

**STATEMENT OF MS BARBARA HOGAN TO
THE HONOURABLE DEPUTY CHIEF JUSTICE,
MR RAYMOND ZONDO:
CHAIRPERSON OF
THE JUDICIAL COMMISSION OF INQUIRY
INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC
SECTOR, INCLUDING ORGANