which to view the propriety of Mr Montana's role in the awards of those contracts.

1934. Based on what was said in Ms Ngoye's affidavit, the Oellermann Report states that the following matters deserve highlighting. In June 2014, PRASA appointed Siyangena to execute the ISAMS Phase 2 Project. Some three months later, the parties agreed, in

an addendum, that Siyangena would provide further services to PRASA – at a cost of an additional R800 million. Mr Montana signed the addendum on 30 September 2014.

1935. Around this time, that is between August 2014 and October 2014, Mr Montana was involved in arrangements for the purchase of three properties for a total of more than R36 million.

1936. The Commission investigated four property transactions in which Mr Montana was involved or showed an interest. One of them was a property he sold to Precise Trade and Invest 02 (Pty) Ltd (“Precise Trade”), one was a property that was transferred to him and the other two were properties in which he had shown an interest in purchasing but which were eventually sold to and transferred into the name of Precise Trade.

1937. The purchases were funded through arrangements made by Mr Adrian van der Walt, an attorney who has acknowledged that he has acted for Siyangena and other companies with which Mr Mario Ferreira is associated. Mr Van der Walt, who apparently now resides in Texas, in the United States, was the sole director of Precise Trade. In addition, only a few months earlier, in May 2014, Precise Trade bought a house from Mr Montana. The agreed purchase price was R6,8 million, which appeared to be some R3 million more than the house was probably valued.

1938. The inferences that Mr Oellermann drew from an analysis of the four property transactions may be summarised as follows. Mr Montana was central to each of the purchases, but attempts were made to conceal his link, even in respect of the one property that was eventually transferred into his name. Despite this, and the fact that all the properties were fully paid for, on the documents that Mr Oellermann has been able to get his hands on, Mr Montana himself appeared not to have paid even a cent towards the purchases.

1939. Most of the finance for the purchases was made available by Mr Van der Walt, through an Investec Bank account in the name of Precise Trade. In a letter to his erstwhile co-directors, Mr Van der Walt suggested that quite large amounts of money flowed into Precise Trade's account from "TMM" [TMM Holdings (Pty) Ltd ("TMM")], an entity linked to Mr Ferreira. In an affidavit in response to the Oellermann Report, however, Siyangena denied that it had made any payments to Precise Trade. Documents also indicate that TMM, together with Mr Ferreira, had entered into a joint venture with Mr Van der Walt. As part of the overall background, Mr Oellermann noted the following. Mr Montana left PRASA on 15 July 2015 only some nine months after signing the addendum. Significantly, soon after PRASA's new Board of Control was appointed on 1 August 2014, according to Mr Molefe, who was appointed the Board's Chairperson, Mr Montana told him that he did not intend to renew his contract when it expired at the end of March 2015.

1940. In his Report, Mr Oellermann said that these matters called for a frank, candid and cogent explanation about the four transactions, principally from Mr Montana, Mr Van der Walt and Mr Ferreira, who played a principal role in securing the addendum that in September 2014 led to the extension of Siyangena's contract with PRASA. None has been forthcoming. When he testified, Mr Montana did not volunteer any explanation save to say that he and Mr Van der Walt had a business relationship.

1941. While Mr Van der Walt is no longer in the country, one of the fellow directors of his law firm, Loubser van der Walt Inc, Mr Nicholas Loubser, provided the Commission's investigators with several documents relating to the property transactions. That was in compliance with a summons issued to him. Mr Loubser also gave oral evidence at the Commission. Among the documents that were provided to the investigators was the transactional history of Precise Trade's Investec bank account. It is from this account that many of the payments relating to the property transactions were made. It is also

the account into which Mr Van der Walt deposited monies which had been deposited into other accounts by Mr Ferreira's entities. In addition, in two letters to his partners, Mr Van der Walt identified Mr Ferreira's entities as being the main source of the money that was paid to settle the purchase price and other expenses associated with the purchase of the three properties and the property that Precise Trade bought from Mr Montana.

1942. In addition to the documents that Mr Loubser made available to the Commission, its investigators have come into possession of several documents connected to the transactions. Among them are the following: deeds of transfer, offers to purchase and communications preceding the conclusion of the contracts and subsequently about their implementation. The Commission obtained affidavits made by an estate agent, an owner and a conveyancing attorney. The relevant documents concerning each transaction were annexed to the Oellermann Report.

1943. In setting out the background facts that are relevant to his Report, Mr Oellermann noted that the history of PRASA's contractual relations with Siyangena is set out in the affidavit of Ms Ngoye that was considered in the previous section of this Report.

1944. It will be recalled that a matter of significance that Ms Ngoye raised was that PRASA only became aware of the addendum when Siyangena annexed it to its interdict papers. The addendum was signed by Siyangena on 19 September 2014 and by Mr Montana, on behalf of PRASA, on 30 September 2014. The cost to PRASA was nearly R800 million. In the review papers, Ms Ngoye raised concerns about the validity of the addendum. The Report notes that the addendum was concluded soon before, during and soon after the period that Mr Montana was taking steps that led to the purchase of the three properties (in Waterkloof, Sandhurst and Hurlingham), the first two by Precise Trade and the last by Mr Montana.

1945. It is against the foregoing as the backdrop that it is convenient now to consider details relating to the sale of the one property and the purchase of the other three.

1946. It perhaps needs to be stressed that it was not suggested in any evidence or papers before the Commission that *Mr Montana had purchased properties to the value of some R36 million*. Rather, the evidence was that he was involved, either personally or through his Trust, in interactions that led to the purchase of three properties valued at R36 million and that one of those properties was in fact registered in his name.

1947. The property transactions with which Mr Montana was involved were as follows:

1947.1. **First**, Precise Trade bought from Mr Montana a house that he owned in Parkwood, Johannesburg, for R6,8 million. The price was R3,3 million more than Mr Montana's own banker had valued it only 20 months earlier.

1947.2. **Second**, after Mr Montana had expressed interest in a house in Waterkloof, Pretoria, it was eventually sold to Precise Trade for R11 million, but when she moved out the previous owner handed over the keys to Mr Montana.

1947.3. **Third**, after Mr Montana's Trust had made an offer to buy a house in Sandhurst, Johannesburg, Precise Trade bought it for R13,9 million.

1947.4. **Fourth**, Mr Montana bought a house in Hurlingham for R11,5 million.

1948. The above transactions had been widely reported in the media long before the Commission began its investigations. However, the details of the transactions and how payments were made only became known as a result of the Commission's investigations. As regards payments for these properties, the evidence presented at the Commission was based to a large extent on the transactional history of Precise Trade's

Investec bank account and what Mr Van der Walt said in the two letters to his partners which have been referred to above.

1949. With regard to the transactions relating to the properties in which Mr Montana or his family trust was involved, the facts were based on documents which Mr Montana did not dispute when he gave evidence on these matters. The relevant facts in respect of each property may be summarised as follows.

The Parkwood property

1950. **First**, Mr Montana bought the Parkwood Property [Erf No 359, Parkwood: 10 Newport Street] on or about 4 July 2008 for R1,85 million. In August 2012, Mr Montana's private banker (from Absa Private Bank) valued the property at some R3,5 million. On 5 May 2014, Precise Trade, represented by Mr Van der Walt, offered to purchase the property from Mr Montana for R6,8 million, an offer Mr Montana accepted on the same day. Transfer was effected on 20 February 2015. Mr Montana made a profit of nearly R5 million [R4,95 million] on the property.

1951. **Second**, as regards payment, the agreement provided for a deposit of R2,5 million (which could be paid in respect of the transfer of the house at which Mr Montana resided) to be paid to Loubser van der Walt Inc by about 4 June 2014 and the balance of the purchase price to be paid into Loubser van der Walt Inc's trust account by about 3 August 2014.

1952. **Third**, payments towards the purchase price were made, but not in accordance with the agreement. Among the deviations were the following: the money was not paid into Loubser van der Walt Inc's account; and a "deposit" of R2,25 million, not R2,5 million, was made but on 18 June 2014, not 4 June 2014. Moreover, periodic payments were made from June 2014 to February 2015. In other words, payment of the purchase price

was not made by 3 August 2014, as required by the agreement. Based on the entries in Precise Trade's Investec account, from which all the payments were made, Mr Montana was paid R439 200 less. When questioned about this when he gave evidence at the Commission, the thrust of Mr Montana's explanation was that Mr Van der Walt may have paid the money from a different account and not from Precise Trade's Investec account.

1953. **Fourth**, the following matters are not without significance. The first deposits into the Investec account, being in the amounts of R1,85 million and R4 million, were, according to Mr Van der Walt's written note on the transaction account and in his letters to his partners, were made by TMM – and reflected in the account on 18 June 2014. That is the day on which payment of the “deposit” of R2,25 million was made – from the Investec account. The next three payments to Mr Montana from the account, totalling R860 800, were made from the amounts that had been deposited on 18 June 2014.

1954. **Fifth**, some six weeks after the agreement of sale was concluded, Mr Montana signed an addendum which imposed on him quite onerous obligations to effect – at his cost – specified improvements and/or alterations to the property that he had just sold. The addendum recorded the following: A friend of Mr Montana was residing at the Parkwood Property, but Mr Montana undertook to give Precise Trade vacant possession within 30 days of registration, if Precise Trade and Mr Montana's friend were unable to conclude a lease agreement for at least R20 000 a month. Mr Montana's friend continued occupying the property after transfer was effected on 20 February 2015, but no payment of rental by the friend is reflected in Precise Trade's bank statement. In addition, the addendum stipulated that it was Mr Montana who had to bear the costs of the alterations. Surprisingly, Mr Montana had improvements effected to the bedroom even though the addendum did not require this.

1955. **Sixth**, what is also surprising is that Mr Montana sent the invoices for the improvements and alterations to Mr Van der Walt to foot the bill, telling him at one stage that he was “under pressure to pay the contractor for additional work”. The amounts that Mr Montana required Mr Van der Walt to pay were not trifling: they totalled more than R1 million. Asked to explain these matters, Mr Montana said that there was a special and dynamic relationship between him and Mr Van der Walt and they had not “strictly aligned” the payments with the agreement. But he did not have a problem with this as he and Mr Van der Walt were working together on many properties... and there were many transactions beyond what “we have here”.

1956. In response to the Oellermann Report, Siyangena said in an affidavit in support of an application to cross-examine Mr Oellermann that it had not made any payments to Precise Trade. Significantly, it did not dispute that it had made payments to other entities and that, if what Mr Van der Walt had told his partners and had recorded in handwriting on the bank account was correct, its payments to those other entities appear to have found their way into Precise Trade’s Investec account. It would appear that in noting the source of those funds, Mr Van der Walt was referring to the ultimate source of those monies. (It should be noted that after evidence in respect of the Commission’s investigations into PRASA was led, the Commission received further documents. These would be made available to state entities who may follow up on the Commission’s investigations into the property transactions.)

The Waterkloof property

1957. The facts relating to the Waterkloof Property, which is Remaining Extent of Erf 587, Waterkloof Township, Pretoria, with street address 225 Rose Avenue, Waterkloof, may be summarised as follows.

- 1957.1. **First**, on 25 August 2014, the Aanmani Guest House CC ("the CC"), represented by Ms Karen de Beer, and Mr Johan Smith, in his capacity as Trustee of the Minor Property Trust, a trust the beneficiaries of which were Mr Montana's children, entered into an agreement in terms of which the CC was to sell the Waterkloof Property to Mr Smith for R11 million. The purchase price was to be paid as follows: a non-refundable deposit of R3,5 million payable within 14 days; and the purchaser to render approved guarantees within 60 days as security for the balance of R7,5 million.
- 1957.2. **Second**, the R3,5 million deposit was paid from Precise Trade's Investec account on 23 September 2014 and was reflected thereon as "minor property trust loan". The entry just before that on the copy of the transactional account reflects, seemingly in Mr Van der Walt's handwriting, that TMM had paid that same amount into Precise Trade's account on the same day. Interestingly, according to Mr Van der Walt's second letter, the balance of R7,5 million was paid directly to the transferring attorneys from TMM with regard to the loan account. Thereafter, on 25 February 2015, Precise Trade paid R1 105 084, 92 to the transferring attorneys in respect of the costs of the transfer. Not coincidentally, it would appear, the entry prior to that entry on Precise Trade's account reflects a deposit of that exact same amount on the same day. The handwritten note reflects that payment was made by TMM.
- 1957.3. **Third**, payments made from Precise Trade's Investec account in respect of the Waterkloof Property appear to be consistent with the agreement between the CC and Mr Smith, in his capacity as trustee of the Minor Property Trust. However, on or about 20 February 2015, a new agreement in respect of the purchase of the Waterkloof Property was concluded.

1957.4. The most important difference between the two agreements is that in the new agreement Precise Trade was reflected as the purchaser, in the stead of Mr Smith, the trustee. There were other changes. Among the more significant are that, as regards payment, the new agreement reflected the following: the deposit of R3,5 million had already been paid; a further amount of R1,5 million had been paid to the seller; and the “balance of the purchase price of R6,5 million”¹³⁵³ had been paid into the transferring attorney’s trust account. The new agreement also reflected that occupation had been given to the purchaser on 1 December 2014 and that the purchaser would be responsible for occupational rental of R50 000 a month until registration. The *domicilium* of the purchaser was changed from that of Mr Smith to that of the Loubser van der Walt Inc. The property was transferred to Precise Trade on 8 April 2015.

1957.5. **Fourth**, notwithstanding that what is set out above suggests that Mr Montana himself had not played any role in the transaction, according to an affidavit and evidence given at the Commission by the sole member of the CC, Ms Karen de Beer, Mr Montana indeed played a key role, which is considered in the paragraphs hereunder.

1957.6. **Fifth**, according to Ms De Beer, Mr Montana’s role in this transaction may be summarised as follows. On 10 February 2013 she and Mr Montana concluded a deed of sale in terms of which she sold to Mr Montana her member’s interest in the CC for R10,5 million but the deal fell through. (For convenience, this will be referred to as “the earlier agreement”.) When Ms De Beer put the property on the market again in August 2014, Mr Montana again indicated an interest in the property but Ms De Beer would not entertain an offer from him, unless he

¹³⁵³ It perhaps should be noted that, if a deposit of R3,5 million and a further amount of R1,5 million had been paid, the balance ought to have been R6 million, not R6,5 million.

paid a substantial deposit. He agreed to pay a non-refundable deposit of R3,5 million. Whereas the earlier agreement had been concluded in the name of Mr Montana, this new agreement was in the name of Mr Smith. The new agreement is the agreement referred to above that was concluded on 25 August 2014. Mr Montana, however, later asked Ms De Beer to change the name of the purchaser from Johan Smith to Precise Trade. The balance of the R7,5 million was eventually paid by Mr Van der Walt, whom Ms De Beer described as "Montana's attorney", and the deal went through.

- 1957.7. **Sixth**, Ms De Beer said that she had first met Mr Montana in mid-November 2014, when he walked through the house as he wanted "to check some things". She then "moved out". On 26 November 2014, she handed the keys to the property to Mr Montana. The next day she sent an email to her neighbours telling them that "the new owner of [her] property was Lucky Montana". She was in no doubt that the CC had sold the property to Mr Montana and that the contracting entities were merely his alter ego.

The Sandhurst property

1958. The facts relating to the Sandhurst Property, which is Portion 18 of Erf 1, Sandhurst, with street address 119 Empire Place, Sandhurst, may be summarised as follows:

- 1958.1. **First**, Mr Montana signed an offer to purchase the property on or about 26 October 2014, after he had attended a show day. The price set out in the offer to purchase was R13,9 million. The seller, a Mr N G Kohler, accepted the offer on 28 October 2014. On 6 November 2014, Mr Van derWalt wrote to the estate agent, Mr Louis Green, saying that he held R5 million in "our trust account" towards the purchase price. He asked for the Offer to Purchase to be forwarded to him and what the amount of the deposit was. On 7 November 2014, Mr Green

sent a copy of a sale agreement and said the deposit payable was R3,9 million. Later that day, Mr Van der Walt wrote to Mr Green confirming that Precise Trade had paid R5 million into the estate agency's trust account with beneficiary reference being kohler/montana. An entry in a copy of Precise Trade's Investec account reflects that on 7 November 2014 an amount of R5 million was paid to the estate agency for 119 Empire Place and an entry on the previous day reflected a payment of a deposit of R5 million seemingly from an entity identified by Mr Van der Walt as "Pimental JV".

1958.2. **Second**, on 25 November 2014, just a month after Mr Montana had signed the offer to purchase the property, Mr Van der Walt wrote to Mr Green asking that *the "buyer" be changed from Mr Montana to Precise Trade*. A new offer to purchase was sent in the name of Precise Trade, which Mr Van der Walt signed on 26 November 2014 and returned to Mr Green. In the new offer, Mr Green noted in manuscript that a R5 million deposit had been received on 7 November 2014. On 6 March 2015 Precise Trade paid the balance of the purchase price.

1958.3. **Third**, although Precise Trade was reflected as the buyer on 26 November 2014, correspondence relating to the property was still sent to Mr Montana. For example: on 27 November 2014, the seller asked Mr Montana [whom he addressed as "Lucky"] if he was interested in taking occupation before transfer; thereafter, in response to a query to him by the seller about payment of the transfer costs, on 3 February 2015, Mr Montana emailed an apology for the delay and said Mr Van der Walt had undertaken to pay by the following day at the latest. Significantly, Precise Trade paid the transfer costs of R1 105 537,30 on the following day. On 6 March 2015 the balance of the purchase price, being R8,9 million, was paid by Precise Trade. Transfer of the property from Mr Kohler to Precise Trade was effected on that day.

1958.4. **Fourth**, even though ownership of the Sandhurst Property was transferred to Precise Trade on 6 March 2015, subsequent exchanges relating to the property show that Mr Montana was still intimately involved with the property. Among the exchanges that confirm this are the following: a request to Mr Montana on 12 March 2015 asking him to co-operate with the sellers in the transfer of the electricity account; and communications by Mr Green to the sellers indicating that he had spoken to Mr Montana about the electricity and other issues such as the pool cover; and Mr Green communicated with Mr Montana about the property as late as 23 June 2015.

1959. However, in between, on 10 May 2015 Mr Van der Walt suddenly asked Mr Green why he had copied Mr Montana on an email relating to the pool cover, saying: "You were well aware of the fact, and as I explained to you last year, before the property was even bought by my company, that Mr L Montana has nothing to do with Precise [Trade] or this property. Please refrain from this action in the future." Mr Green apologised. However, as indicated earlier, Mr Green continued communicating with Mr Montana about the Sandhurst Property.

The Hurlingham property

1960. The facts relating to the Hurlingham Property, which is the remaining extent of Erf 70, Hurlingham Township, with street address 12 Montrose Avenue, Hurlingham, may be summarised as follows:

1960.1. **First**, on 14 May 2015, Ms Merileon Gevisser, the owner of the Hurlingham Property, accepted an offer by Mr Montana to purchase the property for R13,5 million. The purchase price was payable as follows: a deposit of R2 million, and the balance of R11,5 by the following day. (It is necessary to record at this stage that a previous contract between Mr Montana and the owner for the sale of the

same property to him was not proceeded with.) A deposit of R2 million had been paid on 23 March 2015 [pursuant to the contract that was not proceeded with]. Payment was made from Precise Trade's Investec account. An earlier entry on the copy of the transaction account records that on the same day a deposit of R5 million had been made into the account. Mr Van der Walt's handwritten note says that it was a "TMM grant". On 15 May 2015, payment of the R11,5 million was made to the conveyancing attorney by an entity called "Midtownbrace". The property was transferred to Mr Montana on 28 July 2015.

1960.2. **Second**, what is recorded in the previous paragraph constitutes the basic facts relating to Mr Montana's purchase of the Hurlingham Property. However, several significant events and developments preceded Mr Montana's purchase of the Hurlingham Property. They may be summarised as follows. The same agent who had been involved in the sale of the Sandhurst Property, Mr Louis Green, had been mandated by the owner to market and sell the Hurlingham Property. Mr Montana attended a show day on or about 12 October 2014, expressed an interest in purchasing the property and asked that an offer to purchase be sent to Mr Johan Smith of the Minor Property Trust. Mr Smith, representing the Trust, then submitted an offer to purchase the property for R12 million. Mr Green told the seller that they had received the offer from Mr Montana [though it] "is in the name of his Trust".

1960.3. On 30 October 2014 a new offer was made, this time in the name of the Trust. The purchase price offered was R13,5 million. It would appear, however, that nothing came of these two offers and that not much happened for some four months. Then, on 3 March 2015, Mr Montana himself made an offer to the seller to purchase the property for R13,5 million, payable as follows: a deposit of R2 million within seven days; and the balance of R11,5 million to be secured by

approved guarantees. The seller accepted the offer on the same day. The R2 million deposit was recorded in the conveyancer's bank account on 24 March 2015. On 14 April 2015, Mr Van der Walt, on instructions from Mr Montana, asked for more time to submit the guarantee. Following concerns that the conveyancer expressed about the guarantees, that agreement was cancelled and a new one was concluded. That is the agreement, as noted earlier, that was implemented, with transfer being effected on 28 July 2015.

1960.4. **Third**, as regards the source of the finance, the position may be summarised as follows. As noted above, whilst Precise Trade paid the guarantee of R2 million, payment of the balance of R11,5 million was made by Midtownbrace (Pty) Ltd ("Midtownbrace). This payment was dealt with in a rather terse affidavit that Mr Andre Wagner submitted after he had been invited to deal with what the Oellermann Report had said in respect of the Hurlingham Property. It perhaps should be noted that Mr Montana mentioned this affidavit when he testified. What Mr Wagner said in his affidavit may be summarised as follows: he was a representative of Midtownbrace; he and Mr Van Der Walt, who were good friends, had "engaged in joint ventures"; Mr Van der Walt had introduced him to Mr Montana; Midtownbrace and Mr Montana had agreed on a development in 2015; the "full investment amount [totalling R11,5 million] was paid over to Mr Montana; the company was satisfied with "the agreements" to secure its investments, but had issued summons against Mr Montana "if he defaults again". That is the essence of what Mr Wagner said in his affidavit.

Mr Montana's objection to the evidence that was led

1961. It is clear from what has been set out above that Mr Montana was not in a position to dispute what was in the documents in relation to his property dealings. In addition,

insofar as payments for the properties, whether to him in respect of the properties in which he had expressed an interest in purchasing for himself or his Trust, he was also not in a position to dispute what Mr Van der Walt had told his partners or had recorded in handwriting on the Investec bank statement. In the circumstances, the relevant factual matrix was not in dispute.

1962. Mr Montana however attacked the evidence in respect of the properties on the following grounds:

1962.1. **First**, he said that the Commission's investigations were based on a 22-page affidavit that Mr Paul O'Sullivan had submitted to the police and the Werksmans Report. As a result, he continued, the Commission was aligning itself with certain people, whom he alleged had acted unlawfully in their investigations. The short answer to this is as follows: as it was entitled to do, the Commission considered what was said by PRASA in its application to review and set aside certain contracts that PRASA had concluded with Siyangena; the documents that it relied on were in the main contracts and communications that were annexed to the Siyangena application papers; the more significant allegations against Mr Montana related to the payments made in respect of the properties; and the main source of that information was Mr Van der Walt's former partner, Mr Nicholas Loubser, who made available to the Commission several important documents, in particular documents that were provided to the investigators was the transactional history of Precise Trade's Investec bank account. In addition, Mr Loubser gave oral evidence at the Commission. In the circumstances, there is no merit in that complaint by Mr Montana.

1962.2. **Second**, Mr Montana objected to the commentary on Mr Oellermann's Report being considered by the Commission. The difficulty with that objection is that,

properly considered, the "commentary" that forms part of the Report is nothing more than inferences to be drawn from the facts, events and circumstances that are detailed in the annexures to Mr Oellermann's Report. Of course, where the inferences that are drawn are not reasonable or do not flow from a proper consideration of the documents annexed to the Report, they should not be and are not accepted. On the other hand, if the inferences drawn are reasonable and cogent, there can be no reason not to consider or adopt them. In the circumstances, the approach adopted was to consider the contents of the annexures and determine what conclusions should be drawn, having regard to the totality of the evidence led and the documents available.

1962.3. **Third**, at a late stage in the evidence he was giving in respect of the property transactions, Mr Montana asked that the evidence leader recuse himself on the basis that he was "invested" in suggesting wrongdoing on Mr Montana's part and had displayed bias.

Conclusions in respect of property transactions

1963. The details set out above about how the agreements to purchase the Waterkloof, Sandhurst and Hurlingham properties came into being make the following clear. It was Mr Montana who was a key figure in the purchases. It is correct that two of the properties were transferred to Precise Trade, but Mr Montana was a significant role player in all three purchases.

1964. It might be noted that at some stage while he was giving evidence on one of the other properties, Mr Montana said he had paid the deposit [seemingly in respect of the Hurlingham Property]. However, before he could be questioned on that payment, he complained that the evidence leader was biased and he subsequently brought an application for the recusal of the evidence leader.

1965. As regards Mr Montana's role in the three transactions, the following matters bear highlighting:

1965.1. With regard to the Waterkloof Property, the following emerges about Mr Montana's role. As far back as February 2013, Mr Montana and the seller, Ms De Beer, concluded an agreement of sale. That deal, however, fell through. In August 2014, Mr Montana again expressed an interest in the property. It was then that an agreement was concluded with Mr Smith, the Trustee. Thereafter, it was Mr Montana who asked the seller to change the name of the purchaser from Mr Smith to Precise Trade. In addition, in mid-November 2014 it was Mr Montana who walked through the house "to check some things". When Ms De Beer moved out, on 26 November 2014 she handed the keys to Mr Montana and on the following day told her neighbours that "the new owner of [her] property was Lucky Montana". She was in no doubt that the CC had sold the property to Mr Montana and that the contracting entities were merely his alter ego.

1965.2. With regard to the Sandhurst Property, the following emerges about Mr Montana's role. It was Mr Montana who signed the first offer to purchase on 26 October 2014, after he had attended a show day, which offer was accepted by the seller. However, following a request by Mr Van der Walt on 25 November 2014, a new offer to purchase in the name of Precise Trade was drawn up, which Mr Van der Walt signed on the following day. It recorded that the R5 million that the "deposit" [that had been paid pursuant to Mr Montana's offer] had been received on 7 November 2014. Even after the change in the name of the purchaser, correspondence relating to the property was still sent to Mr Montana, whom the seller addressed as "Lucky". When the costs were late in being paid, in February 2015 it was Mr Montana who apologised to the seller

and seemingly caused Mr Van der Walt to make payment on the day after. Even after ownership of the property was transferred to Precise Trade [on 6 March 2015], when the electricity account needed to be transferred, it was Mr Montana with whom the estate agent and the seller communicated.

1965.3. The Hurlingham Property was transferred to Mr Montana. Accordingly, his direct link with the property cannot be disputed. However, even in respect of this property, there was an attempt to disguise that link, as emerges from the following. After attending a show day in the second week of October 2014, Mr Montana expressed an interest in purchasing the property, but asked that an offer to purchase be sent to Mr Smith, the Trustee, who then submitted an offer to purchase. However, on 30 October 2014 a new offer was made, but in the name of the Trust. Nothing came of those offers. In addition, the first agreement between Mr Montana and the seller had to be cancelled and the transfer was effected pursuant to a later agreement between Mr Montana and the seller.

1965.4. As regards the sale by Mr Montana of the Parkwood Property, the following matters are worthy of mention. The seemingly inflated price that Mr Van der Walt, on behalf of Precise Trade, was prepared to pay for the property. Mr Montana's agreeing to an addendum that, when implemented, involved expenses of more than R1 million, which he was to pay, but did not. Moreover, the addendum stipulated that Mr Montana's friend would pay Precise Trade rent of R20 000 month from 21 February 2015 but Precise Trade's bank account does not reflect any rent being paid. Finally, it is clear that the parties did not exercise their rights or comply with their obligations as these were set out in the agreements. Significantly, Mr Montana had not even kept a record of what had been paid in respect of the property or if the R439 000 that was calculated to be owing had been paid.

1966. The foregoing confirms that Mr Montana played a central role in the sale of the Parkwood Property and the purchase of Waterkloof Property, the Sandhurst Property and the Hurlingham Property.
1967. What Mr Van der Walt told his partners about the source of the funding for his purchase of the Parkwood Property and the purchases of the Waterkloof Property, the Sandhurst Property and the Hurlingham Property and an analysis of Precise Trade's Investec's transactional account suggests that there is a link between the payments for all four properties and Siyangena. The deposit for the Hurlingham property was paid from those monies. Mr Montana said that he had paid the deposit, but that is not what the documents show. A further question arises: why were there such efforts to disguise his involvement. Having regard to the foregoing, there is a reasonable basis for concluding that Mr Montana received an undue benefit from a Siyangena-linked entity, at least in respect of the Hurlingham property.
1968. These payments were made at a time when PRASA was concluding contracts with Siyangena. As has been noted above, Mr Montana played a role in those decisions. Mr Montana placed himself in a conflict of interest. While on the one hand PRASA was concluding business contracts with Siyangena, he should not in his personal capacity have been involved in any business transaction with Siyangena or entities or individuals connected with Siyangena because Siyangena or those entities or individuals connected with Siyangena could do favours for him so that in turn he could influence PRASA to do favours for them or he, acting in his official capacity as GCEO of PRASA, could remember that Siyangena or people or entities connected with Siyangena had done favours for him in his personal capacity and reciprocate through PRASA. He ought not to have played any as he was conflicted. Moreover, he signed the addendum that "emerged" only while there was litigation between PRASA and Siyangena.

MR ROY MOODLEY

1969. It will be instructive to preface the evidence relating to Mr Moodley by recording the following. When Public Protector Thuli Madonsela was compiling her State of Capture Report, she submitted a list of 42 questions to President Zuma. One of them related to his relationship with Mr Moodley. President Zuma refused to answer the questions. Moreover, there was evidence in affidavits submitted to the Commission that entities connected to Mr Moodley had received preferential treatment at PRASA and that on several occasions Mr Montana intervened in this respect. In all, five witnesses gave evidence on Mr Moodley: Mr Molefe, Ms Ngoye, Mr Digiswayo, Mr Holele and Mr Makwanatala Jacob Ramagothe.

1970. The evidence indicated that Mr Moodley had direct or indirect interests in several companies that provided services to PRASA, including Royal Security, Strawberry Wox and Prodigy. A company of which he was the sole director, Hail Way, was also said to have received a total of R550 million from Siyangena.

1971. In his evidence, Mr Molefe told the Commission that he did not know Mr Moodley before his appointment as Chair of the PRASA Board. However, he soon became aware that the name Roy Moodley was on the lips of many at PRASA, with some describing him as “the owner” of PRASA. He was told that Mr Moodley would often walk around with managers in their work environment.

1972. Mr Molefe gave examples of means by which Mr Roy Moodley intended to “capture” him. On one occasion, Mr Roy Moodley invited him to a Golf Day that he had arranged and, on another, Mr Roy Moodley invited him to the Durban July Handicap, telling him that then President Zuma, Minister Jeff Radebe and other Ministers had been his guests at the event every year. Mr Molefe declined both invitations. Mr Roy Moodley also wished to attend the US Masters with Mr Molefe in April 2015. Mr Molefe wriggled out

of this. It should be recorded that in an affidavit in response, Minister Radebe denied that he had attended the July Handicap as a guest of Mr Roy Moodley. And, in an affidavit, Mr Roy Moodley disputed Mr Molefe's evidence.

1973. In his response to Mr Molefe's evidence, Mr Montana said the following:¹³⁵⁴ Mr Molefe and Mr Moodley were close; Mr Molefe had told him (Mr Montana) that he and Mr Moodley were to travel together to the US "to play the golf event"; he had not attended any golf event organised by Mr Roy Moodley; and whilst he had not heard Mr Roy Moodley being described as "the owner" of PRASA, he was aware that Moodley's entities had contracts with PRASA. He also said that Mr Roy Moodley had been appointed "in Railways" in or about 1991, long before Mr Montana joined PRASA [in 2006]. Mr Montana said that Mr Molefe was relying on hearsay and rumours to back up his claims of state capture.

1974. In an affidavit, Mr Roy Moodley denied that he had tried to capture Mr Molefe and in general denied all the allegations made by Mr Molefe. He alleged Mr Molefe had tried to befriend him for his own personal benefit to secure sponsorships for himself and his foundation. He said that it was Mr Molefe who had tried to pursue an association with him, rather than the other way around. Mr Roy Moodley testified that it was Mr Molefe who initiated plans for the US trip but these fizzled out. He also denied Mr Molefe's evidence about the July Handicap.

1975. In her affidavit and evidence, Ms Ngoye dealt with a contract between PRASA and an entity called Strawberry Worx. Her evidence may be summarised as follows. In July 2011 Intersite [a subsidiary of PRASA] and Umjanji (Pty) Ltd (Umjanji) had concluded an advertising agreement that was to endure for five years. In August 2011, with the consent of PRASA, Umjanji ceded portions of its rights to Strawberry Worx and another

¹³⁵⁴ His response begins at Page 163 of the Transcript.

entity called Siyathembana Trading. Although Intersite was the contracting party, it received instructions from Mr Montana (as the head of PRASA) on how to deal with the advertising portfolio.

1976. Ms Ngoye said she was once summoned to a meeting with representatives of Strawberry Worx. Present on behalf of Strawberry Worx were: a Mr Maharaj, Mr Ashveer Dwaerkapersadh, Mr Selwyn Moodley and a fourth person whose details escaped her. At the meeting, she was given instructions by Strawberry Worx's representatives on how to manage the advertising portfolio. She was also told the following: she would have to take instructions from them; they had the power to remove the portfolio from Intersite; they intended to do so, as she clearly did not know what she was doing; and there were instructions from Mr Montana to take back instructions given to attorneys Hogan Lovells, who were representing PRASA in litigation that had been instituted by Primedia challenging the validity of the award of the advertising tender, and that BBM Attorneys (who were not on PRASA's panel at the time) be appointed to represent PRASA.

1977. After the meeting, Intersite continued to manage the portfolio, but under difficult circumstances, as threats of removing the portfolio from Intersite continued to be made. However, on 20 May 2013, the threat of removing the portfolio was carried out in an aggressive and bullish way by Ms Marlini Naidoo. She was described as the special legal adviser in the office of the Group CEO. She arrived at Intersite's office and "conducted a raid". Ms Naidoo told Ms Ngoye that she was "an officer of the court" and had been instructed by Mr Montana to remove the Strawberry Worx files from Intersite. Ms Ngoye called Mr Montana, who did not respond to her call. She also called Intersite's lead independent director, who was not aware of the instruction. Ms Naidoo proceeded to remove the files.

1978. Ms Ngoye raised the issue of the removal of the files at an Intersite Board meeting that had been scheduled for the following day. Mr Montana told her he had nothing to do with the instruction. At Ms Ngoye's request, a meeting of all relevant parties was then held a few days later. Present were Ms Hope Zinde (GM: Corporate Affairs), Mr Holele who was based at Intersite at the time, Ms Naidoo and Mr Montana. One of the aftermaths of the meeting was that Mr Martin Chauke, the manager who was responsible for the advertising portfolio, was placed on suspension. There is a dispute as to what happened at the meeting and particularly who placed Mr Chauke on suspension: Ms Ngoye says it was Mr Montana, while he claims that it was Ms Zinde. It is not necessary to resolve this dispute, save to note that disciplinary action was taken against another employee in respect of a difference of opinion about a contract that PRASA had with an entity in which Mr Roy Moodley had an interest. It needs to be recorded that Mr Chauke's suspension, which was on full pay, endured for more than two years. He was one of the employees who were brought back after the Molefe Board had instructed that all suspensions of employees be investigated.

1979. Ms Ngoye said that these events demonstrated just how powerful Mr Roy Moodley was at PRASA.

1980. When Mr Montana testified on this issue, he said that judgment in Primedia's application had been handed down recently and that PRASA had lost the case. He suggested that that was because PRASA had dropped its opposition to Primedia's application. However, a perusal of the judgment makes it clear that the Judge said PRASA had been wise to withdraw its opposition to Primedia's application to have the award to Umjanji of the tender set aside.

1981. Mr Montana's responses to the evidence given by Ms Ngoye may be summarised as follows: he was not aware of any link between Strawberry Worx and Mr Roy Moodley,

nor was he aware of any link between Siyangena and Mr Roy Moodley;¹³⁵⁵ he denied giving instructions on how to deal with the advertising portfolio;¹³⁵⁶ he said he was not aware of Ms Ngoye's meeting with Strawberry Worx at which she was told that she would have to take instructions from them;¹³⁵⁷ he denied that Ms Ngoye had told him that it had been suggested that Hogan Lovells should be removed as PRASA's attorneys, but said that his legal adviser had later spoken about changing attorneys and he supported the idea;¹³⁵⁸ he was not aware that Maharaj Attorneys, who were also acting for Strawberry Worx, were the last group of attorneys to handle the matter for PRASA;¹³⁵⁹ Ms Ngoye had not raised with him the threatened removal of oversight of the contract from Intersite;¹³⁶⁰ he also said that it was Ms Ngoye who as the CEO of Intersite who had signed the contract between Intersite and Strawberry Worx;¹³⁶¹ he also said that one of the reasons that Primedia was not awarded the contract again was that PRASA was not getting value for the portfolio it owns;¹³⁶² Mr Montana agreed that the manner in which the files were removed was incorrect;¹³⁶³ but, he continued, he did not agree with the way in which Intersite was dealing with the litigation that Primedia had instituted after it was not awarded the tender;¹³⁶⁴ he also disputed that Intersite was required to manage the portfolio under difficult circumstances; he said that Ms Ngoye raised the issue with the Commission to implicate Strawberry Worx (and Mr Roy Moodley);¹³⁶⁵ he denied that he had attended the meeting that led to Mr Chauke's

¹³⁵⁵ Page 96 of the Transcript of the third day on which Mr Montana testified, namely 21 May 2021.

¹³⁵⁶ Page 102

¹³⁵⁷ Page 104

¹³⁵⁸ Pages 110-112

¹³⁵⁹ Page 113

¹³⁶⁰ Page 116

¹³⁶¹ Page 118

¹³⁶² Page 136

¹³⁶³ Page 141

¹³⁶⁴ Page 143

¹³⁶⁵ Page 144

suspension;¹³⁶⁶ he also denied that Ms Ngoye had said he must put her on suspension;¹³⁶⁷ he also did not know if Mr Chauke had been suspended;¹³⁶⁸ he accepted that the management of the Strawberry Worx portfolio had been moved from Intersite to PRASA;¹³⁶⁹ as regards Ms Ngoye, Mr Montana said she was moved from CEO of Intersite because the Intersite Board was not happy with her and she was unhappy about being moved to PRASA as Executive Head of Group Legal. He confirmed that he had asked her to act when he went on leave in December 2014 and thanked her when he returned;¹³⁷⁰ he denied that her dismissal had anything to do with their refusal to assist with changes to the Swifambo contract.¹³⁷¹

1982. In his affidavit and oral evidence Mr Dingiswayo said that it was known at PRASA that certain persons and entities wielded undue influence over Mr Montana and other senior PRASA employees and that, if you crossed Mr Montana's path or attempted to ensure that things were done lawfully and properly insofar as these entities and individuals were concerned, he ruthlessly abused his powers and even arrogated to himself powers that he did not possess.¹³⁷² Being in Group Legal Services, he was often required to deal with the maladministration that was pervasive at PRASA.

1983. As an illustration of the foregoing matters, he testified on how concerns that he had expressed about the lawfulness or otherwise of certain dealings between PRASA and

¹³⁶⁶ Page 157

¹³⁶⁷ Page 163

¹³⁶⁸ Page 171

¹³⁶⁹ Page 175

¹³⁷⁰ Page 224

¹³⁷¹ Page 227

¹³⁷² When he gave evidence, Mr Montana disputed this allegation: Page 10 of the transcript of the second day on which Mr Montana gave evidence, namely 20 May 2021.

an entity called Prodigy Business Services (Pty) Limited ("Prodigy") led to his dismissal. His evidence on these issues may be summarised as follows:

1984. **First**, Prodigy had entered into a number of contracts with PRASA to provide training and other related services. Mr Roy Moodley was previously a director of Prodigy. PRASA has since placed the validity of those contracts in dispute. It has applied to the High Court to have different agreements purportedly concluded between it and Prodigy reviewed and set aside.

1985. Mr Dingiswayo testified that, as the validity of the agreements was before the High Court, he did not wish to deal with that issue. Instead, he gave evidence on the manner in which the agreements had been concluded. Mr Dingiswayo said that, when he raised questions about the validity of one of the agreements, Mr Montana dismissed him. He said that, when Ms Ngoye, who had questioned the fairness of his dismissal she, too, was dismissed by Mr Montana. On the issues of how the contracts came into being and how he came to be dismissed, his evidence may be summarised as follows:

1985.1. **First**, on 10 June 2010, Ms Shunmugam an employee of Prodigy, sent a letter to Mr Montana proposing some form of "partnership". Mr Montana noted on the letter that the proposal should be accepted in writing and an MOU be concluded. A partnership agreement was signed by the two on 11 October 2010. Thereafter, on 30 August 2011, an addendum was concluded and on 31 October 2012, a further aspect was added to the agreement, with Mr Montana again representing PRASA. This aspect in effect required PRASA to pay Prodigy R24 000 per learner for a five-day course for 300 learners, which meant that PRASA would be required to pay R72 million to Prodigy. Thereafter, on 10 May 2015, PRASA and Prodigy entered into an SLA.

- 1985.2. **Second**, in about February or March 2015, Mr Dingiswayo was asked by the Contracts Manager at SCM to draft an agreement to reinstate and extend two of the earlier contracts. After reviewing the matters, he raised a number of compliance issues. On 1 April 2015, Prodigy sent an email to the office of the Group CEO asking about outstanding payments. Mr Dingiswayo later raised questions about certain issues relating to the drafting of the proposed agreement and said, until they were addressed, he would not begin drafting the agreement.
- 1985.3. **Third**, on 10 April 2015 Prodigy sent a further email, this time setting out the thrust and purposes of the agreements were. On 18 April 2015 Mr Dingiswayo was asked to finalise a draft of an SLA that had been sent to him. He raised concerns about the draft in an email, which was also sent to the Group Chief Procurement Officer, Mr Josephat Phungula. Mr Dingiswayo said that it appeared that there was general acceptance that the contracts were invalid, but a view was put forward that Prodigy was "innocent" and that PRASA should therefore proceed with the transaction. On 18 May 2015, Mr Montana sent an email contending that there was nothing wrong with the extension of the contract and alleged that "certain contracts" were being targeted and a "dirty campaign" was being waged against him.
- 1985.4. **Fourth**, at about 19h00 on the following day, that is 19 May 2015, Mr Montana's PA phoned Mr Dingiswayo to say Mr Montana wished to see Mr Dingiswayo urgently. Mr Dingiswayo asked if the matter could wait until the following day. He was told Mr Montana wished to see him personally that evening.
- 1985.5. **Fifth**, Mr Dingiswayo arrived at Mr Montana's office and sat to meet with Mr Montana, who thanked him for coming back to work from home and made light

of this by chuckling. Mr Montana then told Mr Dingiswayo that he had been told that Mr Dingiswayo was one of the people that were working against the interests of PRASA on a number of matters. He accused Mr Dingiswayo of leaking documents to the Board and of abusing his position as one PRASA's legal advisors, citing as an example that he had told PRASA employees to cancel a tender. Mr Dingiswayo denied the allegations and said he had no such power.

1985.6. **Sixth**, but Mr Montana told Mr Dingiswayo that he was not interested in what he had to say and that the only thing that he had called him for was to tell him that he no longer worked at PRASA. He went on to say that the only thing that he could discuss with Mr Dingiswayo was how much he would accept for his contract to be terminated. Mr Dingiswayo responded that he would not be party to an unlawful termination of his own employment. He was told to collect his letter of termination on the following day.

1985.7. **Seventh**, Mr Dingiswayo noted that the meeting lasted just five minutes and commented that he had driven for 30 minutes, one way, for a meeting of about five minutes.

1985.8. **Eighth**, Mr Dingiswayo called Ms Ngoye soon thereafter. She was outraged, and arranged to meet Mr Montana the following day. The following day, Mr Montana dismissed Ms Ngoye. The circumstances in which that came about are set as follows by Ms Ngoye in her evidence.

1986. Ms Ngoye confirmed that she had received Mr Montana's email of 18 May 2015 about the Prodigy contract. However, she added that during that period the Legal Function had declined to be involved in assisting in amending the Swifambo contract as it had not been involved in the negotiations and drafting of that contract. She also confirmed

the following: Mr Dingiswayo's advice in respect of the Prodigy contract did not accord with instructions given to him to amend and extend the Prodigy contract; in the evening of 18 May 2015, Mr Dingiswayo called her to tell her he had been dismissed; she immediately called Mr Montana and asked why he had dismissed Mr Dingiswayo who, as general manager, reported to her. She said that she found it unacceptable and it was a repeat of how Mr Montana had dealt with Mr Chauke. Whilst the interaction over the phone did not go well, Mr Montana agreed to meet her the following day.

1987. Ms Ngoye said in her affidavit: "We indeed met on 19 May 2015. The meeting started at 18:00. By 18:05, Mr Montana told me he was dismissing me with immediate effect. I received my dismissal letter on 20 May 2015."

1988. What thereafter happened, in respect of Mr Dingiswayo and Ms Ngoye, is this: following the intervention of Mr Molefe, who had prevailed on Mr Montana to follow the law in applying discipline, Mr Montana agreed to reinstate the two but within about a week he suspended them. However, Mr Dingiswayo noted that other PRASA employees who had not supported the Prodigy contract were also placed on suspension. They returned to work after Mr Montana had left PRASA [in mid July 2015] without any charges being proffered against them.

1989. Three other matters raised by Mr Dingiswayo when he gave evidence on Prodigy and Mr Roy Moodley's influence at PRASA are worthy of mention. They are as follows.

1989.1. **First**, PRASA's contracting with Prodigy breached other regulatory measures as well. For example, Prodigy was not an accredited provider of train drivers. Despite this, Prodigy charged PRASA for the development of training for the train drivers. More worryingly, it charged PRASA penalties for non-attendance by employees. These penalties were in contravention of the PFMA and constituted wasteful expenditure.

1989.2. **Second**, Mr Dingiswayo was of the view that Prodigy was favoured because Mr Roy Moodley exercised undue influence over Mr Montana.

1989.3. **Third**, what happened to him as a result of his not toeing Mr Montana's line on Prodigy illustrates part of how the capture of PRASA was implemented: when employees stood for what was proper, they were disciplined and often dismissed.

1990. As regards the Prodigy contracts, when Mr Montana testified, he said the following: as Mr Dingiswayo was not in PRASA's employ when the Prodigy contract was concluded, his evidence on this issue was "hearsay";¹³⁷³ Mr Montana went on to say that there was a background to the contract of which Mr Dingiswayo was not aware;¹³⁷⁴ the training was for persons who did not have Matric and had gained PRASA an international award;¹³⁷⁵ it also appeared from his evidence that it was not clear precisely how much training time each learner was to be given;¹³⁷⁶ it was not for Mr Dingiswayo to decide which contracts he would draft or whether counsel should be briefed;¹³⁷⁷ Mr Montana also accused Mr Dingiswayo of undermining his leadership and being part of a "campaign" against him;¹³⁷⁸ among others who he said were part of this "campaign" were Mr Molefe and Ms Ngoyi;¹³⁷⁹ he conceded that no procurement process had been followed before the Prodigy agreement had been concluded, but added that this was

¹³⁷³ Page 11 of the second day's transcript

¹³⁷⁴ Page 25

¹³⁷⁵ Pages 30-31

¹³⁷⁶ Pages 91 to 93

¹³⁷⁷ Page 107

¹³⁷⁸ Page 112

¹³⁷⁹ Pages 122-123

because of the offer that PRASA had received from Prodigy;¹³⁸⁰ he also accepted that the Legal Department had not been asked if the contract was valid.¹³⁸¹

1991. As regards the details relating to Mr Dingiswayo's dismissal, Mr Montana said the following: he had raised with Mr Dingiswayo the fact that he had cancelled contracts, not just one tender;¹³⁸² as the appointments and dismissals of general managers were the CEO's responsibility, he decided to "fire" Mr Dingiswayo, who was "not working in the best interest of PRASA";¹³⁸³ he said he had made up his mind to dismiss Mr Dingiswayo even before the meeting;¹³⁸⁴ he stated that the labour laws allowed for summary dismissal "when you think a lot is at stake";¹³⁸⁵ he could not recall if Mr Dingiswayo had told him that he would not be part of an unlawful process [in respect of his dismissal], but said Mr Dingiswayo was unhappy that he was dismissed;¹³⁸⁶ he also said that he had consulted the Head of Human Resources (HR), who had advised against summary dismissal, but he weighed up the situation and decided on summary dismissal;¹³⁸⁷ he said the meeting lasted 10-15 minutes;¹³⁸⁸ as regards the question of whether the appointment of Prodigy complied with section 217 of the Constitution, Mr Montana said that the way in which section 217 of the Constitution was being interpreted "has become an instrument to undermine transformation in the country";¹³⁸⁹ Mr Montana said Mr Dingiswayo was bitter because he [Mr Montana] had fired him.¹³⁹⁰

¹³⁸⁰ Page 128

¹³⁸¹ Page 132

¹³⁸² Page 137-138

¹³⁸³ Page 146

¹³⁸⁴ Page 148

¹³⁸⁵ Page 151

¹³⁸⁶ Page 156

¹³⁸⁷ Page 161

¹³⁸⁸ Page 162

¹³⁸⁹ Page 179

¹³⁹⁰ Page 238

1992. It is convenient now to consider the evidence that Mr Holele and Mr Rakgoathe gave on Mr Roy Moodley. It may be summarised as follows.

1993. In about February or March 2017, Ms Shunmugan asked to meet Mr Holele to discuss the issue of non-payments to Prodigy. However, it was not Ms Shunmugan who attended, but Mr Roy Moodley. Mr Holele invited Mr Rakgoathe, a General Manager: Group Compliance, to attend with him. However, when they got to the boardroom for the meeting, it was not Ms Shunmugan who was present but Mr Roy Moodley.

1994. Mr Holele said that Mr Roy Moodley complained that PRASA owed Prodigy a significant amount and demanded that it make payment in full. Mr Holele found it irregular that none of Prodigy's directors or employees were present and that it was Mr Roy Moodley who was insisting on payment. Mr Holele said that the meeting was "very tense". He said he explained that as the matter was before the court, they could not accede to his demand before the court decision.

1995. Mr Holele said that Mr Roy Moodley then told them that he was part of the top 15 decision makers in the country and made reference to media reports of an impending Cabinet re-shuffle. Mr Holele said that Mr Roy Moodley then threatened us that 'big changes' were coming and that we needed to ensure that we were on the right side of these changes." Mr Rakgoathe corroborated this part of Mr Holele's evidence but added that Mr Roy Moodley had also said that "he was involved" in the selection of CEOs of SOEs. Mr Holele pointed out that the "big change" for PRASA was in the Cabinet changes announced March 2017, in terms of which Ms Peters was replaced by Mr Joe Maswanganyi as Minister of Transport.

1996. In an affidavit that he submitted to the Commission, Mr Roy Moodley emphatically denied that he had met Mr Holele and Mr Rakgoathe.

1997. Mr Roy Moodley did not apply for leave to testify nor did he apply for leave to cross-examine either Mr Holele or Mr Rakgoathe. He contented himself with filing an affidavit notwithstanding that serious allegations had been made about him. Having heard the evidence of Mr Molefe, Mr Holele and Mr Rakgoathe, and the substance of what they said, the probabilities are that what they said is true and correct.

1998. Aside from Mr Roy Moodley, according to the evidence led at the Commission, the other person who enjoyed undue favourable treatment at PRASA was Mr Makhensa Mabunda. The evidence on that issue is set out hereunder.

MR MABUNDA

1999. It will be instructive to recall that evidence by Mr Molefe in respect of the Swifambo tender had made several references to Mr Mabunda. Among the references were the following. First, the proposal that Siyaya Rail Solutions had made to PRASA, even before the Swifambo tender was issued, to lease locomotives to it and that he had already suggested Vossloh locomotives to PRASA. Second, Mr Mashaba had told Mr Molefe that it was Mr Mabunda who had told him to bid for the Swifambo tender; and that it was someone from the S Group who had collected the locomotives tender documents with the reference "Swifambo".

2000. However, in respect of Mr Mabunda and the Siyaya Group, it was Mr Dingiswayo who had given the most direct evidence, though it was given in the course of complaints he had made about the role that Ms Makhubele had played in effecting payment of some R59 million to the S group. The two issues should, however, be separated. In this section, what Mr Dingiswayo said about Mr Mabunda and the S Group will be summarised.

2001. According to Mr Dingiswayo, Mr Mabunda controlled the Siyaya Group of Companies, also known as "the S Group". It had over the years received more than R1 billion of work from PRASA. Mr Dingiswayo said that the entity that received a lot of work from PRASA was Siyaya Consulting Engineers (Pty) Limited (Siyaya Engineers), which was registered in 2006. It is now in liquidation.
2002. Insofar as the relationship between Mr Montana and Mr Mabunda was concerned, Mr Dingiswayo said that it was a matter of public record that they had worked together at the Department of Public Enterprises and thereafter at the Department of Transport. He noted that Mr Montana left PRASA on 15 July 2015. He said that, shortly thereafter, in September 2015, three summonses were served on PRASA in respect of civil actions instituted by the Siyaya Group of companies against PRASA for the payment of certain amounts. The agreements on which two of the claims were based had been signed by Mr Montana, and the one on which the third claim was based had been signed by Mr Daniel Mthimkulu. The following year, and whilst the above three matters were pending, the Siyaya Group instituted two further actions in the High Court against PRASA. The agreements that formed the bases of these claims had also been signed by Mr Montana.
2003. The attorneys who represented the Siyaya Companies in the above matters were Mathopo Attorneys. Based on instructions from the relevant business unit or division that PRASA was not liable, the actions were defended. Siyaya Consulting Engineers was voluntarily liquidated on 27 March 2017. When the actions had reached the pre-trial stage, PRASA pressed for the disclosure and production of all documents the Siyaya companies relied upon. This is a process allowed by the Rules of Court in litigation, but the Siyaya companies failed to disclose and produce any documents upon which they intended to rely at the trial. In order to expedite proceedings and because some of the agreements had arbitration clauses, the matters were referred to

arbitration. However, the Plaintiffs still struggled to produce the documents. It was agreed however that the arbitration would be held between 11 to 22 September 2017.

2004. In the meantime, the Liquidators held an enquiry in terms of section 417¹³⁹¹ and 418¹³⁹² of the Companies Act. They subpoenaed a number of past and present PRASA employees.

¹³⁹¹ 417 Summoning and examination of persons as to affairs of company

- (1) In any winding-up of a company unable to pay its debts, the Master or the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company. (1A) any person summoned under subsection (1) may be represented at his attendance before the Master or the Court by an attorney with or without counsel.
- (2) (a) The Master or the Court may examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories, and may reduce his answers to writing and require him to sign them. (b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction. 5(c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to- (i) the administering or taking of an oath or the administering or making of an affirmation; (ii) the giving of false evidence; (iii) the making of a false statement; or (iv) a failure to answer lawful questions fully and satisfactorily.
- (3) The Master or the Court may require any such person to produce any books or papers in his custody or under his control relating to the company but without prejudice to any lien claimed with regard to any such books or papers, and the Court shall have power to determine all questions relating to any such lien.
- (4) If any person who has been duly summoned under subsection (1) and to whom a reasonable sum for his expenses has been tendered, fails to attend before the Master or the Court at the time appointed by the summons without lawful excuse made known to the Master or the Court at the time of the sitting and accepted by the Master or the Court, the Master or the Court may cause him to be apprehended and brought before him or it for examination.
- (5) Any person summoned by the Master under subsection (1) shall be entitled to such witness fees as he would have been entitled to if he were a witness in civil proceedings in a magistrate's court.
- (6) Any person who applies for an examination or enquiry in terms of this section or section 418 shall be liable for the payment of the costs and expenses incidental thereto, unless the Master or the Court directs that the whole or any part of such costs and expenses shall be paid out of the assets of the company concerned.
- (7) Any examination or enquiry under this section or section 418 and any application therefor shall be private and confidential, unless the Master or the Court, either generally or in respect of any particular person, directs otherwise."

¹³⁹² 418 Examination by commissioners

- (1) (a) Every magistrate and every other person appointed for the purpose by the Master or the Court shall be a commissioner for the purpose of taking evidence or holding any enquiry under this Act in connection with the winding-up of any company. (b) The Master or the Court may refer the whole or any part of the

2005. Although this was not part of Mr Dingiswayo's evidence, it is worth noting that, according to the record of the liquidation proceedings, among those who gave evidence in support of Siyaya's claims were Mr Montana and Mr Mthimkulu.

2006. At this stage, it would be convenient to deal with the manner in which the Interim Board that replaced Mr Molefe's Board dealt with the Siyaya's claims. This necessitates a consideration of the role played by its Chairperson, Ms Nana Makhubele.

MS NANA MAKHUBELE

2007. It will be recalled that the relevant Siyaya Companies had instituted several civil actions in the High Court against PRASA for the payment of certain amounts.

2008. The trial bundles were to have been delivered and served by 25 August 2017. This did not happen. PRASA made applications to Court to compel the Siyaya companies to comply with the pre-trial processes but to no avail. In the meantime, although the term

examination of any witness or of any enquiry under this Act to any such commissioner, whether or not he is within the jurisdiction of the Court which issued the winding-up order. (c) The Master, if he has not himself been appointed under paragraph (a), the liquidator or any creditor, member or contributory of the company may be represented at such an examination or enquiry by an attorney, with or without counsel, who shall be entitled to interrogate any witness: Provided that a commissioner shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily. (d) The provisions of section 417 (1A), (2) (b) and (5) shall apply mutatis mutandis in respect of such an examination or enquiry.

- (2) A commissioner shall in any matter referred to him have the same powers of summoning and examining witnesses and of requiring the production of documents, as the Master who or the Court which appointed him, and, if the commissioner is a magistrate, of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any lien with regard to documents, as the Court referred to in section 417. 7
- (3) If a commissioner- (a) has been appointed by the Master, he shall, in such manner as the Master may direct, report to the Master; or (b) has been appointed by the Court, he shall, in such manner as the Court may direct, report to the Master and the Court, on any examination or enquiry referred to him.
- (4) Any witness who has given evidence before the Master or the Court under section 417 or before a commissioner under this section, shall be entitled, at his cost, to a copy of the record of his evidence.
- (5) Any person who- (a) has been duly summoned under this section by a commissioner who is not a magistrate and who fails, without sufficient cause, to attend at the time and place specified in the summons; or (b) has been duly summoned under section 417 (1) by the Master or under this section by a commissioner who is not a magistrate and who- (i) fails, without sufficient cause, to remain in attendance until excused by the Master or such commissioner, as the case may be, from further attendance; (ii) refuses to be sworn or to affirm as a witness; or (iii) fails, without sufficient cause- (aa) to answer fully and satisfactorily any question lawfully put to him in terms of section 417 (2) or this section; or (bb) to produce books or papers in his custody or under his control which he was required to produce in terms of section 417 (3) or this section, shall be guilty of an offence."

of office of the Molefe Board had ended on 31 August 2017, it was only on 17 October 2017 that a board was appointed. It was said to be an Interim Board. Ms Nana Makhubele SC was appointed as its Chairperson. Why a normal Board was not appointed is not clear.

2009. Mr Dingiswayo noted that this was around the time that PRASA's Audit Report would have to be finalised. One would have expected that the most pressing issue for the Board would have been the finalisation of the audit. Instead, according to Mr Dingiswayo, hardly a month after the appointment of the interim Board, its Chairperson started making enquiries about the litigation between Siyaya and PRASA. According to Mr Dingiswayo, what happened in respect of the litigation may be summarised as follows:

2009.1. First, on 14 November 2017, Ms Makhubele met with Ms Ngoye to enquire after the cases involving the Siyaya Group. Pursuant thereto, upon a request by Mr Dingiswayo, PRASA's attorneys prepared a report. The report detailed the defences that had been set out in the Plea in each matter. The report was shared with Ms Makhubele.

2009.2. Second, Ms Makhubele responded with a report of her own in which she said that she had been approached by the attorneys of the liquidators and she was in possession of an interim report of the Commissioner in the insolvency inquiry; and that that report indicated that PRASA employees who had testified in the liquidation inquiry had made "major concessions" in respect of PRASA's liability. Mr Dingiswayo said that Ms Makhubele asked for written reports from the employees "to confirm their testimony". Two employees compiled reports in which they indicated that they had not made concessions.

- 2009.3. **Third**, on 30 November 2017, Mr Dingiswayo prepared a further report or memorandum in which he pointed out the following: the delays in the litigation were at the instance of Siyaya and the liquidators; the liquidators appeared to have given preference to liquidation proceedings instead of preparing for the arbitration, which would produce a binding outcome. He sent his report or memorandum and the reports of the two employees to Ms Makhubele.
- 2009.4. **Fourth**, on the following day, that is 1 December 2017, the Board held a special meeting at which it resolved to suspend the panel of attorneys but did not mention the Siyaya litigation.
- 2009.5. **Fifth**, on 15 December 2017, a meeting was held between Ms Makhubele and Mr Madimpe Mogoshoa, of Diale Mogoshoa Inc, PRASA's then attorneys in the Siyaya matters. At the meeting, Mr Mogoshoa was told to settle each of the matters at the amounts given to him. Mr Mogoshoa was told by Ms Makhubele not to communicate with PRASA's Legal Unit in regard to the litigation relating to Siyaya companies. These instructions were confirmed in a letter from the Company Secretary later that day. However, when Mr Mogoshoa made the offer to Mr Mathopo who represented Siyaya, Mr Mathopo told him that his offer was not in accordance with his (i.e. Mr Mogoshoa's) client's instructions. This was strange because how could Mr Mathopo know what instructions Mr Mogoshoa had been given by his clients. As a result, Mr Mogoshoa sent a revised offer which was accepted. On 7 February 2018, this revised offer was made an award by the appointed arbitrator.
- 2009.6. **Sixth**, in early March 2018, Mr Dingiswayo became aware that Mr Mabunda had indicated that he would be receiving monies from PRASA pursuant to an application made to the High Court to make the arbitration award an order of

court. On being requested, Mr Mogashoa furnished Mr Dingiswayo with a copy of the papers.

2009.7. **Seventh**, PRASA's Head: Group Legal Affairs, Ms Ngoeye then instructed Bowman Gilfillan to deliver a notice to oppose the application, which had been set down for 9 May 2018. Surprisingly, the attorneys representing the liquidators were Mathopo Attorneys, the attorneys who had represented Siyaya Engineers before it was liquidated.

2009.8. **Eighth**, Mathopo Attorneys challenged Bowman Gilfillan's authority to act on behalf of PRASA. A power of attorney signed by Ms Ngoye was filed to counter this. However, Mathopo Attorneys then wrote to Bowman Gilfillan to indicate that they were in possession of a text message from Ms Makhubele saying that Bowman's did not have the authority to represent PRASA. Mr Dingiswayo communicated this to the Board by email on 8 March 2018, but no member of the Board responded to the e-mail. Ms Ngoye sent a similar email to Minister Blade Nzimande, who had just been appointed Minister of Transport. No response was received from him.

2009.9. **Ninth**, at the hearing of the matter on 9 March 2018 the following happened. Mr Botes, for the Siyaya Companies, had in his possession a letter on the PRASA letterhead. The letter, which was addressed to Diale Mogashoa Attorneys, instructed them to concede to the Siyaya claims. The letter referred to the conclusion of a "settlement agreement" that led to the arbitration award being made. Mr Dingiswayo was surprised that Siyaya's legal representatives were in possession of a privileged letter. Be that as it may, the order sought by Siyaya and the liquidators was granted by Acting Judge Holland-Muter, who ruled that PRASA's attorney did not have the authority to represent PRASA.

- 2009.10. **Tenth**, Group Legal Services then told the Board and the Minister that judgment had been entered against PRASA.
- 2009.11. **Eleventh**, in the meantime, Siyaya Companies and the Liquidators had instructed the sheriff to attach PRASA's banking account and about R59 million was removed therefrom.
- 2009.12. **Twelfth**, the Minister of Transport, Dr Blade Nzimande then called a meeting with Ms Makhubele and senior PRASA employees, including Ms Ngoye and Mr Dingiswayo. At the meeting, Ms Makhubele was told to compile a report setting out her version. PRASA's Group Legal was asked to do the same.
- 2009.13. **Thirteenth**, upon instructions from the Minister, PRASA launched an application in the High Court for the rescission of the judgment granted on 9 March 2018 and an order interdicting the Sheriff from paying any money from PRASA's bank account over to Siyaya. That application was granted, the attached money returned and the judgment was rescinded.
2010. Seemingly, Ms Makhubele resigned from the Board with effect from the due date of her report, namely 16 March 2018.

THE APPOINTMENT OF WERKSMANS ATTORNEYS

2011. As can be seen from several of the matters set out above, an issue that was raised on numerous occasions in connection with the Molefe Board's attempt to deal with corruption at PRASA was the appointment of Werksmans Attorneys to conduct investigations into matters first identified by the Auditor-General and thereafter by the Public Protector. The issue was whether Werksmans had been properly appointed.

2012. Ms Ngoye gave evidence on this issue. Her evidence was based on a report that had been prepared by her unit at PRASA for PRASA's new Board. The Report is dated 21 September 2020. Ms Ngoye confirmed the correctness of the Report. What was said in the report and what she said in evidence may be summarised as set out hereunder.

Ms Ngoye's report

2013. **First**, Werksmans was appointed by way of a letter of engagement dated 6 August 2015. The letter was signed by Mr Nathi Khena, the then Acting Group CEO. Werksmans was appointed to investigate irregular expenditure that had been identified by the AG in the 2014/2015 financial year. The appointment was the culmination of discussions between the 2014 Board and a consortium that was initially led by a chartered accounting and auditing firm, Ngubane & Company (Ngubane), and later led by Werksmans. According to Mr Khena, the decision to appoint Ngubane to conduct the forensic investigation was based on Regulation 16A of Treasury's Regulations.

2014. **Second**, after an initial meeting with Ngubane, a further meeting was held. This meeting included sub-contractors to Ngubane. Among them were Werksmans. The meeting was told that the Board had decided that Werksmans would lead the team and not Ngubane. The reasons given were: as Werksmans was a law firm, PRASA would be protected by the attorney-client privilege in the work done by the consortium; Regulation 16A was not applicable to the appointment; and Werksmans was one of the law firms on PRASA's panel. A new letter of engagement was then prepared, which had been vetted by Group Legal Services and then signed by Mr Khena.

2015. **Third**, an issue raised by PRASA's Group Legal was negotiations on the method of billing. But the Chairperson of the Board's Risk and Audit Committee, Ms Zodwa Manase, responded: "if you want quality work, you don't negotiate fees". Initially, fees were paid by the cost centre of legal fees and would be refunded to that cost centre

later. Thereafter, however, payments were made from the cost centre of the Group CEO, who approved the invoices.

2016. **Fourth**, from its inception until the final report was issued in 2017, the forensic investigation and litigation that flowed from it were under the direction of the Board. The role of PRASA's Group Legal Services was to assist the investigation team, provide information and facilitate meetings between them and officials. Werksmans did not report anything to Group Legal Services. Their reports were presented to the Board and then the Minister of Transport. Invoices were signed by the Company secretary and the Acting Group CEO. However, after Group Legal Services had suggested that their services should be more productively used, they were allowed to see reports, but only at Werksmans' premises.

2017. **Fifth**, in June 2016, a meeting was held at which Group Legal Services thought the costs of the investigations would be discussed but Ms Manase said she would discuss the costs separately with Werksmans' lead partner and the two retired to a separate room.

2018. **Sixth**, the initial scope of the investigation was the investigation of fruitless and wasteful expenditure that the AG had found in the 2014/2015 financial year. After the Public Protector had tabled her *Derailed* Report, the Board and National Treasury agreed to refer to Werksmans some of the investigations that the Public Protector had directed be undertaken. This agreement increased the number of transactions from about 33 to about 140.

2019. **Seventh**, the report notes that among the outcomes that flowed from the Werksmans investigations were the review applications that the Board had instituted in respect of the Swifambo and Siyangena contracts. These applications have been considered quite

extensively earlier in this Report. It also noted that the investigation had highlighted PRASA's fight against corruption.

2020. The parties who were mentioned in Ms Ngoye's report were invited to respond. They did so by way of affidavits. Their responses are considered separately hereunder.

Werksmans' response

2021. Werksmans' response to the evidence by Ms Ngoye is set out in an affidavit made by Mr Bernard Hotz on 16 February 2021, read with an earlier affidavit dated 24 November 2020 that he had submitted to the Commission. The essence of Mr Hotz's response may be summarised as set out hereunder.

2021.1. First, the Special Investigating Unit (SIU) was investigating various PRASA-related matters, one of them being the appointment of Werksmans. PRASA had already instructed Werksmans to provide assistance to the SIU in respect of the SIU investigations and Werksmans did so. As regards the SIU's investigation into the appointment of Werksmans by PRASA, Mr Hotz said that Werksmans had given a detailed oral explanation to the SIU on 25 June 2020 and thereafter confirmed it in a letter dated 30 June 2020. Werksmans had not heard from the SIU after it had sent the letter, which had also been copied to Mr Molefe, Ms Manase and Ms Ngoye.

2021.2. Second, in the letter of 30 June 2020 Mr Hotz set out how Werksmans came to be appointed. In his letter, Mr Hotz said that: after PRASA had decided to appoint Ngubane, Werksmans was asked by a firm that was to provide investigative capacity to Ngubane whether Werksmans was on PRASA's legal panel and, if so, whether Werksmans would accept an instruction; Werksmans confirmed that it was on the panel and would accept an instruction. It was

invited to a meeting attended by Mr Molefe, Ms Manase and other firms whom PRASA intended to engage for the investigations.

2021.3. Mr Hotz said that at the meeting, Ms Manase said that Ngubane had been appointed in terms of Treasury Regulation 16A and; it was also envisaged that Ngubane would be leading the process. Thereafter, Werksmans met with Ngubane to discuss, among other things, the methodology that could possibly be followed in the investigations; however, no agreements were concluded between Ngubane and Werksmans or any of the other firms pursuant to the earlier meeting.

2021.4. Werksmans had in the meantime concluded that it was not competent for PRASA to utilise Regulation 16A to appoint Ngubane. It advised Mr Molefe and Ms Manase of that view and also stressed the importance of attorney-client privilege, which would only exist if PRASA instructed a firm of attorneys to conduct the investigation and explained that, if Werksmans were appointed by PRASA the attorney-client privilege would extend to service providers whom Werksmans would appoint. Mr Hotz's letter went on to say that PRASA accepted Werksmans' advice and this led to engaging with Ms Ngoye for the purpose of finalising the letter of engagement, which was signed by the Acting Group CEO on 6 August 2015. It was only then that Werksmans commenced rendering its services.

2021.5. Mr Hotz's letter stressed that at the time of its engagement, Werksmans was (and still is) a member of the PRASA legal panel and as such PRASA was lawfully entitled to appoint Werksmans for the tasks and in the manner it had. It also pointed out the following: it was Werksmans who had appointed the different service providers; after it was appointed, Werksmans engaged on

numerous occasions with among others, the Board, representatives of National Treasury and the AG's office, Minister Peters, the Head of Scopa (Mr Themba Godi) and law enforcement.

2021.6. **Third**, in his affidavit, Mr Hotz disputed the correctness of certain conclusions reached by the AG in respect of PRASA's appointment of Werksmans. In this regard, Mr Hotz said that the AG's conclusion that no SCM process had been followed by PRASA in the set-up of the legal panel was incorrect. He said that this was because a proper tender process had been followed by the South African Rail Commuter Corporation Ltd (SARCC) and the SARCC's name was changed to PRASA by the Legal Succession Act.¹³⁹³ The SARCC had lawfully appointed a panel and accordingly PRASA was not required to conduct a fresh tender process. The AG had also concluded that no SCM process had been followed when selecting suppliers from the panel and not all services providers had been given a fair chance to compete with Werksmans for this service.

2021.7. In his response to this conclusion, Mr Hotz said that PRASA's SCM policy in place at the time permitted the development and maintenance of a database and obtaining of quotations from persons on the database; but the policy in place at that time also permitted PRASA to deviate from the requirement to obtain more than one quotation in certain circumstances; one of those circumstances was in respect of single source or confinement, which PRASA was permitted to use, but only in respect of professional services such as legal and, which is in addition approved and ratified by the Group CEO. Mr Hotz's affidavit stated that PRASA formed the view that the requirements for confinement were satisfied for Werksmans' appointment as a professional legal

¹³⁹³ The Legal Succession to the South African Transport Services Act, No 9 of 1989

service provider. Accordingly, Mr Hotz said that there was no merit in the allegations made by the AG's office.

2021.8. **Fourth**, as regards the June 2016 meeting when he and Ms Manase retired to a separate room to discuss the issue of Werksmans' costs, Mr Hotz said that a private discussion was necessitated by the following: from the commencement of the Werksmans' investigation, they were not operating in "friendly waters"; many people in PRASA did not welcome the investigation; measures were taken to interfere with the investigation, destroy or conceal evidence, mislead investigators and be generally obstructive; this was because the evidence that had been gathered suggested that PRASA was "plagued by corruption"; as a result, one of the other measures used was to delay payment of Werksmans' invoices; because Mr Molefe and Ms Manase were the driving force behind the initiation and continuation of the investigations, he [Mr Hotz] informed them of the non-timeous payments; however, he had at the outset cautioned them that their interactions should be confined to a small group of trusted persons within PRASA; that is the reason that only one copy of Werksmans' Reports would be presented to Mr Molefe and it was for him to decide to whom to make the Reports available; in June 2016 their invoices had again not been paid; it was to discuss the delay in payment of those invoices that he had asked to meet separately with Ms Manase; and their outstanding invoices were eventually paid.

Ms Manase's response

2022. Ms Manase dealt with the issue of the appointment of Werksmans in her affidavit. What she said in her affidavit may be summarised as follows: after the Board had received the AG's report on irregular and fruitless expenditure, it resolved to investigate so as to

prevent further irregular and fruitless expenditure; the Board also approved the use of Regulation 16A; it delegated the responsibility to appoint a service provider to its chairperson (Mr Molefe) and Ms Manase (as the chair of its risk and audit committee); Ngubane was appointed in terms of Regulation 16A; a member of a forensic team that Ngubane had engaged, BCPS, introduced them to Werksmans; BCPS said it was standard practice that a firm of attorneys is appointed to lead the investigations, so that attorney-client privilege could be claimed in respect of the investigations; she and Mr Molefe agreed that Werksmans could be appointed to lead the investigations, provided they were on PRASA's panel of attorneys; in the meantime Werksmans had advised that because PRASA was a Schedule 3B entity for the purposes of the PFMA, Regulation 16A could not be utilised; after Ms Ngoye confirmed that Werksmans was on PRASA's panel, Werksmans was appointed to lead the investigations; Ms Ngoye had also informed her that attorneys on the panel were not appointed on a quotation basis, but on a rotation basis; upon her request, Ms Ngoye had informed her that, provided that one adjustment was made to Werksmans' rates, she was satisfied that Werksmans rates were reasonable; and the agreement with Werksmans was thereafter signed on PRASA's behalf by its then Acting Group CEO, Mr Nathi Khena, on 6 August 2015.

2023. As regards the investigations, Ms Manase said the following: she and Mr Molefe met with the forensic team regularly; as the investigations were sensitive, only she and Mr Molefe were privy to some of the information that was obtained; after the Public Protector's *Derailed* Report, in order to reduce PRASA's costs, she asked that investigations that the Werksmans team had not started be referred to National Treasury; she pointed out that when the agreement with Werksmans was signed, there were 33 contracts; thereafter, following a meeting with National Treasury on 2 March 2016, it was decided that, in respect of the Public Protector's remedial action,

Werksmans would investigate 141 contracts and Treasury would investigate 220 contracts.

2024. As regards the outcome of the Werksmans investigations, she said: of the 141 matters investigated by Werksmans, 66 had been referred to the DPCI by the time she had left PRASA in April 2017; and PRASA had succeeded in setting aside the Swifambo and Siyangena contracts.

2025. Ms Manase denied that she had told Ms Ngoye: if you want quality, you don't negotiate fees.

Mr Molefe's response

2026. In a separate affidavit dealing with the allegations made by Ms Ngoye, Mr Molefe said the following: Werksmans had been appointed to PRASA's legal panel prior to his tenure as Board chairperson; after receiving the AG's draft report on fruitless and wasteful expenditure in June and July 2015, the Board had mandated him and Ms Manase [in her capacity as chair of its Audit and Risk Management Committee] to ensure that the investigations recommended did happen; Ms Manase was of the view that Regulation 16A could be utilised to fast track the appointment of a service provider; it was thereafter that the appointment of Werksmans was made by Mr Khena; he and Ms Manase met frequently with Werksmans; and the reason that he and Ms Manase had adopted a hands-on approach was management's reluctance or refusal to cooperate with the investigation.

Analysis

2027. It is considered that there are three significant issues that arise in respect of the Molefe Board's appointment of Werksmans to conduct the investigations that the AG and the Public Protector required.

2028. The first is the lawfulness, propriety and fairness of the appointment. In respect of this issue, what emerges from the foregoing is that it does not appear that a procurement process as such was followed when first Ngubane and thereafter Werksmans were engaged by PRASA. It appears that the appointment of Werksmans was made on the basis that it was one of the law firms on PRASA's panel and that PRASA was entitled to rely on its "single source or confinement powers" to appoint Werksmans, as it was a professional legal service provider. In the circumstances, whilst it may have been lawful for PRASA to appoint Werksmans, given the scope of the work and the duration for which the services were to be procured, it may appear to have been unfair to other service providers.

2029. The second issue raised about the appointment of Werksmans related to their fees. This was a matter that Minister Peters emphasised as having been a great concern to her. That is that the costs associated with Werksman's investigations were growing all the time and at some stage had exceeded R100 million and yet the Board was not able to give Minister Peters an estimate of the costs that PRASA would incur in respect of the investigations. It appeared as if the Board took the view that those who raised concerns about the legality of the appointment of Werksmans and who raised the issue of the costs of the investigation were people who were against the investigation of corruption and maladministration at PRASA. While the Molefe Board rightly wanted to hold wrongdoers accountable, it appeared not to want to be held accountable itself for how the funds were spent.

2030. The unfortunate result is that much of the good work done by the Board and Werksmans in the fight against corruption at PRASA was hindered by allowing the appointment of Werksmans and the insistence on the continued utilisation of its services to be a major distraction. The Molefe Board, as well intentioned as it was, would have done more to root out corruption at PRASA had it adopted a more nuanced approach to questions about its appointment of Werksmans and the containment of the legal costs relating to the investigations.

2031. The observations made above about the Board's approach is not to be understood as an acceptance of the treatment meted out to the Molefe Board by Minister Peters and the Portfolio Committee. They too were under a duty to ensure that corruption was rooted out from public entities. In this they failed.

2032. It perhaps should be reiterated in this section that of the Report that Mr Montana on several occasions criticised the appointment of Werksmans and accused them of engaging in illegal surveillance, an allegation that Werksmans denied. Some of these matters have already been considered above.

2033. Mr Montana also raised several matters not directly connected to allegations that were made against him which he was required to respond to when called as a witness by the Commission. The more significant of those matters are considered in the next section of this Report.

MATTERS RAISED BY MR MONTANA

2034. While Mr Montana was entitled to set out "his side of the story," many of the matters that he dealt with in his affidavit were not relevant to the Commission's terms of reference. Members of the Commission's investigating and legal teams dealing with PRASA-related matters sought to persuade Mr Montana to exclude those parts of the

affidavit that did not fit into the Commission's terms of reference. Mr Montana took offence at this suggestion and alleged that the Commission was attempting to "curtail" his evidence. He accused the Commission of depriving him of the opportunity to tell his story and the "real story of PRASA" and refused to accept the excising of the irrelevant parts of the affidavit. Mr Montana's approach could not legitimately be countenanced. The main reason is that this is a Commission whose terms of reference set out the matters it should deal with. It is perhaps important to stress that this is not a Commission into PRASA, although given what has emerged about PRASA at the Commission, it may well be that a separate commission should be established to look at the wrongs at PRASA. Be that as it may, given the firm position taken by the Commission's legal and investigating team, on the one hand, and Mr Montana, on the other, a stand-off ensued about Mr Montana's giving evidence.

2035. Eventually, Mr Montana was served with a directive in terms of Regulation 10(6) of the Commission's Regulations requiring him to respond under oath to the evidence of Mr Molefe, Ms Ngoye, Mr Dingiswayo and the Report of Mr Oellermann. However, Mr Montana did not comply with the directive to furnish the Commission with affidavits that set out his responses to evidence against him. The purpose of requiring such responses was to identify precisely what was being disputed and thereby curtail the time spent on oral evidence. As a result of Mr Montana's failure to comply with the directive, it became a time-consuming exercise to get answers from him when he did testify. As noted above, he did not agree to answer all questions relating to the property transactions, and he said saying that the evidence leader was biased.

2036. In order to ensure that the public heard from Mr Montana himself his response to the allegations made against him, Mr Montana was accommodated. However, as regards his affidavit, the problems remained until the very end. Eventually, the Commission

admitted the affidavit. But not all the original annexures form part of the affidavit that was admitted.

2037. As emerges from what has been set out above, Mr Montana's responses to evidence made against him by different witnesses were included in the sections of the Report where the evidence against him is set out are set out.

2038. In addition to setting out his responses, however, among the more significant issues that emerged when Mr Montana gave evidence or in his affidavit are the following.

2039. Early in his evidence, he delivered what he described as his "opening statement to the Commission". The opening statement throws some light on his views on the Commission, the role of SOEs and allegations made about them generally and at the Commission. It is accordingly instructive to set out some of what he said on these matters. They are set out in the paragraph immediately hereunder.

2039.1. **First**, he had written to the Chairperson on 26 July 2019 asking for an opportunity to testify [on] a whole range of issues that he intended to address, but the Commission¹³⁹⁴ wanted to curtail his evidence and wanted him to take out some parts that dealt with the appointment of Werksmans Attorneys [by the Molefe Board] to investigate allegations of irregularities.¹³⁹⁵

2039.2. **Second**, as pointed out earlier, he asked the Commission to subpoena the bank accounts of Mr Molefe, who was "the most preferred witness of this

¹³⁹⁴ This was clearly a reference to members of the Commission's Investigating and Legal Team dealing with the Investigations into PRASA. It needs to be placed on record that there was no attempt on the part of the Commission not to deal with the complaints relating to the appointment of Werksmans by the Molefe Board. In this regard, it is worth noting that the appointment of Werksmans was an issue that was raised on several occasions by Minister Peters and the Portfolio Committee. For the record, the members of the Commission's Investigating and legal teams deny that there was any attempt to curtail the evidence relating to the appointment of Werksmans.

¹³⁹⁵ At Page 11 of the Transcript of the first day on which he testified, namely 16 April 2021 (first day's transcript).

Commission”,¹³⁹⁶ and those of his Foundation. It perhaps should be noted that on this issue the Commission did not accede to the request as no proper basis existed to do so.

2039.3. Finally, it is necessary to refer to certain to certain points made by Mr Montana in his affidavit. Mr Montana made the following points: there appeared to be a split in the ANC, between those deemed to be associated with former President Zuma and the so-called State Capture project and those seemingly opposing them; the ANC or some of its leaders were either beneficiaries of payments by companies that were contracted to PRASA or directly from PRASA; as the Group CEO, he worked very closely with the ANC; ANC leaders would put pressure on many CEOs of SOEs and public entities to assist the ANC or entities that it said belonged to “the movement”; the “dominant view and practice in the party” was that cadres “deployed” in positions of power should assist the party financially; the ANC “would ask many of us in leadership positions of SOEs and public entities” to get contractors to contribute financially to the party; he had once agreed to meet companies to whom the ANC owed money to see if “we could assist them in the future”; although the ANC had denied that it had ever received money from Swifambo, Mr Mashaba had confirmed to Mr Montana that he had made payments to the ANC; the ANC, through instructions from the Minister of Transport, had over years used PRASA transport services without paying; and PRASA had also provided dozens of trains and more than 200 buses for the ANC’s Centenary Celebrations in 2012.

2040. Mr Montana also testified that on two separate occasions he had been approached by Minister Peters to provide transport for ANC events. First, in 2014 the request was to provide "PRASA buses" for a large gathering of traditional leaders in the North West Province. He said that he refused to comply with the request despite being told that "he was defying the movement". He said he refused to provide the buses as Autopax would have lost an estimated R40 million had the buses been provided. Second, in January 2015 Minister Peters had asked him to provide trains and buses for the ANC's January 8 celebrations in Cape Town as she was "under pressure". On this occasion, he said, he put together a transport plan for the event.

2041. Former Minister Peters' response to these allegations was as follows. She said that in January 2014 she had approached Mr Montana after she had been told by former Minister Bathabile Dlamini that she had not been able to get hold of Mr Montana to ascertain the process to follow to secure Autopax buses and a quotation for the use of the buses. Former Minister Peters said that there had been no suggestion that the buses were to be made available free of charge. She said that she was not aware of Mr Montana's refusal or his being told that he was "defying the movement". As regards her request to Montana in January 2015, she said she had asked Mr Montana to provide a quotation and assistance with the use of the trains. She stated that she had not made the request to him in his capacity as PRASA's Group CEO or to make the trains available for free or without following the usual processes "when such services are enlisted".

2042. In response to allegations made in Mr Montana's affidavit, against Dr Zweli Mkhize personally, or in his capacity as Treasury-General of the ANC, Dr Mkhize filed an affidavit in which he said that Mr Montana had made similar allegations in the past and that he had responded to those allegations in a letter to Parliament's Public Enterprises Portfolio Committee. A copy of his letter was annexed to his response to the

Commission. The thrust of what is set out in Dr Mkhize's response and letter is as follows: when Mr Montana visited the ANC's Headquarters at Luthuli House, he would "come and greet"; Mr Montana had on a few occasions offered to let Dr Mkhize know if there were private business people who were willing to offer a donation to the ANC, though such offers were not linked to PRASA contracts; he and Mr Montana had never discussed a donation [to the ANC] that would be solicited through a PRASA contract; he confirmed that Ms Maria Gomes had made donations to the ANC, but he said that the money was not "derived from PRASA contracts"; and at some stage Mr Montana had asked him to meet a PRASA service provider, but he refused to do so.

2043. On any basis, the evidence given by Mr Montana is highly worrisome. It suggests that people whom the ANC deployed to leadership positions in SOEs were expected to secure benefits for the ANC from service providers to which the SOEs awarded tenders. On Mr Montana's version, he did attempt to secure such benefits for the ANC: according to him on one occasion he undertook to see what he could do for the companies "in the future".

2044. The evidence of former Minister Peters is equally worrisome. Even on her own version, in early 2014 she had asked Mr Montana to assist the ANC by providing PRASA transport in 2015 and had succeeded in getting him to provide the ANC with PRASA transport in 2015. It is so that former Minister Peters said that she expected that the ANC would have to pay for this. Yet, what is missing from her response to Mr Montana's allegations is that she followed up on the issue of payment. Given that she was the Minister, there would have been a duty to do so. She does not seem to have asked for any quotation first which one would expect anyone who was going to pay for such transport to request.

Mr Montana's recusal application

2045. Mr Montana appeared before the Commission on numerous days. His appearance came as a result of a summons that was served on him. He was given a lot of time to put his side of the story which he did. Towards the end of his evidence he applied for the "recusal" of the Evidence Leader, Mr V Soni SC. He advanced two grounds for that application. The one was that Mr Soni is biased and the other was that Mr Soni had a conflict of interest. Mr Montana was given an opportunity to deliver written submissions. The Commission's Legal Team dealing with evidence relating to PRASA was also given an opportunity to deliver written submissions. Both sides delivered written submissions. I previously dismissed Mr Montana's application and indicated that the reasons would be furnished at the time of the release of that part of the Commission's Report that relates to PRASA. These are the reasons.

2046. To support his contentions of bias, Mr Montana stated that the request or application for recusal of the Evidence Leader was justified because the Evidence Leader acted dishonestly, conducted himself disgracefully and withheld critical information from the Commission and witnesses. He further argued that the Evidence Leader aligned himself with "a particular narrative about the issues and challenges facing the Passenger Rail Agency of South Africa...irrespective of the facts of the matter". Mr Montana further stated that Adv Soni was subject to, and indeed, under outside interferences, particularly the network under the Werksmans Attorneys.

2047. According to Mr Montana, the facts that showed bias on Mr Soni's part included: first, the curtailment of his evidence with the ultimate goal of feeding into the predetermined agenda and to protect certain individuals; second, the selective use of evidence which did not support the predetermined outcome being discarded, for instance, the evidence of Karen De Beer and Louis Green and the total ignorance of Mr Wagner's affidavit

which disproved allegations that properties were bought for Mr Montana; and third, the conduct by the Evidence Leader to keep certain letters submitted by Mr Montana and certain evidence from reaching the Chairperson of the Commission.

2048. On the aspect of conflict of interest, Mr Montana submits that Mr Soni was completely conflicted and should not have been permitted to be the Evidence Leader for the PRASA workstream. To this end, Mr Montana stated that Adv Soni was at some stage asked to provide an opinion by Werksmans Attorneys regarding possible criminal liability of Mr Montana for what had happened at PRASA during Mr Montana's tenure as GCEO of PRASA. Mr Montana states that Adv Soni admitted this during the Commission's hearings and as such, it was dishonest of him to not have disclosed this fact at the very beginning. He stated that Adv Soni had a duty to disclose to the Chairperson that he had done work for PRASA and Werksmans Attorneys and allow the Chairperson to make an evaluation of whether there was a conflict of interest.

2049. Mr Montana also supported this ground by stating that Adv Soni acted as a Judge in a matter regarding PetroSA, which was Chaired by the very same Mr Popo Molefe. He referred to what he said was a commonly held view about the judgment of Adv Soni in that matter involving Mr Popo Molefe. Mr Montana further submitted that Adv Soni was an evidence leader at the Jali Commission and Ms Zodwa Manase, who was a forensic investigator at that Commission, was a member of PRASA Board. He states that Ms Manase submitted an affidavit to the Commission and all these when viewed in the light of the relationship they (Adv Soni and Ms Manase) had, placed Adv Soni in a compromised position – a conflict of interest. According to Mr Montana, Adv Soni fails the test of integrity, honesty and fairness – a test reasonably expected of any officer of the court. He said that, objectively speaking, Adv Soni could not act in a fair and unbiased manner.

2050. Mr Montana thus argued in conclusion that, "a reasonable apprehension of bias" existed and, owing to that, Adv Soni should recuse himself or should be recused by me.

2051. Adv Soni did not make any written submissions. Adv Soni elected not to deal with other matters that had been raised by Mr Montana except the issue and allegation that Adv Soni was conflicted. He responded to allegations of conflict of interest during Mr Montana's oral testimony at the Commission. This is what he said:

"I am not going to deal with other matters that Mr Montana has raised. Mr Montana says I am conflicted. As the – an officer of court and I accept this is not a court but in general I am deeply conscious of not involving myself in activities that might involve a conflict. So I want to place on record I have never been briefed by Werksmans Attorneys in any matter involving PRASA or Mr Montana. This is not the first time Mr Montana has raised it. He has raised it with journalists who communicated with me and out of concern I wrote to the lead counsel of the commission Mr Pretorius and placed on record."

2052. Adv Soni continued:

"I have never been briefed by Werksmans Attorneys in respect of either Mr Montana or PRASA ever before or after the commission. I was briefed by Werksmans once about fourteen/fifteen years ago in a matter in Durban it was a commercial matter it had nothing to do with PRASA. In regard to PRASA one matter on which I was briefed was a matter in which I was asked to give an opinion on whether criminal charges could be brought against Mr Montana. I am surprised that Mr Montana thinks that that disqualifies me because that opinion said that given the position Mr Montana occupied he could not be criminally involved. But it had nothing to do with anything that the commission is in. And Chairperson when I came to the commission I was not aware of what stream I would be fitted into."

2053. In my view Mr Montana's application for the "recusal" of Mr Soni can be disposed of on the facts. Mr Soni is an evidence leader in a Commission of Inquiry. As such he is entitled to question witnesses and to test their evidence so as to help the Commission establish the truth about the matters it is investigating. There is no evidence justifying the conclusion that Mr Soni plays the role of evidence leader in a manner that has

revealed that he is biased against Mr Montana. Mr Soni has not withheld any information from me that needs to reach me. With regard to Mr Montana complaining that Mr Soni sought to curtail his evidence, I wish to point out that every witness' evidence is curtailed if it is irrelevant or, in the context of this Commission, if though relevant, is not significant. This has to be done because the Commission does not have all the time in the world to hear all evidence. I am satisfied that Mr Montana's complaints against Mr Soni are not supported by evidence.

2054. I, therefore, dismissed Mr Montana's application on the basis that his complaint was not supported by the facts.

2055. There are two further matters that should be addressed in this Report. The first is the failure to appoint a permanent, as opposed to an Interim, Board for more than three years and a permanent, as opposed to an Acting, Group CEO for some five and a half years. According to an affidavit presented to the Commission by the Office of the Auditor General, those failures contributed to instability at PRASA. The second is this. Notwithstanding that there is now a permanent Board, it would appear that the instability continues, seemingly being the result of the authoritarian manner in which the new Board is conducting itself. What is disturbing is that the approach to the exercise of power by the new Board in respect of labour-related matters is somewhat reminiscent of the Montana era, which was so graphically captured by Ms Madonsela in her Derailed Report. These two issues are considered in the next section of this Report.

INSTABILITY AT PRASA

2056. After the expiry of the term of office of the Molefe Board, only Interim Boards were appointed – until 22 October 2020 when a permanent Board was appointed. This means that PRASA did not have a permanent Board for some three years and three months.

2057. Similarly, after Mr Montana had left PRASA as Group CEO on 15 July 2015, only Acting Group CEOs were appointed – until 24 February 2021 when Mr Zolani Kgosietsile Matthews was appointed as the Group CEO. This means that PRASA did not have a permanent Group CEO for more than five and a half years.

2058. In an affidavit prepared by the late Mr Thembekile Makwetu, who was the Auditor General at the time, and subsequently submitted to the Commission by the Office of the Auditor General, he said that he had drawn the attention of the Minister to the following matters.¹³⁹⁷

2058.1. **First**, from November 2016, there was instability in the Board and from 1 August 2017, there was no permanent Board.

2058.2. **Second**, from July 2015 only acting Group CEOs were appointed.

2058.3. **Third**, the instability in the Board and at PRASA's key management level were negatively impacting PRASA's operations and contributed to the collapse of the control environment.

2058.4. **Fourth**, the instability in the Board and at PRASA's key management level were negatively impacting PRASA's operations and contributed to the collapse of the control environment.

2058.5. **Fifth**, irregular expenditure had increased from R100 million in 2013/14 to R24,2 billion in 2017/18.

¹³⁹⁷ Mr Makwetu unfortunately passed away before he could sign the affidavit. But the correctness of what is set out in this Report from that affidavit has been confirmed by another officer from the office who also has first-hand knowledge of the matters contained herein.

2058.6. **Sixth**, the instability in the Group Chief Executive Officer position was also troublesome.

2059. However, notwithstanding that the Auditor General brought the foregoing quite worrisome matters to the attention of the respective Ministers of Transport, the unsatisfactory situation was allowed to persist for close to six years. In the circumstances, it is necessary to ascertain the following: whose responsibility it was to make those appointments; if the repository of power did not make those appointments, whose responsibility it was to hold the repository of power accountable; and should anyone be held accountable for the failure to appoint a permanent Board for more than three years and a permanent Group CEO for close to six years.

The relevant statutory and regulatory provisions

2060. The issue of the appointment of the Board of PRASA is dealt with in section 24 of the Legal Succession of the South African Transport Services Act¹³⁹⁸ ("the Legal Succession Act"). Section 24 reads:

“

- (1) The affairs of the Corporation [PRASA] shall be managed by a Board of Control of not more than 11 members including the chairman, who shall be appointed and dismissed by the Minister.
- (2) At least
 - (a) one of the members of the Board of Control shall be an officer in the Department of Transport;
 - (b) one of the members of the Board of Control shall be an officer in the Department of Finance;

¹³⁹⁸ No 9 of 1989

(bA) one of the members of the Board of Control shall be an officer in the Department of State Expenditure;

(c) one of the members of the Board of Control shall be nominated by the South African Local Government Association recognised in terms of section 2(1)(a) of the Organised Local Government Act, 1997 (Act 52 of 1997);

(d) three of the members of the Board of Control shall have experience in the management of a private sector enterprise.

(3) The Minister shall appoint the Corporation's first Board of Control with effect from the date referred to in section 3(1)¹³⁹⁹.

(4) The first Board of Control shall appoint a secretariat which shall carry out, on a full-time basis, such functions as the Board may depute to it.

(5) The Board of Control may, subject to such conditions as it may stipulate, delegate any of its powers to any member of the Board, employee or other person with or without the power to delegate such power further.

(6) Any action taken by a member of the Board, employee or other person on behalf of the Corporation may be ratified by the Board of Control.

(7) The Board of Control shall ensure that any directive issued under section 23(6) is taken into consideration in the management of the affairs of the Corporation during the financial year concerned."

2061. Section 24(1) makes it clear that the Board of PRASA has the power to manage the affairs of PRASA. In the absence of any provision of the same Act or any other Act making a different provision, the power to manage the affairs of PRASA includes the power to appoint the Group CEO. However, that was not always everyone's understanding. It seems from the evidence of both Mr Popo Molefe and Minister Peters that the understanding was that the Board recommended to the Minister but it would be the Minister who or the Cabinet which would make the appointment. It would appear

¹³⁹⁹ Section 3(1) is the date on which the Corporation became the successor to the South African Transport Services

that after the Molefe Board left office at the end of July 2017, only "Interim Boards" were appointed until the Ramatlakane Board was appointed – for the ordinary period of three years.

2062. As has been noted above, the issue of the appointment of the Group CEO is not addressed directly in the Legal Succession Act is silent. In the circumstances, based on the wording of especially section 24(1), together with the fact that the Board is the Accounting Authority of PRASA for the purposes of the PFMA, it would appear that the power to appoint the Group CEO is in the hands of the Board.

2063. However, that is not the practice which is, and has been, followed in respect of the appointment of PRASA's Group Chief Executive Officer. The practice that has been put in place is based on a document that is referred to as the "Board Charter". It was provided to the Commission by Mr Popo Molefe, who referred to it when he gave evidence. Clause 15.8 of the Board Charter provides that among the "reserved powers" of the Board are "recommending to the [Minister], the appointment and removal of the chief executive officer". Based on this provision, it appears that the following practice was followed when a Group CEO was to be appointed: the Board did the recruiting; it would make a recommendation to Minister on the identity of its preferred candidate or candidates; and the Minister would then get Cabinet approval for the appointment of the Group CEO.

2064. The effect of the foregoing is as follows: notwithstanding that the section 24(1) puts into the hands of the Minister only the power to appoint, or dismiss, Board members, in fact the Boards and Ministers have also assumed [seemingly on the basis of clause 15.8 of the Board Charter] that it is also the Minister who has the power to appoint, or dismiss, the Group CEO, save that that power is to be exercised on the recommendation of the Board. Yet, they do not appear to have considered what the legal status of the Board Charter is. As is discussed later in this Report, it appears that it does not have any legal

status: accordingly, the practice that has been followed in respect of the appointment of the Group CEO is not in accordance with the provisions of the Legal Succession Act.

In questioning both Mr Molefe and Minister Peters, the evidence leader proceeded on the basis of an understanding that the practice that he and the Commission had been told about, namely that the Board would recommend and the Minister would appoint reflected the correct legal position. It has turned out that this is not correct. However, the issue will be discussed below with an appreciation that this is how the matter had been approached by the Evidence Leader in regard to the witness. The evidence that was tendered is set out as it was given. In addition, the conduct of the various role players will be assessed on the basis of the accepted, albeit mistaken, understanding of what the correct legal position was. However, as is noted at the end of this section it would appear that the practice that was followed is not in accordance with the governing legal provisions.

The non-appointment of a permanent Group CEO

2065. On the basis of the practice that was followed as regards the appointment of the Group CEO, it will be helpful to begin by referring to the contents of a table contained in Mr Makwetu's affidavit which records who occupied the position of Minister during the period of instability referred to in the affidavit. According to the table: Ms Dipuo Peters was the Minister from sometime until 30 March 2017; Mr Joe Maswanganyi was the Minister from 1 April 2017 to 28 February 2018; Dr Blade Nzimande was the Minister from 28 February 2018 to June 2019. Mr Fikile Mbalula has been Minister from April 2019 to the present.

2066. When she gave evidence at the Commission, Minister Peters was questioned on her reasons for not appointing a permanent CEO after Mr Montana had left in July 2015. Ministers Maswanganyi and Mbalula submitted affidavits in response to written queries that were addressed to them by the Secretary of the Commission at the instance of the

Chairperson of the Commission. A similar request was sent to Dr Blade Nzimande. He sent a declaration to the Commission. What each said about his or her failure to appoint a permanent CEO is considered hereunder. However, before considering the reasons each tendered, it will be helpful to begin by noting the following matters.

2067. Mr Popo Molefe and other members of the PRASA Board of 2014-2017 were appointed with effect from 1 August 2014. Their term of office, as was the practice at the time, was three years. That meant that their term would end at the end of July 2017. The evidence revealed that Mr Montana's term as Group Chief Executive Officer of PRASA was to come to an end sometime towards the end of 2015. There is also evidence that, before the end of 2014, Mr Montana told Mr Molefe and his Board that his contract was going to expire at a certain stage in 2015. The Minister of Transport at the time, under whose portfolio PRASA fell, was Ms Dipuo Peters. Minister Peters would have known in 2014 that Mr Montana would be leaving at some stage in 2015. She would, therefore, have wanted to know at some stage in 2014 or early 2015 what arrangements the Board of PRASA was making to ensure that it could make a proper recommendation on who she should appoint as the new Group CEO for PRASA to enable her to make the appointment timeously so that, when Mr Montana left, there would be a new GCEO without, if possible, any acting GCEO having to be appointed. However, in case the new GCEO had not been appointed by the time Mr Montana left, there would have been no justification for the new GCEO not to have been appointed for a period beyond three months. In other words, if there was a justification for the non-appointment of the new GCEO timeously enough for him or her to assume duty as GCEO when Mr Montana left, there would have been no justification for a period of more than three months to expire after Mr Montana had left without the new GCEO having been appointed.

2068. At some stage early in 2015 the Molefe Board asked Mr Montana to stay for another six months. However, in July 2015 the Board asked Mr Montana to leave and he left in

that month. There was some abruptness in Mr Montana's departure. So, I am prepared to assume that there was justification for the Board to search for a new GCEO from around March to July 2015 so that it could make its recommendation to the Minister. That being the case, there would have been no need for the recruitment process for the purposes of the Board making a recommendation, to have taken longer than three months from July 2015. If it took longer than three months after July 2015, there certainly would have been no justification for that process to have taken beyond six months after July 2015.

2069. However, on the evidence heard by the Commission, PRASA was allowed to be without a Group CEO from July 2015, when Mr Montana left PRASA, until early 2021. That means that the entity had no Group CEO for about six years. During that entire period PRASA appointed only Acting Group CEOs. This was allowed to be the case despite the fact that PRASA had many serious problems or challenges that needed to be addressed. These problems included huge amounts of irregular expenditure that had started in the 2012/2013 financial year and was rising every year. This was reflected in the Auditor-General's annual reports for the years 2012/2013 to 2019/2020. These problems also included serious acts of corruption and maladministration as revealed by the evidence heard by the Commission and as reflected in the Public Protector's Report titled "Derailed".

2070. It was necessary to set out the above background so that the delay in the appointment of the Group CEO for PRASA for a period of close to six years could be appreciated properly. The question that arose, therefore, in the Commission's investigation of corruption at PRASA was: why was no Group CEO appointed at PRASA over such a long period when the entity had such enormous problems?

2071. Both Mr Popo Molefe and Ms Dipuo Peters gave answers to this question when they testified before the Commission.

2072. Mr Molefe testified that Mr Montana told him or the Board in about March 2015 that he was due to leave PRASA in about June, but he offered to stay on for six more months. It was then expected that he would leave only at end of November 2015. Mr Molefe testified that the Board's response to Mr Montana in March 2015 was that he should stay for the following six months and help them to identify a service provider who would help the Board find a new Group CEO. Mr Molefe however went on to note that in July the Board decided to release Mr Montana. He said that at that time the Board had begun to uncover governance issues. He said that unfortunately the Board found that by the time Mr Montana left, he had not as yet done anything to engage a company that would help the Board to identify a new Group CEO.

2073. Mr Molefe testified that the Board would have identified the company that was going to handle the recruitment process for the Board some time during the second half of 2015. It would appear that the Board gave Minister Peters the names of three candidates early in 2016. Mr Molefe testified that the candidate whom the Board put up as its first recommendation was a black woman who was in well knowledgeable about rail matters and had worked for Metrorail and Transnet.

2074. It is common cause that Minister Peters did not take the recommendations of the Board in respect of the candidates to the Cabinet and had not done so by the time she was relieved of her duties as a Cabinet Minister late in March 2017. This means that for close to one and a half years after she had been given three names by the Board, Minister Peters failed to take the names and the recommendation of the Board to the Cabinet so that an appointment could be made. This is despite the fact that, as noted above, everyone concerned laboured under the impressions that the authority or power

to appoint a GCEO for PRASA vested in the Minister, who would make the appointment on the recommendation of the Board. According to Ms Peters, the Board had to give the Minister the names or name of the candidates that it recommended and the Minister would then take that name or those names to Cabinet first. It is perhaps important to stress that the Legal Succession Act gives no role to the Cabinet in the appointment, or dismissal, of the Board or, in this case, of the Group CEO.

2075. According to Mr Molefe's evidence, he put pressure on Ms Peters to expedite the process for the appointment of the Group CEO, but Minister Peters did not move. Mr Molefe testified that initially Ms Peters agreed that the new GCEO should be appointed expeditiously.

2076. Ms Peters also stated that she initially took this view but said that she later changed and adopted the view that PRASA was "not ready" for a new GCEO. The evidence revealed that as at August 2016 Minister Peters' position was still that PRASA was not ready for a new Group CEO. This was over a year after Mr Montana had left PRASA: Mr Montana had left PRASA on 15 July 2015. So, the position as at August 2016 was not only that PRASA was without a Group CEO but was also that the Minister stated view was that that PRASA was not ready for a new GCEO. It is a pity that Minister Peters took the position that PRASA was not ready for a new CEO at a time when the Board had identified and recommended as its first choice a black woman for appointment as the Group CEO. I am sure that it had nothing to do with that, but it is simply unfortunate because that candidate would have been afforded a wonderful opportunity to lead an SOE as big as PRASA.

2077. It has already been noted above that, when Ms Peters left the Cabinet at the end of March 2017, she had still not taken the names of the candidates recommended by the Board for the position of CEO to the Cabinet. Minister Peters was replaced by Mr

Maswangayi as Minister of Transport. Mr Maswangayi, too, did not do the necessary to have a new GCEO appointed. He was dropped from Cabinet in February 2018 and by that time there had been no appointment of a new CEO. By July 2018 a period of three years had lapsed since Mr Montana had left. This meant that for three years PRASA operated with Acting Group CEO's only. As the position was only filled only early in 2021, almost a further three years would pass before a permanent Group CEO would be appointed.

2078. President Zuma resigned as President of the country on 14 February 2018 and President Ramaphosa, who had been Deputy President of the country since May 2014 but had been elected President of the ANC in December 2017, took over as President of the country. It was only in February 2021 that a new GCEO for PRASA was appointed. That means that for nearly six years PRASA was allowed, or perhaps more accurately forced, to operate without a permanent Group CEO.

2079. The most obvious question that arises from the fact that PRASA went for such a long period without a permanent CEO is: given their understanding of what their respective obligations were, why did the respective Ministers of Transport and the Cabinet not ensure that PRASA was given a Group CEO much earlier than February 2021?

2080. The one reason why there was an undue delay in the appointment of a GCEO for PRASA, as has already been noted above, is that the Molefe Board delayed in initiating the recruitment process. However, that delay on the part of the Board relates to the period only up to the end of 2015 or early 2016.

Minister Peters' role

2081. The following reason given by Ms Peters for delaying the appointment of PRASA's Group CEO is one that will shock everyone because I do not think anybody has ever heard it in relation to any business entity. That reason is this: Minister Peters thought PRASA was not ready for a new CEO. This is the view that she articulated to the Board after the PRASA Board had given her the names of the three candidates it recommended. This continued to be the view of Minister Peters for the rest of 2016. Ms Peters testified that close to the time when she left Cabinet, she changed her mind and accepted that a new CEO for PRASA should be appointed. How a company that had been in existence and in operation for many years and had had a Group CEO for many years suddenly became not ready for a new CEO is incomprehensible. This was a bizarre reason for the decision by Minister Peters for failing to ensure that a new CEO for PRASA was appointed.

2082. In her evidence Ms Peters said that she and Mr Popo Molefe had agreed that PRASA was not ready for a new CEO. Mr Molefe denied this.

2083. Ms Peters gave other, and different, reasons or explanations for her refusal to appoint a new permanent Group CEO.

2084. On was that, according to her, there were certain investigations that were going on at PRASA. In this regard, Ms Peters said in her evidence:

"...I even said to him [Mr Montana] I do not think that you and the company is ready for the new CEO. Let us deal with these particular issues and we agreed with him that when you appoint a CEO then you will have an indication of this is what was a problem. This is how we dealt with them..."

2085. I could not follow this logic. I therefore called upon Ms Peters to explain to me how the fact that there were investigations going on at PRASA and that there were problems at PRASA justified delaying the appointment of a permanent CEO because I would have thought that the fact that there were problems at PRASA was all the more reason why a permanent CEO had to be appointed. In response to this Ms Peters said:

"Now that you say it Chairperson, and they usually say hindsight is the best science, and I realise what you are saying."

2086. In other words, Ms Peters conceded that the reason she gave for taking the view that PRASA was not ready for a new CEO was not sound. However, it is difficult to think that in 2016 she thought that that was a sound reason to delay the appointment of a new Group CEO. On her version, for close to a year or even for just over a year she delayed the appointment of a new CEO of PRASA on the basis of the reason given above which, as detailed above, she conceded was not sound in response to the first question that was put to her challenging the soundness of her reason for being against the appointment of a new Group CEO for PRASA.

2087. I also said to Ms Peters:

"Yes, of course, Ms Peters, you have conceded that it was not the correct position to adopt, to say that the Group CEO should not be appointed as yet because PRASA was not ready for a Group CEO but that view seems to me to be so extraordinary that one has got to ask you: but how could you have thought along those lines as Minister responsible for PRASA...How could you have thought that it was not the right thing to appoint a Group CEO at that time? How is that possible?"

2088. Ms Peters responded:

"Chairperson, like I indicated there were those processes that we were involved in but there was also the consultation process that I was busy with. That was what I was saying to Mr Molefe, and I did say to Mr Molefe that at that particular moment we are not ready to conclude on this process of appointing a Group CEO. In the same paragraph Chairperson, he gives an indication of the work they are doing and also the workshops that they are convening, and like I said earlier on yes, with hindsight I could have been wrong at that particular time and I concede."

2089. Ms Peters further testified that it was in January 2017 that she changed her view from saying that PRASA was not ready for a new CEO to saying that PRASA was ready. She said that that is when she set in motion the process that would lead to the appointment of a new CEO for PRASA. However, by March 2017, when she was dropped from the Cabinet, she had not gone far with the consultation process. One would have thought that her successor would have continued with the process where she left off but, as will be seen below, this was not to be.

2090. At this stage it is perhaps important to place on record what the direct financial cost to PRASA was of Ms Peters' decision not to act on the Board's recommendation. The evidence heard by the Commission was to the effect that the Board had paid R1 767 000,00 to the company that it had engaged to undertake the recruitment process. What this means is that, since Minister Peters frustrated the process for the appointment of the GCEO for PRASA arising out of that recruitment process for which PRASA paid so much money, through her conduct Minister Peters rendered that amount fruitless and wasteful expenditure. During the course of Ms Peters' evidence, the evidence leader put it to her that her delay in the appointment of the new Group CEO for PRASA rendered the amount of R1 767 000 fruitless and wasteful expenditure and she conceded that this was so. She had no valid reason for not doing what she was required to do, or certainly what everyone thought she was required to do, and which would have led to the appointment of a new GCEO of PRASA. Therefore, she should

refund PRASA that money. It is recommended that the Board of PRASA consider taking legal steps to recover from her that amount plus interest.

2091. I asked Ms Peters whether she informed President Zuma and the Cabinet about the problems at PRASA. She said that she did inform President Zuma of the problems at PRASA. With regard to the Cabinet, it was not clear from her evidence whether she had informed the Cabinet of the problems at PRASA. Nevertheless, she testified that annually the Auditor-General – who would have been the late Mr Makwetu at least during some of the years she must have been referring to – addressed the Cabinet annually on, among others, the state of the SOEs. She said that she remembered that on one of those occasions on which she was present when the Auditor-General addressed the Cabinet, the Auditor-General told the Cabinet that there was instability at SOEs because of leadership issues. She testified that on that occasion President Zuma urged the affected Ministers to take steps to address the instability.

2092. President Zuma would have known the problems facing PRASA, firstly because Ms Peters testified that he did because she had informed him but also because as the President who had appointed a Minister under whose portfolio PRASA fell, he should, of his own accord, have been calling for regular reports from the Minister concerned about how PRASA was doing. Accordingly, President Zuma must be taken to have been fully aware of the problems at PRASA. He would also have been aware throughout the years when PRASA did not have a permanent CEO during his term of office that PRASA did not have a permanent CEO. He ran away from testifying before the Commission and from answering questions such as why he allowed PRASA to operate without a permanent CEO for close to three years while he was President.

2093. President Zuma and Minister Peters are to blame for the fact that PRASA was allowed to operate without a permanent CEO from the beginning of 2016 up to March 2017. For

the period 16 July 2015 to the end of December 2015 it is understandable that PRASA operated without a permanent CEO because, although Mr Montana's had agreed to leave only at the end of November 2015, the Board had asked him to leave on 15 July 2015. However, given the concerns expressed by the Public Protector (in her Interim Report that preceded her Report titled: "Derailed") about maladministration, abuse of power and tender irregularities at PRASA under Mr Montana's watch, the Board was fully justified to ask him to leave when it did. Until the Board asked Mr Montana to leave, the position was that he was still going to continue as the Group CEO of PRASA until November 2015 and that the Board would have enough time to search for a new Group CEO. However, when the Board abruptly asked Mr Montana to leave, PRASA was left without a permanent Group CEO and was forced to make do with acting CEOs.

The position after Ms Peters was dropped from Cabinet

2094. For a certain period in 2017 the Molefe Board was rendered dysfunctional because it was not quorate. Mr Maswanganyi, who took over from Ms Peters as Minister of Transport from late March 2017 was required to have ensured that the Board was quorate but he did not do anything about appointing more or alternate persons to the Board so that the Board could be quorate. Mr Maswanganyi has not said why he did not ensure that the Board was quorate. The evidence given by Mr Molefe suggests that Mr Maswanganyi may have deliberately decided to render the Board dysfunctional. For the months August to November 2017 PRASA was without a Board, as if the Executive did not know many months before July 2017 that the term of the Molefe Board would expire on 31 July 2017. A new Board was only appointed in November 2017. It was however only an Interim Board. The Chairperson of this new Board was Adv Nana Makhubele SC who took the position after being interviewed for judicial appointment in October 2017. She was appointed with effect from 1 January 2018 as a Judge of the

Gauteng Division of the High Court. She resigned in March 2018 to resume her duties as a Judge.

2095. On 12 April 2018, yet another new Board was appointed. It too was only an Interim Board. Its term of office was for a period of 12 months.

2096. That Board was chaired by Ms Khanyisile Kweyama. It was appointed by Dr Blade Nzimande, who was appointed as Minister of Transport in February 2018 and succeeded Mr Maswanganyi in that position. As noted immediately above, the Kweyama Board was also an Interim Board. It is difficult to understand why this Board was given a term of 12 months when the term of the previous Boards (the Boards chaired by Mr Sifiso Buthelezi and the Board chaired by Mr Molefe) was three years and why it was given such a short term when PRASA had the kinds of serious problems that it had. Be that as it may, in April 2019 Minister Nzimande constituted a further Interim Board, but most of the members of the Kweyama Board, whose terms of office were to expire, were re-appointed to this new Interim Board, which appointed to serve until the end of October 2019 – a period of some six further months.

2097. In May 2019 Dr Blade Nzimande was appointed as Minister of Higher Education and Mr Fikile Mbalula as Minister of Transport. On 30 October 2019, Mr Mbalula extended the term of the Kweyama Interim Board by six months. After Mr Mbalula's extension of that Board's term, its term was due to expire in the first half of 2020. However, Mr Mbalula dissolved the Board with effect from 5 December 2019. This means that the Kweyama Board was in place for less than two years when it was dissolved.

2098. The picture that emerges from what has been set out above and earlier in this Report may be summarised as follows: from 16 July 2015 to 5 December 2019, PRASA operated only with acting Group CEOs, as no permanent Group CEO was appointed; during most of the first half of 2017 the Molefe Board was either fighting in Court against

its unlawful dismissal by Minister Peters or was not able to function because Minister Maswanganyi had rendered the Molefe Board dysfunctional; from August to October 2017, PRASA had no Board; from November 2017 to March 2018, PRASA had a Board that was chaired by a chairperson who had accepted appointment to lead that Board when she knew that in a few months' time she was going to be assume duties as a Judge; that Board, which in any case was not properly constituted in terms of the Legal Succession Act, had a life span of less than six months; as it was not properly constituted it could not validly make any decisions; and the Kweyama Interim Board, which was appointed on 12 April 2018 and dismissed by Minister Mbalula on 5 December 2019, lasted less than two years.

Appointment of an “administrator” and the finally a permanent Board

2099. What is disturbing about Minister Mbalula's decision to dismiss the members of the Kweyama Interim Board is the reason he gave for doing so and in effect dissolving that Board. Minister Mbalula said he was dismissing the members of the Kweyama Board because it was failing to do its job but the Chairperson of the Board, Ms Kweyama, said that he had dismissed her and the other members of her Board because she refused to appoint as Group CEO a person whom Minister Mbalula wanted the Board to appoint as Group CEO, without however following any competitive process.¹⁴⁰⁰ Strangely, when Minister Mbalula dissolved the Kweyama Board, he did not appoint another Board despite the fact that he said in his letter to the members of the Kweyama Board that he had decided to appoint a “new full-time Board”. What he instead did was to appoint an “administrator”. Disturbingly, however, the person whom Minister Mbalula appointed as the administrator was the person whom Ms Kweyama says Minister Mbalula wanted as

¹⁴⁰⁰ It is perhaps necessary to note that, as pointed out above, it has been a widespread assumption, albeit a mistaken one, that the power to appoint PRASA's Group CEO lies in the hand of the Minister and that the role of the Board is to recommend to the Minister a candidate or candidates.

the Group CEO of PRASA, namely Mr Bongani Mpondo. It is necessary to look at this more closely.

2100. On this issue, in an affidavit that Ms Kweyama submitted to the Commission, she said the following. In November 2019, Minister Mbalula's advisor, Mr Bongani Mbindwane, sent her (in her capacity as Chairperson of the Interim Board) Mr Mpondo's CV and informed her that Mr Mpondo was the Minister's choice for appointment as the permanent Group CEO. Ms Kweyama responded to that communication as follows: her Board had initiated a process to appoint an agency to headhunt a candidate for the position of permanent Group CEO and candidates for other vacant positions at PRASA; once the agency had been appointed, she would submit Mr Mpondo's CV to it so that he could be considered with other candidates for the position of Group CEO. Ms Kweyama stressed that her Board would not be able to appoint a person without due process being followed and accordingly she could not even table the issue before the Board. She said that it was clear to her that Minister Mbalula's advisor was firm on the fact that Mr Mpondo be considered for the position of permanent Group CEO immediately.

2101. In an affidavit that he submitted to the Commission in response to Ms Kweyama's allegations, Minister Mbalula said that it was false that he had put pressure on the Board to appoint anyone, including Mr Mpondo. Interestingly, he said in that affidavit that the power to appoint a Group CEO lay with the Board, not the Minister. He denied that he had attempted to influence the process in any way. Elaborating, he said the following. Ms Kweyama had told him and Mbindwane that because the Board had been unable to find a suitable candidate, they had engaged an outside company. He said that Ms Kweyama had asked him and Mbindwane to suggest the names of suitable candidates. It was against that background that he had proposed Mr Mpondo, who was suitably qualified and had extensive experience in rail transport and the corporate world. He

added that he had suggested three other candidates. Minister Mbalula also denied that there was any correlation between the dissolution of the Board and the discussion between him and Ms Kweyama about Mr Mpondo. He said he had decided to dissolve the Kweyama Board after considering the contents of the following documents: the Auditor-General's Report, which he received in September 2019 and a report by the Government Technical Advisory Centre (GTAC). The Auditor-General's Report, he said, referred to "chronic and persistent governance failures" and the GTAC Report, he said, "made it clear that there is no prospect of rescuing PRASA with its current leadership".

2102. After Minister Mbalula had dissolved the Kweyama Board, he appointed Mr Mpondo as an "administrator". The validity of that appointment was challenged in an application brought by an NGO, #UniteBehind, in the Western Cape Division of the High Court. Among the bases on which #UniteBehind challenged Mr Mpondo's appointment as administrator was that the Legal Succession Act did not provide for the appointment of an administrator at PRASA and that the Minister was required to appoint a permanent Board, as opposed to an administrator. The application was opposed by Minister Mbalula. However, the High Court agreed with #UniteBehind on these issues: it declared the Minister Mbalula's failure to appoint a Board and his decision to appoint Mr Mpondo as an administrator to be unlawful. The High Court also directed the Minister to appoint a Board, in accordance with section 24(1) of the Legal Succession Act, within 60 days. The Minister was also directed to pay the costs of the application.

2103. The Board that Minister Mbalula appointed after the judgment of the Western Cape High Court was appointed with effect from 22 October 2020. Minister Mbalula appointed Mr Ramatlakana as its Chairperson. Mr Ramatlakana previously served as an ANC Member of Parliament and as a member of the Portfolio Committee on Transport that had been very hostile to the Molefe Board. That is the Portfolio Committee that failed

dismally to perform its oversight functions over the Executive. It was during the term of office of that Committee that PRASA had irregular expenditure figures that were running into billions and escalating drastically every year, as if there was nobody who sought to bring those figures down. The Ramatlakana Board is discussed again later in this Report in the context of its decision to dismiss three PRASA executives early in 2021 which dismissal the Labour Court has declared unlawful as well as its decisions to dismiss the PRASA GCEO, Mr Z Mathews twice. The first dismissal was declared unlawful by Judge R Nugent, a retired Judge of Appeal of the Supreme Court of Appeal but in his capacity as a private arbitrator. These matters are dealt with more fully below.

2104. For the period 1 April 2017 to 14 February 2018 Mr Maswangayi was the Minister of Transport and President Zuma remained the President of the country. Therefore, for the fact that during that period PRASA was allowed to operate without a permanent CEO, President Zuma and Minister Maswangayi must take the blame. As if the fact that PRASA had been allowed to operate without a permanent CEO from 16 July 2015 to 14 February 2018 was not enough, from 14 February 2018 to February 2021 – when President Ramaphosa was the President of the Republic, PRASA was once again allowed or forced to operate without a permanent CEO. That was a period of about three years. For the first three or so years when PRASA operated without a permanent CEO, President Zuma was the President. For the second period of about three years when PRASA was forced to operate without a permanent CEO, President Ramaphosa was the President of the country.

2105. President Ramaphosa and Minister Bonginkosi “Blade” Nzimande who was Minister of Transport from 25 February 2018 to 25 May 2019 and Minister Fikile Mbalula who was appointed Minister of Transport from May 2019 and remains the incumbent must take the blame for allowing PRASA to continue to operate without a CEO. Even if President Ramaphosa did not know before he became the President that PRASA had been

operating without a permanent CEO from 16 July 2015 to 14 February 2018, he certainly would have been informed soon after he took over as President of the state of PRASA and the fact that PRASA had been operating for about four years then without a permanent CEO. The same applies to Minister Nzimande and Minister Mbalula. If, prior to becoming the President of the country, President Ramaphosa had not been aware of the serious findings of maladministration and findings concerning tender irregularities which were rife at PRASA as reflected in the Public Protector's report titled "Derailed", he would have become aware of them soon after he became President. The same applies to Minister Nzimande.

2106. Given that, when President Ramaphosa became President, PRASA had already been operating without a permanent CEO, there was even a greater urgency for President Ramaphosa and Minister Nzimande to ensure that a permanent CEO was appointed for PRASA so that PRASA could operate with a permanent CEO as soon as possible. Unfortunately, for close to three years after President Ramaphosa had taken over as the President and Minister Nzimande had become Minister of Transport this was not to be. Ms Peters failed to give a sound reason why she had not taken the steps she was supposed to take to ensure the appointment of a permanent CEO for PRASA for the period July 2015 to March 2017. She said she took responsibility for the fact that a permanent CEO for PRASA was not appointed during that period.

Explanations by certain Ministers

2107. Mr Maswanganyi did not testify at the Commission. The Commission however asked him to depose to an affidavit or affirmed declaration and answer the following questions:

2107.1. When you were appointed as Minister of Transport, did you establish from your predecessor, Ms Peters, or from officials in your department or from the Board of PRASA, why a period of two years had been allowed to lapse without a CEO

being appointed for PRASA? If you did, you are requested to specify who gave you the information and what exactly you were told were the reasons.

2107.2. Why was a CEO for PRASA not appointed during your term of office as Minister of Transport? What steps did you take to ensure that a CEO for PRASA was appointed as soon as possible after you took office in April 2017?

2108. In a declaration that he furnished to the Commission, Mr Maswanganyi did not give any answer at all to the two questions in paragraph (a). That is strange because there is no way that he could not have seen the questions in para (a). It means he deliberately decided not to answer the two questions in para (a). That speaks volumes. If he did not ask why a period of close to two years had lapsed without a CEO being appointed, that would be a very poor reflection on him. In fact, it would reflect that he did not care much about such an important SOE that was under his portfolio that an entity had gone without a Group CEO for close to two years. Yet, it should have been alarming for any incoming Minister. If he did ask, his decision not to answer the two questions in paragraph (a) may mean that the answer would have been embarrassing to him or government or the ANC or it may mean that he knows the reason, but it is not one that he considers he should disclose. Therefore, he considered that the best way was not to answer those questions. This is quite serious because it may mean that if he was asked these questions while on the witness stand giving evidence, he would have refused to answer them or he would have invoked the privilege against self-incrimination. So, one has a situation where Minister Peters gave a strange reason for not doing the necessary to have a permanent Group CEO appointment for PRASA and her successor decides not to answer two pertinent questions.

2109. With regard to the two questions in para (b), in his declaration Mr Maswanganyi kind of answered the first one but did not answer the second one. I deal further with his response to the questions in para (b).

2110. In his declaration Mr Maswanganyi did not set out any steps he took to ensure a Group CEO was appointed as soon as he took office. All he said was that:

2110.1. when he took over as Minister of Transport, PRASA was the worst performing of the SOEs under the Minister of Transport; he said it was performing "at a mere 34%" whereas the other SOEs under the Department of Transport were performing very well, mostly at 90% or better, with only two below that, namely at 67% and at 86%;

2110.2. from the outset he wanted to indicate that "PRASA has constantly shown a gross decline in performance, a lack of or inadequate governance, oversight and poor financial management";

2110.3. PRASA's irregular expenditure when he took over as the Minister of Transport was at an alarming R2,2 billion.

2110.4. the Board led by Mr Popo Molefe had numerous challenges, one of which was that he had a dispute with it about increases in Board allowances that it had increased unilaterally. He instructed them to repay the increases but they refused to comply. Thereafter, five of the Board members resigned leaving the Board "not in good standing";

2110.5. a new PRASA Board was appointed during October 2017, but he said that that Board "was not duly constituted at the beginning as the Board did not have an

officer of the Department of Finance as a member which is required by the [Legal Succession Act]";

2110.6. I note the Board referred to immediately above was the Board chaired by Advocate Nana Makhubele SC;

2110.7. the appointment of the Board was delayed due to, amongst other things, the delay in pre-employment screening by the State Security Agency;

2110.8. by the time he was dropped from Cabinet in February 2018, the PRASA Board was in the process of recruiting a Group Chief Executive Officer; he said that after conducting the interviews, the Board "would have submitted the candidate for approval".

2111. What emerges from Mr Maswanganyi's affidavit is that he himself did not take any steps to ensure that a permanent Group CEO was appointed as soon as possible for PRASA. From what he says in his affidavit it seems that he did not take further the process for the appointment of a permanent Group CEO for PRASA that Ms Peters testified was being processed when she was dropped from Cabinet in March 2017. Furthermore, Mr Maswanganyi did not take the necessary steps to ensure that the Molefe Board was quorate. Mr Maswanganyi fails to explain why he could not make sure that he appointed the Board earlier or why a permanent Group CEO for PRASA could not have been appointed as soon as possible after his appointment. He says that the Board that he appointed in October 2017 was not duly constituted. He does not explain why, as Minister , he appointed a Board that was not duly constituted. How difficult can it be to appoint a duly constituted Board? It cannot be for a competent Minister.

2112. Dr Nzimande was also asked by the Commission to depose to an affidavit or affirmed declaration and explain what steps he took to make sure that a permanent CEO for

PRASA was appointed as soon as possible. He furnished a statement to the Commission in which he indicated that the time that he had been given by the Commission to furnish such an affidavit or declaration was not adequate and also pointed out that, within the time given to him, he was not able to have access to certain documents at the Department of Transport which he would have needed in order to deal with the issues raised by the Commission. In this regard the Commission is aware that Dr Nzimande was last Minister of Transport in May 2019 and, therefore, three years ago. In addition, the understanding at the time was that the Minister makes the appointment after a recommendation from the Board. Furthermore, Minister Nzimande appointed a new Board of PRASA in April 2018 which was less than three months after he had been appointed. That was the Kweyama Board.

2113. Fortunately, Ms Khanyisilie Kweyama who chaired the Board that was appointed by Minister Nzimande, furnished the Commission with an affidavit in which she explained the steps that her Board took to have a permanent CEO for PRASA appointed.

2114. The Commission also asked Minister Mbalula to furnish it with an affidavit or affirmed declaration and answer the two questions that were asked of Mr Maswaganyi, except that in the case of Minister Mbalula, his predecessor was Minister Blade Nzimande and not Ms Peters and the period over which PRASA had been operating without a permanent CEO was about three years and not close to two years. In respect of the questions in para (a), although Minister Mbalula states that there was a handover meeting between himself and Minister Nzimande, he says he does not remember specific details discussed in respect of the 12 entities under the Department of Transport.

2115. This is very difficult to understand. PRASA is one of the most important entities under the Department of Transport and when Mr Mbalula had a handover meeting with Mr

Nzimande, he must have learned then, if he was not already aware before, that PRASA had been operating without a permanent CEO for about three years by then. How could he not remember whether he asked why and what answer he was given? He cannot remember whether he asked the question. He cannot remember to whom he asked it, if indeed he did ask it. He cannot remember what answer he got, nor can he remember who gave him the answer. This is shocking, to say the least. He should have been alarmed that an entity as important to the public and to millions and millions of people, mainly poor and vulnerable, who rely on it for transport everyday had been operating without a permanent CEO for about three years. He should have vowed to ensure that a permanent CEO was appointed without any further delay.

2116. However, that is not what Minister Mbalula did. Instead, according to Ms Kweyama, who deposed to an affidavit in this regard, Mr Mbalula was putting pressure on her to have a certain official from the Department of Transport, Mr Mpondo, appointed as CEO of PRASA without any competitive process and Ms Kweyama was resisting that. It was around the time when Ms Kweyama was resisting this pressure from Mr Mbalula that, out of the blue, according to Ms Kweyama, Mr Mbalula wrote letters to her and other members of the Board asking them to give reasons why he should not dismiss them on the basis that they were failing in their job and having received their representations said he was dissolving the Board. He then appointed a person to perform both the duties of a CEO and of the Board at the same time. Guess who the person was that Minister Mbalula appointed to perform these duties? The same person that Ms Kweyama said Minister Mbalula had been putting pressure on her to have appointed as Group CEO, namely, Mr Mpondo.

2117. In its judgment in the application by #UniteBehind, the Western Cape Division of the High Court dealt with the explanation given for the steps that Minister Mbalula took before appointing Mr Mpondo as an administrator of PRASA:

"[26] On 22 November 2019 the Minister wrote to his Cabinet colleague, the Minister of Finance, as well as the President of the Republic, briefing them on the performance of the Passenger Rail Agency of South Africa (PRASA) Board and "My Intention to Dissolve the Board" is the heading. After summarising the shortcomings of the Interim Board and the intention to dissolve same he states:

"I intend to write to the individual Board Members to afford them an opportunity to make written representations as to why their membership to the Board should not be terminated and as to why the board should not be resolved There are two options that I am currently considering in the post Board dissolution phase. Option one involved work to fast track the appointment of a full-time Board that is fully fledged in line with the provisions of the Legal Succession to the South African Transport Services Act, No 9 of 1989, and option two involves placing PRASA under Administration in line with the provisions of section 49(3) of the Public Finance Management Act, No 1 of 1999. I'm leaning more on option two considering the situation of the entity and wish to consult with yourself on invoking the provisions of section 49(3) of the PFMA in me appointing an Administrator, which should be a turnaround expert to assist in addressing the operational deficiencies of the entity ... I therefore seek your concurrence in invoking the provisions of section 49(3) of the PFMA. I fervently and eagerly await your response in this matter, which I shall highly appreciate."

2118. So, by dissolving the Kweyama Board, Mr Mbalula derailed all the work that the Board had done aimed at the appointment of a permanent Group CEO, whether or not the power to make that appointment lay with him, as he stated in his affidavit in response to the allegations made by Ms Kweyama against him, or with the Board. Worse, he did not appoint another Board. He appointed an official from his Department to perform both the duties of the Group CEO and of the Board. Of course, as the Western Cape Division of the High Court held, this was all unlawful. However, it delayed the appointment of a permanent Group CEO by a number of months because Mr Mpondo occupied the position of administrator until 5 December 2019. He was succeeded by Dr Nkosinathi Sishi, who was an Acting Group CEO from 19 March 2019 to 24 February 2021 when Mr Z Mathews was appointed as PRASA's permanent Group CEO.

The National Executive's handling of PRASA is unacceptable

2119. None of the matters that I have referred to above makes sense. The manner in which the Executive has handled PRASA does not make sense. It is difficult to understand. First, the high turnover of Ministers of Transport over a few years is alarming. Second, for close to six years PRASA was made to operate without a permanent Group CEO. Third, the Molefe Board was not given any support in its efforts to fight corruption at PRASA – Minister Pieters unlawfully fired that Board while it was attending a meeting with the Portfolio Committee on Transport? What was the rush about? Why publicly embarrass the Board? No one knows. Then she decided not to take the steps that she was supposed to take in order to ensure that PRASA had a permanent Group CEO and the reason she gave for not doing that was that PRASA was not ready for a Group CEO. She stayed for close to two years doing nothing to ensure that PRASA got a permanent Group CEO. Then Mr Maswanganyi also did nothing to get a permanent Group CEO appointed for PRASA and he decided not to answer the question whether he asked his predecessor or officials in his Department or the Board of PRASA why PRASA had been allowed to operate for close to two years without a permanent Group CEO and what steps he took to have the post filled as soon as possible. At least Minister Nzimande appointed a Board that took steps to have that post and several others filled.

2120. Minister Mbalula also does not answer pertinent questions on whether he asked why PRASA has been allowed to operate without a permanent Group CEO for close to three years. All he says is about getting the Board to appoint a permanent Group CEO is that he emphasised to the Board the need for the appointment of a permanent Group CEO.

2121. Then Minister Mbalula puts pressure on Ms Kweyama to appoint a certain official from his Department as the permanent Group CEO of PRASA and when she resists her Board is dissolved and Minister Mbalula appoints the same official as administrator to

perform the functions of both the Group CEO and the Board. In due course that is set aside by a Court and the Court orders the appointment of a Board after the Executive [the Ministers] had been appointing what is called interim Boards, some of which lasted only a few months, like the one that was chaired by Adv Makhubele, or one that lasted for less than two years even after its term of office was twice extended. One can simply not understand why the Executive would have thought that it was the right thing to do to appoint Boards of such short duration in an entity with the kind of problems that PRASA is known to have. So, interim Boards, Acting Group CEOs and a high turnover of Ministers of Transport. No wonder PRASA has been unstable for a long time.

2122. There could have been no justification whatsoever for President Zuma and Minister Peters not to have taken the necessary steps to ensure the appointment of a Group CEO for PRASA during the period July 2016 to 31 March 2017. There could have been no justification for President Zuma and Minister Maswanganyi not to have taken the necessary steps to ensure the appointment of a permanent Group CEO for PRASA during the period from April 2017 to February 2018. There could have been no justification for President Ramaphosa and Minister Nzimande not to have taken the necessary steps to ensure the appointment of a permanent Group CEO for PRASA within six months after President Ramaphosa had taken over as President and Minister Nzimande had been appointed as Minister of Transport.

2123. Six months from February 2018 when President Ramaphosa had become President and when Minister Nzimande was appointed as Minister of Transport would have been mid-July 2018. I can even add an additional three months. There could have been no justification for President Ramaphosa and Minister Nzimande to have delayed beyond nine months, which would have been mid-October 2018. That PRASA was allowed to operate for more than two years without a permanent Group CEO after President

Ramaphosa had taken over as President of the country is difficult to understand and is completely unacceptable.

Duty to appoint the Group CEO

2124. As has already been noted earlier in this section of the Report, it appears that the Ministers of Transport concerned, and it seems Cabinet as a whole, and the PRASA Board themselves, whether permanent or Interim, were of the view that the legal position in respect of the appointment of the Group CEO was this. First, the Legal Succession Act does not expressly address this issue. Second, but the "Board Charter" does so. As noted above, it provides that the Group CEO is appointed by the Minister, on the recommendation of the Board. Based on these provisions, the practice that appears to have developed is as follows. When the position of Group CEO was or was to become vacant, the Board would initiate a recruitment drive to recommend one or more candidates with whom it was satisfied. The name or names, and perhaps details of the outcome of the recruitment process would be furnished to the Minister. The Minister would in turn consult the President and the matter would then be taken to Cabinet where a decision would be made.

2125. However, a proper consideration of the relevant statutory provisions suggests that that practice is flawed and in fact unlawful on account of the following. Section 24(1) of the Legal Succession Act provides: the affairs of PRASA *shall be managed by a Board of Control* that is appointed and dismissed by the Minister. That Act does not refer to any Board Charter. To the extent that successive Boards and Ministers have relied on the Board Charter, which places the power to appoint the Group CEO in the hands of the Minister, to formulate the practice that has been described above in terms of which the Group CEO is to be appointed, they have not been acting lawfully. In this connection, it may perhaps be noted that no provision of the Legal Succession Act sets a limit on the

Board's express power, as set out in section 24(1), to manage PRASA's affairs. In the premises, it would be unlawful for a Board and a Minister to decide, whether through a Board Charter or any other instrument, that a power that a statute gives to the Board is to be exercised by the Minister. Moreover, there does not appear any legal basis for taking such a far-reaching decision, especially given that, in terms of section 49(2) of the PFMA, PRASA's Board is its accounting authority.

2126. The fact that PRASA was allowed to operate for close to six years without a permanent CEO is totally unacceptable. It has now been established that as a matter of law the power to appoint the Group CEO for PRASA vested in the Board but it was the understanding of the Boards and the various Ministers of Transport and, probably President Zuma and President Ramaphosa that the Minister and the Cabinet had a role to play in the appointment of the GCEO of PRASA. It seems that that was a mistaken view. Nevertheless, the Molefe Board, which could have made the decision itself early in 2016 if it knew that it could make that decision on its own, ran a recruitment process through a recruitment entity and gave Minister Peters three names and she decided not to pursue the matter for over a year. Mr Maswanganyi who succeeded Ms Peters did nothing. Dr Blade Nzimande appointed a Board soon after his own appointment but he did not stay long in the position. However, the Chairperson of the Board that Dr Nzimande appointed, submitted an affidavit and indicated that the Board was dismissed or dissolved by Minister Mbalula while it was still trying to get GCEO for PRASA. Minister Mbalula has failed to give the Commission concrete steps he took to make sure that PRASA had a permanent GCEO. All he said was that the appointment of a CEO was a matter for the Board which was true but he dealt with the matter as if he had no role to play. Of course, if the appointment of the GCEO was a matter for the Board, it was Minister Mbalula's obligation to keep an eye on whether the Board was carrying out its duties including the appointment of a permanent GCEO for PRASA so that if the Board failed, without good cause, to do its job, he could dismiss it and appoint one that

would perform its duties properly. In terms of section 24 of the Legal Succession Act which applies to PRASA, the Minister of Transport has the power to appoint and dismiss the Board of PRASA. Mr Mbalula did not place before the Commission any evidence that shows that he performed his oversight function. It may well be that the problem was him rather than the Board because if he did want to Board to appoint a permanent GCEO, he would have been able to ensure that. If the position is not that Mr Mbalula did not want PRASA to have a permanent Board, then it was a serious dereliction of duty on his part that it took close to three years after his appointment as Minister of Transport that a permanent GCEO was appointed for PRASA.

2127. If the position is not that Mr Maswanganyi did not want PRASA to have a permanent GCEO when he was Minister of Transport, then he too was guilty of serious dereliction of duty in not ensuring that PRASA has a permanent CEO during his term of office.

2128. President Zuma also failed to supervise Minister Peters and Minister Mawanganyi properly to make sure that a permanent GCEO for PRASA was appointed between 16 July 2015 and 14 February 2018 when he resigned as President of the Republic. He has not placed before the Commission any evidence providing any valid reason as to why he did not make sure that his Ministers, from Ms Peters to Mr Maswanganyi got the Boards to appoint a permanent GCEO. If the position is not that he did not want PRASA to have a permanent GCEO during that time, it was a serious dereliction of duty on his part (i.e. President Zuma) not to ensure that.

2129. For the period 15 February 2018 to 21 March 2021 President Ramaphosa was the President of the Republic and had an obligation to supervise whether Minister Mbalula was performing his obligations towards PRASA and was taking the necessary steps to ensure that the Board did its job. I put the proposition to President Ramaphosa when he gave evidence that he had an obligation to supervise the Minister of Transport to

ensure that a permanent GCEO was appointed for PRASA. President Ramaphosa accepted the proposition. He failed to supervise Minister Mbalula in this regard. He did not advance any justification for this failure or he may have accepted that he had failed in his duties in this regard. This was unacceptable, particularly because President Ramaphosa is the one who testified that during President Zuma's time as members of Cabinet they worked in silos and did not know what was happening in the portfolios of various Ministers. When he became President of the country in February 2018, President Ramaphosa would have wanted to be briefed fully as to the state of the SOEs, especially PRASA. If he was fully briefed in early 2018, then it is even more unacceptable that he did not ensure that the Board appointed a permanent GCEO. If he was not briefed, that too would be very serious because he may have become aware of the problems at PRASA when it was too late. However, it is to be remembered that the problems of corruption at PRASA are well known. This was a serious dereliction of duty on President Ramaphosa as well. It is completely unacceptable that an SOE that has the kinds of problems that PRASA has and which is so important to the economy and to millions of people in this country should have been allowed to operate without a permanent GCEO for such a long time.

2130. It is convenient now to consider the second broad theme that is contained in this part of the Report. It is this: has the culture or mind-set at PRASA in respect of labour-related issues changed now that a permanent Board has been appointed. This theme is considered in the paragraphs hereunder.

Has the culture/mind-set at PRASA changed?

2131. It is perhaps necessary to preface this part of this Report with the following observation. Much of what is dealt with in this section of the Report happened in the quite recent past, after all the scheduled evidence on PRASA had been, or was due to be, led at the

Commission. Accordingly, no evidence has been led on these matters at the Commission. However, the matters are contained in documents that are part of legal proceedings in respect of which a court judgment has been handed down and an arbitration award issued. Having considered what is set out in the judgment and the award in question, it is considered that those matters should be included in this Report, as they are germane to issues of significance that have been raised during the Commission's hearings and ought to be brought to the attention of the President and indeed the South African public.

2132. One would have thought that five years after Mr Lucky Montana had left PRASA, the unlawful, unfair or unjustified use by PRASA authorities of their power to suspend or dismiss employees which had been a problem at PRASA during Mr Montana's term, as detailed earlier in this Report, in the way in which Mr Montana had fired Mr Dingiswayo and Ms Ngoye, one after the other for no valid reason and also in the Public Protector's Report: "Derailed", would have come to an end. Unfortunately, the dismissals of three PRASA executives at more or less the same time at the beginning of 2021 by the Board of PRASA chaired by Mr Ramatlakane and the first and second dismissals towards the end of 2021 and early 2022, respectively, of the PRASA CEO appointed in February 2021, Mr Z Matthews, by the PRASA Board chaired by Mr Ramatlakane suggests that such unacceptable practices continue to plague PRASA. The dismissals referred to are dealt with hereunder.

2133. However, before reference is made to the dismissal of the three PRASA executives early in 2021 and the first and second dismissals of the PRASA CEO towards the end of 2021 and early 2022, it seems apposite to give the reader a glimpse of some of the suspensions and dismissals and in some cases failure to discipline which happened during Mr Montana's term at PRASA which the Public Protector found in her report

titled: "Derailed" to have constituted maladministration. I quote certain parts of that Report below:

"7. Regarding PRASA's alleged improper advance payment of R600.000.00 to Enlightened Security:

- a) The allegation that **Enlightened Security** was irregularly given an advance payment of about R600.000.00 is substantiated.
- b) PRASA made a first payment of R684.720.00 to **Enlightened Security** for security services at Mabopane station on 22 October 2008 which was preceded by an invoice dated 19 September 2008 before the signing of the contract and the issuing of a Notice to Proceed, which followed on 17 October 2008.
- c) Mr Joe Ngcobo's conduct in making advance payments to **Enlightened Security** accordingly constitutes maladministration and improper conduct.
- d) PRASA management became aware of this violation but took no disciplinary steps against the manager responsible, Mr Joe Ngcobo, despite initially commencing a disciplinary process. This conduct is in violation of the accounting officer's responsibility under section 38 of the PFMA and is accordingly irregular and constitutes maladministration and improper conduct.

23. Regarding the GCEO's improper termination of contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million:

- a) The allegation that Mr Montana improperly terminated the services of 5 of its Executives mentioned in paragraph 6.27.2.1 of this report is substantiated.
- b) Mr Montana terminated the services of five Executives during 2008-2013 without following proper procedure as provided for in paragraph 4.4 of PRASA's Disciplinary Code and Procedure. This resulted in the CCMA overturning some of the terminations and others being settled out of court at cost to PRASA.
- c) PRASA subsequently paid labour dispute settlements amounting to R3 816 735.32, principally due to procedural irregularities in the disciplinary steps taken against involved officials, which payments can be said to constitute fruitless and wasteful expenditure as envisaged in section 38(1)(c)(i.i) of the PFMA.
- d) Failure by PRASA to follow its corporate disciplinary procedures and labour laws relating to procedural fairness constitutes maladministration and improper conduct.

24. Regarding the GCEO's alleged improper suspension of employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure:

a) The allegation that the GCEO suspended employees without following proper disciplinary procedures is substantiated in respect of some of the employees as others were not suspended by him.

b) PRASA suspended 7 employees without following proper procedure as provided for in the Labour Relations Act and paragraph 11 of its Disciplinary Code and Procedure, leading to loss of approximately of R2 million in wages during their suspension period.

c) The case studies regarding the seven (7) officials mentioned in paragraph 6.28.2.3 of the report support the conclusion of a pattern of habitual suspensions for periods exceeding thirty (30) days without following proper procedure.

d) The conduct of PRASA in habitually suspending employees was in contravention of paragraph 11.1 of its Disciplinary Code and Procedure which provides that the employer has the right to suspend an employee with pay for a period not exceeding thirty (30) calendar days and also in contravention of paragraph 4.4 of PRASA Disciplinary Code and Procedure and Schedule 1 Part VII of the Basic Conditions of Employment Act which provides that employment practices shall ensure employment fairness.

e) It is not unreasonable to draw a nexus between the payment of salaries for staff sitting at home with pay for long periods of time and failure to manage employment relations appropriately, and the conclusion that the payment of salaries without any value derived therefrom is irregular and constitutes fruitless and wasteful expenditure.

f) PRASA's conduct in this regard amounts to fruitless and wasteful expenditure in contravention of the provisions of section 38(1) (c) (ii) read with section 51(b)(ii) of the PFMA while being at odds with the financial prudence and efficiency requirements of section 195 of the Constitution.

g) The conduct of PRASA regarding improper suspension of employees accordingly constitutes maladministration and improper conduct.

29. Regarding PRASA's alleged improper replacement of the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa, without following proper recruitment process:

- a) The allegation that Mr. Mphefo Ramutloa was improperly appointed in replacement of Group Executive HR by PRASA is not substantiated.
- b) No evidence could be found to support the allegation that Mr. Mphefo Ramutloa is Mr Montana's uncle.

30. Regarding PRASA's alleged failure to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers amounting to R8.1 million:

- a) The allegation that PRASA failed to take disciplinary action against employees involved in the fraudulent electronic financial transfers of its funds, from its corporate bank accounts, is partially substantiated.
- b) Action was taken against one of the six (6) employees found responsible by a Deloitte forensic investigation, for security lapses that led to the fraudulent electronic transfer of PRASA funds amounting to R81 million in its KwaZulu Natal and Gauteng bank accounts.
- c) PRASA took action against Ms Pallaiyah but inexplicably failed to take disciplinary action against the other six individuals recommended for possible disciplinary action as mentioned in paragraph 13.3 of the Deloitte Report of 26 February 2010.
- d) The conduct of Mr Montana regarding failure to take disciplinary action against the other five (5) employees constitutes maladministration and improper conduct.

32. Regarding Mr Montana's alleged improper transferring of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability:

- a) I have deferred my finding on the alleged failure by Mr Montana to take disciplinary action against Mr Stephen Ngobeni as PRASA has failed to provide the necessary documents relating to the issue.
- b) No evidence was found in support of the allegation that Mr Ngobeni is Mr Montana's cousin.
- c) I have deferred my findings on this allegation and will be dealt with in the second report."

The dismissal of the three executives: judgment of the Labour Court

2134. At the beginning of 2021 the PRASA Board fired three executives on the basis that they had been employed on fixed-term contracts of five years and those terms had expired many years previously without those executives leaving PRASA. The three executives were Ms Onica Martha Ngoye, Mr Nkosinathi Allen Khena and Mr Tiro Holele. Respectively, as at the beginning of 2021 they were employed as Group Executive: Legal Risk and Compliance, Chief Operational Officer and General Manager: Strategy.

2135. Each of the three executives (I will use the term executives in respect of all three even though the position that Mr Holele occupied at the beginning of 2021 was not an executive position) wrote to the Chairperson of the Board of PRASA or to the Acting Chief Executive Officer – Ms Mabija, who had signed the letters after receiving the letters of dismissal. In their letters to the Board the three executives pointed out that they had not been party to any fixed-term contracts of employment with PRASA.

2136. One would have thought that the Board would reconsider its position once the three executives said this to the Board, but it seems that it did nothing. The Board did not respond to those letters. The applicants then instituted an urgent application in the Labour Court for an order declaring their dismissals to be unlawful, invalid and void and ordering their reinstatement. The Board, PRASA, members of the Board and the Acting Chief Executive Officer opposed the application. That was strange, given that, when the three executives wrote to the Board saying that they had not been on fixed-term contracts of employment, the Board did not refute that version and did not do what would have been expected of a reasonable employer in the position of the Board of PRASA. That is to show the three executives proof of the fixed-term contracts of employment to which the Board was saying they had previously been party or, if it did not have such proof, to concede that it had no case and withdraw the dismissals. The

Board of PRASA and the Acting Chief Executive Officer of PRASA did neither. Instead, they filed papers in Court and opposed the executives' application.

2137. In due course the Labour Court handed down its judgment. The judgment of the Labour Court reveals something most concerning about the Board of PRASA and the Acting Chief Executive Officer of PRASA, Ms Thandeka Mabija. The Board, PRASA and the Acting Chief Executive Officer opposed the application by disputing only that the application was urgent and that the Labour Court had jurisdiction. The judgment of the Labour Court reveals that on the merits the members of the Board, PRASA and the Acting Chief Executive Officer had no response to the executives' version that they had never been party to fixed-term contracts of employment. Let me refer to that part of the judgment which reveals this. In paragraph 32 of the judgment, the Labour Court said:

“[32] The applicants refuted knowledge of their employment contracts being fixed to a term of five years. Their attempts to seek clarity through the letters to the Board drew blank. The very issue was raised as a persuasive factor to find urgency. The Court papers received no factual response from the respondents. It is not denied that the contracts of employment do not have expiry dates. The respondents elected not to produce documentation or to make averments to support the decision to terminate the contracts. It is not in dispute that clause 3 of the standard contracts signed by first and second applicants were designed to endure until terminated as provided for in the very contracts. Clause 9 which recognizes various forms of termination of employment, makes no mention of termination on ground of expiry of a five year fixed term contract.”

2138. This passage reveals that all the Board members – and they were all cited as respondents – opposed the applicants' Court application even though not a single one of them had documentary proof that any one of the three executives had previously been party to a fixed-term contract of five years with PRASA and they had no witness who could depose to an affidavit and say that, although there was no written fixed-term contract of employment, there was an oral agreement fixing five years as the term of their employment. As an employer, you fire an employee on the basis that that

employee was employed or had been employed for a fixed-term and that that term has expired. One would expect that you would know that you have evidence to prove such a fixed-term contract. If that contract was in writing, you would be expected to make sure, before you fire the employee on that basis, that you have seen that contract and you can produce it in Court if your decision is challenged by the employee. If the contract was not in writing but was oral, you would be expected to have as a witness the person who entered into the oral agreement with the employee so that that person can testify in Court on your behalf or can depose to an affidavit to prove that the employee had been employed on a fixed-term contract and what those terms and conditions of employment were. If as the employer you have neither, how do you oppose the employee's legal challenge?

2139. I am lost for words as to why all the members of the PRASA Board, the Acting Chief Executive Officer and PRASA opposed the executives' Court application when they had no defence to the executives' unlawful dismissal claim on the merits. If the Court had accepted their argument that the application was not urgent, that would have been temporary relief because the executives would have won in due course because PRASA and the Board had no defence to their claim on the merits. The Board, PRASA and the Acting Chief Executive Officer also took the point that the Labour Court did not have jurisdiction in respect of that matter. If the Labour Court had upheld this point, it would only have been a temporary victory because PRASA, the Board and the Acting Chief Executive Officer of PRASA had no defence on the merits of the executives' unlawful dismissal claim because the executives would, in that case, have subsequently taken their case to the High Court and they would have won there.

2140. The question that then arises is this: the Board and the Acting Chief Executive Officer of PRASA were at all relevant times legally obliged to act in the best interests of PRASA. In respect of the Board, section 50 of the Public Finance Management Act obliged it to

exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity, act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity and should seek to prevent any prejudice to the financial interests of the State.

2141. It must be remembered that the Board of PRASA was obliged, in terms of section 51(1)(b)(ii) of the PFMA to "prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity". The PFMA defines "fruitless and wasteful expenditure" as meaning "expenditure which was made in vain and would have been avoided had reasonable care been exercised". The Board and its Acting Chief Executive Officer appear to have acted without exercising reasonable care in causing the expenditure arising from the dismissal of the three executives in early 2021 and in opposing their Court application. To the extent that PRASA may have had two people for each of the posts to which the three executives were attached – namely each executive and somebody acting in their positions between their date of dismissal and their reinstatement or the finalisation of the litigation, serious consideration must be given to whether the Board members should not jointly and individually be required to pay back that money.

2142. In light of the legal obligations referred to above, it must be questioned as to whether it was in the interests of PRASA for the Board and the Acting Chief Executive Officer to fire the three executives on the basis on which they fired them when they had no evidence to prove their basis for dismissing them. Not only that, it must also be questioned whether it was in the interests of PRASA for the Board and the Acting CEO to oppose the three executives' application in the Labour Court when they had no defence on the merits to the executives' unlawful dismissal claims and only wanted to take technical points that the matter was not urgent and that the Court did not have

jurisdiction. In this respect, it may be assumed that the Board ought to have known that, if the Labour Court did not have jurisdiction, the High Court would have jurisdiction and the executives would end up going to that Court and winning their case there because the Board had no defence on the merits of their claim.

2143. It must accordingly be asked whether what the Board and Acting Chief Executive Officer did could have been in the best interests of PRASA. If they were not, the question is: in whose interests were the Board and the Acting Chief Executive Officer acting when they dismissed the three executives on the ground on which they dismissed them early in 2021 and then decided to oppose the executives' application in the Labour Court? That is the question. In this regard, it may be noted that nobody in the PRASA Board and the management needed to be a lawyer to realise that to dismiss the three executives on the grounds on which they were dismissed and to oppose their Court application when PRASA had no defence on the merits of their claims could not have been in the interests of PRASA. If any one of them did not see that, then it must be concluded that he or she was either incompetent or simply did not have what he or she was supposed to have to serve on the Board of a company, particularly a company as big as PRASA.

Dismissal, reinstatement and second dismissal: the new CEO

2144. One would have thought that, after PRASA had operated without a permanent CEO for close to six (6) years, there would be stability at PRASA after the appointment of a permanent CEO. Unfortunately, this was not to be as the events which happened at PRASA concerning its new CEO towards the end of 2021 and during the first few months of 2022 reveal. The person who was appointed as the permanent CEO of PRASA in March 2021 was Mr Z Matthews.

2145. In an arbitration award to which reference will be made shortly, it is stated that Mr Matthews pointed out that at the time he took the helm, PRASA was "in a parlous state".

This was in March 2021. Before Mr Matthews could finish even seven months as CEO of PRASA, he was dismissed by the Board of PRASA. By the time the Board of PRASA appointed Mr Matthews, it was chaired by Mr Ramatlakane. As has been noted above, Mr Ramatlakane previously served as an ANC Member of Parliament and was a Member of Parliament's Portfolio Committee on Transport during the term of office of the Molefe Board. It is worth reiterating that Mr Molefe gave evidence which is referred to earlier to the effect that that Committee or the ANC members of that Committee was antagonistic towards his Board and effectively failed to do its job in relation to the problems at PRASA. That is, it failed to carry out its constitutional function of oversight in relation to the problems at PRASA.

2146. The dispute between Mr Matthews and the Board of PRASA concerning his dismissal ended up in arbitration. Judge Robert Nugent, a former Judge of Appeal of the Supreme Court of Appeal who is now retired was the arbitrator in those arbitration proceedings. In April 2022 he issued an arbitration award. Judge Nugent concluded that Mr Matthews' dismissal by the Board of PRASA was unlawful and he ordered PRASA to reinstate him. A copy of that arbitration award is annexed as addendum "A" to this part of the Report of the Commission. When one reads that award you cannot but get the impression that the Board was trying to find a reason to get rid of Mr Matthews on the basis of whatever reason they could lay their hands on. In fact, Judge Nugent found that that was the case. Judge Nugent said in paragraph 108 of his award:

"PRASA is perfectly entitled to dismiss an employee, including its Group CEO but then I must do so frankly and for proper reason. In my view it is fair to infer from the events that have occurred that the Board of PRASA wanted to rid itself of Mr Matthews and has cast about for reasons to do so."

2147. What Judge Nugent is saying here is that in his view the events surrounding Mr Matthews' dismissal revealed that the Board of PRASA simply wanted to get rid of a

CEO whom it had appointed only a few months earlier and it was simply looking for a reason it could use to get rid of him. Judge Nugent also had the following to say in paragraphs 109 to 112 of his arbitration award:

"[109] The Board minute of 29 November 2021 demonstrates ambivalence on the part of the Board as to why they thought he should be dismissed. It was said at one time that he should be dismissed for poor performance. It was said at another time that he should be dismissed for failure to obtain security clearance. But ultimately, as I have observed, it plumped for dismissing him for failure to disclose his dual citizenship. Yet the failure to obtain security clearance was resurrected once again in argument, on this occasion contending that the contract had ended for non-fulfilment of a condition precedent, without having alleged that before.

[110] And if that was not enough PRASA then went in search of whether Mr Matthews had an interest in any companies that had not been disclosed. Without any apparent inquiry as to the nature or relevance of those interests, and without inquiry of Mr Matthews, it was seized upon to purport yet again to terminate his employment.

[111] But yet when it came down to the reason given by PRASA all along for terminating Mr Matthews' employment, nothing could be advanced by PRASA for why his dual citizenship was material, other than veering back to the refusal of security clearance in the investigation report, which the Board said it had accepted.

[112] Absent an adequate explanation for why Mr Matthews' dual citizenship was material and required disclosure, PRASA's claim to have terminated his employment fairly and lawfully on that ground was a mere makeweight."

2148. Judge Nugent says in his award ultimately the reason advanced by the PRASA Board for why they had dismissed Mr Matthews is that he had failed to disclose that he had dual citizenship, namely British citizenship and South African citizenship. Earlier on in his award Judge Nugent said that he had not been able to find anything in PRASA's

affidavits which explained why Mr Matthews' dual citizenship was material. Judge Nugent went on to say in paragraph 85 of his award:

"[85] PRASA was challenged by Mr Matthews to provide an explanation [as to why his dual citizenship was material], when he said in his affidavit:

'[It] remains a mystery why my British citizenship is considered to be material information by the Board. I have no idea whether any and what evidence was placed before the Board and on what basis it was concluded that my British citizenship was material – and to what exactly it was considered material.'

2149. So, what this means is that, after the PRASA Board had said that the reason why it had dismissed Mr Matthews was that he had failed to disclose his dual citizenship, Mr Matthews challenged the Board to explain why that was material to his employment by PRASA and the Board could not provide an explanation. So, one would ask the question: why did the PRASA Board think he was obliged to have disclosed the dual citizenship if they could not explain why making that disclosure was material to his employment?

2150. It is appropriate to quote paragraphs 34, 36, 37, 38, 41 – 47 of Judge Nugent's arbitration award. They read:

"[34] Meanwhile, on 3 November 2021 Mr Matthews was requested to attend the chambers of Adv Sethene, who told him the Board wanted to terminate his employment due to poor performance. Shortly afterwards social media circulated that he had been given five days' notice of termination due to poor performance. In a telephone call on 5 November 2021, Mr Matthews was told by Mr Ramatlakane that that was 'fake news'. Fake news it might have been but the conversation with Adv Sethene has not been placed in dispute.

...

[36] On 18 November 2021 Mr Ramatlakane telephoned Mr Matthews and told him that security clearance had been refused, and Mr Matthews should not attend the office, other than to meet with him and Adv Sethene that afternoon. Later that day he wrote to Mr Matthews:

It has been brought to my attention that there are serious allegations of misconduct relating to gross dishonesty that you could have committed in your capacity as the Group Chief Executive Officer of PRASA.

PRASA views these allegations against you in a very serious light and therefore, will be conducting a thorough and comprehensive considerations into these allegations.

It is therefore the view of PRASA that whilst these allegations are being considered by the PRASA Board, you are hereby placed on a precautionary suspension with full pay. Please note that this is not a sanction or a punitive measure, but a necessary step that will allow PRASA to conduct an objective and unbiased probing into these allegations.'

[37] On the following day Mr Ramatlakane issued a release to the media:

'The PRASA Board of control at its meeting on Thursday 18 November 2021 considered an alleged sensitive matter of security breach and other contractual obligations associated with the employment contract of the Group CEO Mr Zolani Kgosietsile Matthews.

By consensus, the Board resolved that Mr Zolani Kgosietsile Matthews should be placed on precautionary suspension to allow detailed probing of the matter at hand to be concluded in his absence.'

...

[38] It will be apparent that inconsistent reasons were given for the suspension. Moreover, neither is supported by the evidence before me. There is no evidence of allegations having been made of 'misconduct relating to gross dishonesty' other than the allegation made in the letter by Mr Ramatlakane himself. There was no mention of a 'security breach' in the letter of suspension, and there is no evidence of an allegation having been made that Mr Matthews was connected to a 'security breach'. Not even the SSA had made that allegation. On the contrary, it said its investigation of Mr Matthews was found to be 'positive on the whole'. What had occurred is only that he had been refused 'Top Secret' security clearance, which in itself was not a 'security breach'.

...

[41] The Board met on 29 November 2021. The only item on the agenda was recorded in the minute of the meeting as 'Investigation Report of GCEO in Respect of his Failure to Declare his Dual Citizenship – Advocate Mokutu SC'. The minute

recorded that 'following the consideration and acceptance of the Investigation Report by Advocate Mokutu SC on the investigation of the GCEO's material non-declaration/disclosure about his dual citizenship' the Board had sought legal advice. The Board then resolved, amongst others, that

'The BoC unanimously accepted recommendation to terminate the employment contract of the GCEO with immediate effect'.

[42] That was not correct. Adv Mokutu had not recommended termination of Mr Matthews' employment. He had only expressed his opinion that Mr Matthews had been obliged to disclose his dual citizenship, and that the omission 'goes to the trust relationship'.

[43] The following day Mr Ramatlakane wrote to Mr Matthews informing him:

'4. The Board has resolved to terminate your employment with PRASA. The Board is satisfied that you materially and intentionally withheld your British Citizenship status from PRASA.

5...

6. The findings of Adv Mokutu SC's investigation have been adopted by the Board. Your actions of acting in bad faith and failing to disclose material information to the Board have led to a breakdown in the employment relationship.

7. Moreover, you have failed to obtain a positive Security Clearance and are thus disqualified from holding the position of GCEO.'

[44] The letter demonstrates the ambivalence on the part of PRASA that has featured throughout this matter, and which is vividly apparent from the minute of the Board meeting of 29 November 2021. On the one hand it was said in paragraph 4 that Mr Matthews' employment had been terminated because he was said to have 'materially and intentionally withheld [his] British Citizenship status from PRASA'. On the other hand it was said in paragraph 7 that he was 'disqualified from holding the position of GCEO' by reason of his failure to obtain security clearance. Which one brought about the termination of his employment is left uncertain in the letter.

[45] On 2 December 2021 Mr Ramatlakane announced the termination to the media:

'The Board of Passenger Rail Authority Agency of South Africa (PRASA) at its meeting of the 29 November 2021, unanimously resolved to terminate with immediate effect the employment contract of its GCEO, Mr Zolani Kgosietsile

Matthews. This is in line with a provision in clause 11 of his employment contract.

This followed an investigation by seasoned senior counsel that established whether Mr Matthews deliberately and intentionally failed to disclose material information to PRASA in respect of his dual citizenship.

Mr Matthews's letter of employment clearly stipulates (as one of the key requirements) that his contract of employment will only be confirmed upon him obtaining favourable security clearance. The State Security Agency (SSA) has since declined to issue Mr Matthews top secret security clearance or any other security clearance.'

[46] Once again, PRASA's ambivalence is apparent. Was Mr Matthews' employment terminated because he had 'deliberately and intentionally failed to disclose material information to PRASA in respect of his dual citizenship', as stated in the second paragraph? Or was his employment contract 'not confirmed' because he was refused security clearance, as stated in the third paragraph? Moreover, what is said in that paragraph is materially inaccurate. The SSA had not declined to issue 'any other security clearance'. It had declined to issue only 'Top Secret' security clearance. The SSA was not asked for any other level of clearance and did not investigate whether any other level should be granted.

[47] I have observed that Mr Matthews finally pinned PRASA's colours firmly to the mast in his affidavit – the reason for terminating his employment, so he said emphatically, was his failure to have disclosed his dual citizenship, and not the refusal of security clearance. I need nonetheless to deal with the matter of security clearance because it has featured heavily in this case and made an appearance yet again in argument before me, and it also has secondary relevance. So, too, I need to deal with Mr Matthews' company interests, which were relied upon in argument to justify the termination."

2151. It would appear that the PRASA Board made three decisions subsequent to the release of Judge Nugent's award reinstating Mr Matthews. The one decision was that they would not reinstate Mr Matthews. The other decision was that they would institute a review application with the aim of having Judge Nugent's arbitration award reviewed and set aside. The third was that they would dismiss Mr Matthews again and give another reason for dismissing him. They subsequently sent Mr Matthews a letter in which they said that they had dismissed Mr Matthews for poor performance. This is

despite the fact that in paragraph 32 of Judge Nugent's award it is revealed that Mr Ramatlakane, the Chairperson of the PRASA Board, stated, in response to certain allegations made by Mr Matthews in relation to two performance reviews conducted by Mr Ramatlakane in regard to Mr Matthews' performance, that the performance reviews were not relevant given that [Mr Matthews] was dismissed for breach of contract by materially and intentionally withholding his British citizenship from PRASA and not for poor performance. Mr Ramatlakane is quoted to have also said in his affidavit:

"The performance reviews and discussions regarding his performance are not relevant to these proceedings."

2152. Judge Nugent said that Mr Ramatlakane added:

"At any rate the Board of Control reviewed his performance and concluded, based on the below par scores that he received, that the applicant had demonstrated poor performance. Consequently, his probation period was extended for an additional three months' [this was after the August review]."

2153. The reason why I have referred to Judge Nugent's arbitration award as extensively as I have done is that it reveals that, after PRASA had had much instability for six years when it did not have a permanent CEO, that instability has continued even after a permanent CEO had been appointed. We have a situation seven years after the departure of PRASA's previous CEO, Mr Montana, that a new CEO was dismissed before he could complete a year in PRASA's employment and a senior Judge, acting as an Arbitrator has concluded that the PRASA Board wanted to get rid of the CEO and was simply looking for whatever reason it could find to get rid of him. The fact that, after the release of Judge Nugent's arbitration award, the Board decided to dismiss Mr Matthews again for another reason serves to give greater credence to the finding by Judge Nugent that the PRASA Board wanted to get rid of Mr Matthews. Actually, the

fact that the Board said in its post-Judge Nugent arbitration award letter of dismissal the PRASA Board said that the reason for Mr Matthews' dismissal was poor performance despite the fact that Mr Ramatlakane had earlier expressly said in an affidavit that Mr Matthews had not been dismissed for poor performance, gives more credence to Judge Nugent's finding.

2154. Given the above, I believe that a special intervention needs to be made.

SUMMARY OF CONCLUSIONS

2155. Judge N Makhubele gave evidence before the Commission but did not complete her evidence. I have decided that the Commission will not pursue the issues it had sought to pursue with her because they may require further investigation and yet I am aware that there is a Tribunal under the JSC that will investigate her conduct at PRASA while she was Chairperson of the Board of PRASA. I will leave the matters of her role at PRASA to be dealt with by the Tribunal even though it may not deal with all aspects.

2156. In 2012, then Public Protector, Ms Thuli Madonsela, began her investigation into PRASA arising from 32 complaints that were made. However, she was able to furnish her *Derailed* Report only in August 2015. Even then, that Report did not deal with all the complaints she investigated. In her Report, Ms Madonsela said that the Report was delayed because of a lack of co-operation mainly from PRASA's then CEO Mr Montana and also from the Board that was in office at the time. She found that some of the allegations had been proven, but some had not. She did not make findings in respect of 15 of the matters. One of her recommendations was that every contract worth more than R10 million that PRASA had concluded after 2012 be investigated by Treasury and that the Board assist with that investigation. Given that PRASA would have paid at least R10 million for many of the goods and services that it procured, that is a seriously damning finding in respect of the propriety of PRASA's procurement of goods and

services. Implicit in the finding is a concern that the 32 complaints she had received did not deal with all the major ills at PRASA: proper investigations of all contracts exceeding R10 million was required.

2157. Fortunately, however, by the time that that recommendation was made, PRASA had a new Board. That Board, whose members were appointed for a period of three years, took office on 1 August 2014, just about a year before the Public Protector's Report "Derailed" was released. However, most of the complaints that were investigated related to actions and decisions that had occurred prior to 2012. In her "Derailed" Report, the Public Protector commented scathingly about some of the matters referred to above.

2158. It is however difficult to comprehend that, notwithstanding the dire state in which PRASA was found to be for such a prolonged period, no actions were taken in respect of what was happening at PRASA, and its state of disrepair had been allowed to remain officially undetected until uncovered by the Public Protector and thereafter by the investigations initiated by the Molefe Board.

2159. In seeking to provide an explanation, as has been detailed above, some of the witnesses who testified in the Commission expressed the view that PRASA had been "captured" or was a victim of "state capture". Most suggested that Mr Montana was central to that capture. Notwithstanding that questions had been raised about at least two multi-billion Rand contracts while he was at the helm of PRASA, he remained the Group CEO. The suggestion was that he had been allowed to become too powerful, in fact so powerful that, according to Mr Molefe, at the meeting of 20 August 2015 Mr Montana had complained to former President Zuma that he was not consulted when or before the Molefe Board was appointed. In addition, Mr Molefe suggested that Mr Montana enjoyed the protection of quite powerful persons behind the scenes.

2160. Mr Molefe was also of the view that, for state capture to succeed, systems in organisations had to be broken, must be weakened and good people must be removed from certain positions and substituted by people who were compliant, who would carry out the agenda [of those] whose objective is the looting of the public purse. In addition, he perceptively pointed out the following. He was in a position to speak out. But not everybody could do that. There were many professionals, he said, who begin to work when quite young. They get married, start a family, buy a home, pay a huge bond, purchase an expensive car and [have] children in private school. They are put in important positions and certain individuals in high places in the ANC make them believe that the extent to which they could have upward mobility, whether where they are or in broader society, is dependent on them pleasing those occupying positions of influence and decision-making either in SOEs or in the ANC.

2161. It is also clear from the evidence heard by the Commission and in what is said in affidavits that were furnished to the Commission, that if the requisite care was displayed by those in a position to assist in the clean-up of PRASA, PRASA would not be in the sorry state it is today. For example, although the DPCI had initially intended utilising Mr Sacks' services, after he submitted to it his damning and quite incriminating "first level" flow of funds report in respect of the Swifambo tender, he has not heard back from the DPCI. Nor did they ask him, as was envisaged at the time he was engaged, to perform a similar exercise in respect of the Siyangena contracts.

2162. In the face of foregoing, one would expect that everyone concerned who had anything to do with PRASA would express at least a measure of regret or apology about the manner in which they exercised, or failed to exercise, their powers. This applies both to those within PRASA who exercised power and took or influenced decisions taken by PRASA and also those who were required to have held the repositories of power and influence accountable. It is a sad commentary on the attitude of those who are placed

in powerful public positions and also those who are required to ensure the lawful, reasonable and fair exercise of those powers that none of them had the grace or courage to express regret or apologise for their failures. If anything, they defended the stances they adopted, even though the disastrous consequences are visible for all to observe. That approach is with respect quite worrying.

2163. In determining who should be held responsible for the ills at PRASA, it would be instructive to divide the persons or entities into two broad categories: first, those who perpetrated the wrongs; and second, those who had occupy positions of oversight to ensure that the perpetrators were held accountable and ensured that appropriate steps were taken. The second category of persons will be considered first.

Persons who had a duty of oversight

2164. Insofar as oversight of the maladministration at PRASA is concerned, at least two fundamental questions must be asked. First, can it be said that the Government leaders, and of course the ANC leadership was not aware of it? Second, given what they knew and also what they must have known, what steps did they take?

2165. It would appear that the answer to the first question is as follows: the ANC leadership and also the then President and the then Deputy President and the other members of the Top 6 of the ANC were told, at least in general terms about the extent of the problems at PRASA and the huge amounts involved.

2166. The answer to the second question would appear to be this. At best, they and other public representatives and public bodies stood by and did nothing while the Molefe Board attempted to fight corruption and bring perpetrators to book. In this regard, it will be recalled that Mr Molefe said he had written to now President Ramaphosa, but who was then Deputy President, just before the term of his Board expired identifying the

critical challenges that PRASA faced and had asked him and Government to intervene and get things back on track. He said that he had also alerted the then Deputy President to the methods used to make his Board dysfunctional, namely not filling in vacancies on the Board. He urged that a proper Board be put in place.

2167. Second, the inaction of the ANC's Top 6 when told by Mr Molefe of the extent of the rot at PRASA and the R79 million paid to the Party [the ANC] by the managing director of a company that had received a R3,5 billion tender. That information was subsequently made public. Even then the Top 6 were not shamed into getting to the bottom of the matter. The beneficiaries of that contract are still at large – with large sums of money still in their possession. The Top 6 too owe the country a profound apology. They allowed a state entity that is required to provide an essential service to the most vulnerable among us to be incapable of fulfilling its duty. It should be noted that the ANC's Top 6 does not formally exercise public power. Nevertheless, given that important positions in SOEs are determined or ratified by the ANC's "Deployment Committee" the Top 6 must be held accountable to the public when it does not act in circumstances where the public interest requires that action be taken.

2168. Third, Parliament's inaction in the face of all the bad news about PRASA is a matter of serious concern. It will be recalled that on 8 March 2017, Mr Molefe wrote to the Speaker of Parliament pleading for protection for his Board when it appeared before Parliament's Portfolio Committee on Transport. He also made a similar request to the Chairperson of the Portfolio Committee on Transport. Mr Molefe did not get the requisite protection. Instead, at a sitting of the Portfolio Committee on that very day an announcement was made on behalf of Minister Peters that she had dismissed the Molefe Board. There is no record of Parliament calling Minister Peters to account for this public embarrassment of the Board, even after the High Court had set aside her decision to dismiss the Board. With respect, Parliament failed to hold the Executive to account and allowed it to punish

a Board that sought to fight corruption and maladministration. It is recommended that Parliament puts in place mechanisms to ensure that such unlawful use, or abuse, of power by the Executive to silence its critics is not allowed to happen again.

2169. Fourth, the members of the Portfolio Committee on Transport have hardly covered themselves in glory in their handling of PRASA-related matters. The most strident criticism must, of course, be reserved for the ANC members of the Portfolio Committee. Just how little some of them cared about their obligations or applied themselves to fulfilling those obligations is illustrated by the following. In her affidavit to the Commission in response to Mr Molefe's complaints about the manner in which his Board was treated by the Portfolio Committee, its then Chairperson, Ms Magadzi, said that in the Swifambo review application Mr Molefe had alleged that "PRASA had donated" R79 million to the ANC. However, that was never Mr Molefe's allegation: he said that Mr Mashaba had told him that *he* [Mr Mashaba] had paid R79 million to the ANC after Swifambo had won the locomotives tender. Worse still, Ms Magadzi and her Committee held it against Mr Molefe that he could not produce receipts *from PRASA* confirming the payments.

2170. However, there are more fundamental problems with the approach that the ANC members of the Portfolio Committee adopted. In her affidavit, Ms Magadzi said that her Committee wanted state institutions such as National Treasury, the Hawks (the DPCI) and the police to investigate the award of the locomotives contract to Swifambo, but "comrade Popo Molefe" engaged Werksmans. The short response to that suggested approach is this: Werksmans was engaged to comply with the Public Protector's remedial action that the PRASA Board had to assist Treasury to investigate every contract of more than R10 million that PRASA concluded from 2012; and the Hawks had to be taken to Court to force them to act against wrongdoers. Most tellingly, after the Molefe Board had left office, the Portfolio Committee did little. Ms Magadzi did not

say what her Committee did to bring wrongdoers to book. She did mention though that, when allegations of procurement irregularities at PRASA “surfaced in the media”, the Committee conducted inspections of, among other things, the “tall trains” that were not fit for purpose. Ms Magadzi’s response betrays a total lack of understanding of how corruption in procurement is uncovered or the nature of the irregularities committed during the tender process for the locomotives contract.

2171. In light of the foregoing, it is not unreasonable to conclude that the ANC members of the Portfolio Committee failed to properly execute their oversight function over the Executive in regard to PRASA.

2172. There is a further issue that arises from Ms Magadzi’s affidavit. After setting out a number of complaints that her Committee had with the Molefe Board, she stated: “Another allegation that the Committee wanted to explore was the appointment of comrade Molefe’s son to work at the law firm, Werksmans.” In response, as noted above, Mr Molefe denied the allegation. However, the serious concerns that that statement raises are the following. The Molefe Board left office on 31 July 2017. Ms Magadzi’s affidavit is dated 21 October 2020, more than three years after Mr Molefe’s Board left office. Importantly, from the perspective of propriety, Ms Magadzi’s statement suggests that the matter was not investigated further. With respect, coming from the Chairperson of a public oversight body, this is shocking. If the allegation were correct, Mr Molefe might have had to answer to a charge of corruption. It would appear however that neither she nor the other ANC member of her Committee investigated the matter. In that case: it must be considered that they are undeserving of being members of a public oversight body; and it is hardly surprising that her Committee did not cover itself in glory.

2173. Finally, in respect of ANC MPs who were members of the Portfolio Committee on Transport during the period that the Molefe Board was in office, the following needs to be recorded. President Zuma appointed Mr Maswanganyi as the Minister of Transport after he had dismissed Minister Peters from the Cabinet. According to Mr Molefe, Minister Maswanganyi refused to meet with his Board and in effect rendered it unworkable. What is however more worrisome about the elevation of Mr Maswanganyi to Minister of Transport is this. As noted above, he said that it was Parliament that had decided to dissolve the Board and a Minister "cannot go against a decision" taken by Parliament! On that score, Mr Maswanganyi is simply wrong. As powerful as Parliament is, the power to dismiss the Board lies with the Minister. It is considered that there should be serious reservations about appointing as a Minister a person who has so limited an understanding of who holds the reins of power in respect of matters that fall within his Portfolio. It is so that Mr Maswanganyi is no longer a member of the Cabinet, but the fact that he was appointed as a member of the Cabinet is quite worrying. Ms Magadzi's inadequacies as Chairperson of the Portfolio Committee have already been considered above. However, notwithstanding those inadequacies, she has been elevated to the position of Deputy Minister of Transport. Again, the question must be raised: is it in the public interest to appoint as a Deputy Minister someone who has not covered herself in glory in performing important oversight functions.

2174. One of the other members of the Portfolio Committee at the time that Mr Molefe's Board was in office at PRASA was Mr Leonard Ramatlakane. He is now the Chairperson of PRASA's Board. As has been noted in the section dealing with the award of the locomotive tender to Swifambo, Mr Ramatlakane has embarked on a process of consequence management at PRASA. This is commendable. However, given his less than distinguished performance as a member of the Portfolio Committee, and complaints made by PRASA employees who appeared before the Commission, it is recommended that the Portfolio Committee on Transport exercises particular oversight

over this process and prepares appropriate reports that are available to the public and civil society organisations.

2175. Fifth, Minister Dipuo Peters must be credited with appointing the Molefe Board in 2014.

It appears that initially at least she was supportive of the Molefe Board's attempt to clean up PRASA. However, it seems that her support for this effort waned. The reason she proffered for withdrawing her support was that the Board was not focusing on ensuring that PRASA was run properly. However, what emerges from the evidence is that she wished the investigations into PRASA's ills to at least be curtailed. Thereafter, when it became public knowledge that Mr Mashaba had said that, after his firm had been awarded the Swifambo tender, he had paid money to persons who would pay it to the ANC, one would have expected that as the Minister to whom PRASA was accountable, she would have insisted that that embarrassing allegation was expeditiously pursued: either to clear the name of the ANC or bring the wrongdoers to book. She did neither. She instead stood by. Moreover, she ought to have been aware of the unacceptable treatment meted out to the PRASA Board by the Portfolio Committee of Transport. By her inaction, it would appear that she made common cause with that Committee's approach. She must accordingly share some of the blame for the fact that the wrongdoers in the Swifambo matter have still not been brought to book.

2176. In addition, Minister Peters must take responsibility for the non-appointment of a Group CEO to replace Mr Montana after he left PRASA in July 2015. That position remained vacant throughout the remaining period that she was Minister – until March 2017. This is despite the fact that she had been provided with a list of three possible candidates, the top being a black female, who had been picked following a thorough recruitment process. When she gave evidence, former Minister Peters tried to justify her failure to act on the following bases: PRASA was “not ready” to appoint a new Group CEO; she has to follow certain processes; and she was seeking an opportunity to discuss the

matter with President Zuma. With respect, none of these reasons is a proper basis for a Group CEO not being appointed. Having regard to the totality of the evidence on this issue, the inference is irresistible that there was some reason for not filling that important position. Former Minister Peters' failure to disclose it suggests that it was not a proper one. It would appear that that conclusion is reinforced by the explanation tendered by her successors when asked to explain the delay in having the appointment of a permanent Group CEO made.

2177. The failure of the successive Ministers to furnish proper and cogent explains for the unacceptable delay in appointment a permanent Board, as opposed to Interim Boards, and a permanent Group CEO, as opposed to Acting Group CEOs, is quite worrisome.

2178. There are at least two matters of a general nature that arise from the systemic failure to arrest the rot at PRASA, notwithstanding its devastating effect on the many vulnerable persons who depended on its services.

2179. First, the fact that not one person who is paid, from scarce public funds, to exercise oversight over PRASA assisted the Molefe Board in its fight to rid PRASA of corruption and maladministration leads to two broad inferences. All of them, individually or collectively, were incompetent and/or uncaring. The other is that they were implementing a pre-determined plan, namely to ensure that the Molefe Board failed. It will be recalled that that is precisely what Mr Molefe told the Top 6 when he met them in July or August 2015. Worryingly, a consideration of the evidence led at the Commission, suggests that the probabilities are that Mr Molefe's prognosis was correct.

2180. Second, many professions have bodies that exercise oversight over their members. Examples are lawyers and doctors. Should a member deviate quite radically from what is expected of a reasonable member of that body, he or she can face malpractice proceedings. The term political malpractice has been recently coined. Given the extent

to which certain public representatives failed to exercise their power, and the resultant massive losses to the fiscus and the suffering cause to vulnerable members of the public, in respect of PRASA-related matters, and the premium that the Constitution places on accountability, perhaps it is time for South Africa to ensure that its public representatives fulfil their obligations by introducing a form of sanction for what may be termed constitutional and political malpractice.

2181. It is convenient now to consider who, on the basis of the evidence led and information considered by the Commission, are the persons who should be held accountable for the wrongs at PRASA and also those against whom steps should be taken.

Persons who should be held accountable

2182. It is worth reiterating that Mr Molefe was clear that in his view PRASA had been “captured” or that PRASA was a victim of state capture. He was also of the view that, at PRASA itself, Mr Montana was at the helm of that project. A similar view was expressed by, among others, Ms Ngoye and Mr Dingiswayo

2183. In assessing the cogency of these views, it is necessary to appreciate that it would be difficult to secure direct evidence of state capture or the capture of state institutions. Whether or not a state institution was “captured” is to be inferred from the evidence heard, the contents of all relevant documents and facts and circumstances that cannot reasonably be disputed. The latter includes known relationships between those in positions of power and persons who are known beneficiaries of contracts that are concluded between organs of state and persons or entities in the private sector.

2184. During the course of the Commission's hearings, evidence was led of the enormous influence that Mr Roy Moodley exercised at PRASA,¹⁴⁰¹ the contracts that PRASA concluded with entities with whom he was associated or known to be associated and the consequences visited upon those who raised questions about some of those contracts. In addition, it is a matter of public record that there was a quite close relationship between President Zuma and Mr Roy Moodley, whose Royal Security paid Mr Zuma a salary for a period of 15 months before Mr Zuma became the President of the country and a month thereafter. In addition, when Mr Montana appeared at the Commission he made no secret of his allegiance to Mr Zuma, even after Mr Zuma had stepped down as President. Not coincidentally, Mr Montana was of the view that institution of the Commission was "targeted" at former President Zuma.
2185. The other person who benefitted handsomely from PRASA contracts was Mr Makhensa Mabunda. He is a known associate of Mr Montana. Evidence was led that entities with which he was associated received contracts totalling nearly R1 billion. In addition, Mr Mashaba told Mr Molefe that it was Mr Mabunda who had encouraged him [Mr Mashaba] to submit a bid for the locomotives contract, which he did through Swifambo. The manner in which the tender came to be awarded to Swifambo, despite the fact that its bid ought to have been disqualified, is a further factor that needs to be taken into account. So must the fact that Swifambo paid large sums of money to Mr Mabunda or entities with which he was associated.
2186. Considered collectively, the information available to the Commission appears to lead to the following inferences: first, PRASA was indeed captured or a victim of state capture; second, its procurement processes, as noted by the Public Protector in her "Derailed" Report were suspect at best; and third, Mr Montana appears to have been a significant

¹⁴⁰¹ It will be recalled that Mr Molefe said that soon after his appointment as Chair of the PRASA Board, he became aware that persons at PRASA referred to Mr Moodley as "the owner" of PRASA.

role player at PRASA in its capture and in determining which service providers would be allocated major tenders, such as the acquisition of locomotives.

2187. As is clear from what has been detailed earlier in this Report, a fair amount of the evidence related to allegations about Mr Montana and the manner in which PRASA was run during his tenure as Group CEO. Based on the position that Mr Montana held at PRASA for some nine years, the evidence that was led, the documents that served before the Commission, the findings of the Public Protector in her *Derailed* Report and the judgments handed down by Courts in the *Swifambo* and *Siyangena* matters, it appears to be a reasonable conclusion to identify Mr Montana as the significant internal role player in the capture of PRASA. However, the following further question must be asked. Who else was involved in that project, whether knowingly or simply by virtue of the position he or she held at PRASA or by virtue of having been a member of a committee that was part of the procurement processes that were followed at PRASA.

2188. Accordingly, in deciding against which persons from PRASA steps should be taken, reliance will have to be placed on the reasonable inferences to be drawn from the documents, read in their proper context.

2189. As noted above, one of the serious problems that was experienced in respect of determining what happened during those procurement processes related to documents. Importantly, it is a problem that was referred to by the Public Protector, who found that PRASA hid documents from her office and then alleged that a finding should be made against complainants because they were unable to produce the documents. In the affidavits in the applications to review and set aside the contract between PRASA and Swifambo and contracts between PRASA and Siyangena that issue was also raised, as all the relevant documents could not be located. In addition, the following further matters were raised in respect of documents that were in fact located: in many cases,

minutes or reports were not signed or dated; and in some instances, different versions of minutes or reports existed. As noted above, when the Swifambo matter was dealt with earlier in this Report, documents relating to the procurement process were made available to the Commission only after the scheduling of oral evidence had been finalised. The correctness what is reflected in those documents and in some instances the authenticity of the documents has been challenged. In addition, in affidavits that he tendered to the Commission, Mr Ramatlakane also referred to some of these concerns. As a result of the foregoing, it is a difficult task to identify the individuals who may have knowingly participated in the capture of PRASA in so far as procurement matters are concerned.

RECOMMENDATIONS

2190. Insofar as the awards of the Swifambo and Siyangena tenders is concerned, it bears reiterating that according to the National Head of the DPCI, Lt General Lebeya, the investigations into the criminal complaints relating to those two matters is quite advanced. In the circumstances, as regards these matters, the following recommendations are made.

2191. First, as regards the Swifambo matter, it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

2191.1. all DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible;

2191.2. the NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA;

2191.3. in deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission; the documents that formed part of the record in the review application; and the documents that Mr Ramatlakane's current Board has uncovered recently;

2191.4. based on the foregoing, it is further recommended that:

- (a) serious consideration be given to prosecuting the following senior employees who played a role in the award of the locomotives contract to Swifambo: Mr Montana; Mr Mthimkulu; and Mr Chris Mbatha;
- (b) the roles of the following persons, who were members of the BEC that made the recommendation that the locomotives tender be awarded to Swifambo, be examined to determine whether they, or any of them, should be prosecuted: Ms Shezi, Mr Khumalo, Mr Mahlobogwane, Mr Nkosi and Mr Magoro;¹⁴⁰²
- (c) the roles of the following persons, who were members of the CTPC, to determine whether they, or any of them, should be prosecuted: Mr Holele, Mr Mbatha, Mr Mathobela, Ms Motshologane, Mr Bopape, Ms Ngoye, Ms Shezi, and Mr Khuzwayo.
- (d) the prosecutions of Mr Mashaba and Mr Mabunda be speeded up;

¹⁴⁰² It must be recorded that Mr Peter Stow was also a member of the BEC, but it is he who had informed Mr Molefe of the irregularities that tainted its meetings. In the circumstances, Mr Stow may prove to be a source of further information.

(e) the roles of others who may have received undue benefits from the award of the locomotives contract to Swifambo, as detailed in the Reports of Mr Sacks and the Liquidators be examined to determine whether or not they should be prosecuted.

2191.5. the NDPP considers instituting a prosecution, in terms of section 86(2) of the PFMA,¹⁴⁰³ against the following members of the PRASA Board which approved the recommendation that the locomotives contract be awarded to Swifambo: Mr Buthelezi, Dr Gasa, Mr Khena, Ms Moore, Mr Nkoenyane, Mr Salanje and Mr Montana.

2192. Second, as regards the Siyangena matter, it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

2192.1. all DPCI investigations relating to possible criminal conduct at PRASA are finalised as soon as possible;

2192.2. the NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing at PRASA;

¹⁴⁰³ The PFMA serves an important regulatory purpose and allows for disciplinary action to be taken against officials of departments and constitutional institutions. Its significance for present purposes is that section 86(2) creates criminal offences in respect of certain conduct of accounting authorities. As has already been noted, PRASA's Board is its accounting authority. Section 86(2) of the PFMA provides: "An accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section 50, 51 or 55." Among the issues to be considered is whether the Board wilfully or in a grossly negligent way failed to ensure the reasonable protection of PRASA's records [as is required by s 50(1)(a)]; and/or whether it wilfully or in a grossly negligent way failed to ensure that PRASA had and maintained an appropriate procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective or a system for properly evaluating all major capital projects prior to a final decision on the project [as is required by s 51(1)(a)(iii) and (iv), respectively].

2192.3. in deciding whom to prosecute, the DPCI and the NDPP, in addition to the documents that they have already collated or are in the process of collating, have due regard to the evidence led at Commission, the documents that served before the Commission; the documents that formed part of the record in the review application; and any further documents that the current PRASA Board may have uncovered recently;

2192.4. based on the foregoing, it is further recommended that serious consideration be given to prosecuting the following PRASA employees who played a role in the conclusion of the two impugned contracts: Mr Montana, Mr Gantsho and Ms Ngubane.

2192.5. the NDPP considers instituting a prosecution, in terms of section 86(2) of the PFMA against the PRASA Board or any of its members who approved the award of the contracts with Siyangena.

2193. Third, as regards Mr Montana's property dealings, it is recommended that it is recommended that the President takes steps to ensure, through the relevant members of the Executive that the following happens:

458.1 the DPCI finalises as soon as possible its investigations into the sale by Mr Montana of the Parkwood Property to Mr Van der Walt's Precise Trade and the assistance that Precise Trade or Mr Van der Walt gave to Mr Montana to pay the deposit for the Hurlingham Property and any of the other properties he acquired or sought to acquire and the assistance that Mr Van der Walt gave to Mr Gantsho to acquire the property in the Point area in Durban.

458.2 the NDPP immediately appoints a team to oversee the investigation into and the prosecution of Mr Montana, Mr Van der Walt and Siyangena (and/or its

associated companies) for possible contraventions of sections 12 and/or 13 of the Prevention and Combating of Corrupt Activities Act.

2194. I conclude this Report with the following observation. Many, many days of the Commission's hearings were devoted to allegations of the capture of PRASA and strident denials thereof, especially by Mr Montana. However, I am left with the uneasy perception that there is much about the ills at PRASA that has not yet been uncovered. That perception is reinforced by what I have set out in the previous sections relating to the instability at PRASA that was exacerbated by the unacceptable delays having a permanent Board and a permanent Group CEO appointed for more than three years and five years, respectively, and also what appears of late to be a harking back to the Montana-style of leadership. I worry that if I do not make a general recommendation about these matters, it is unlikely that PRASA will recover. Having given anxious consideration to the issues, I have decided that a special commission of inquiry be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin, who should be held responsible for that and who could have benefitted from those that unacceptable state of affairs.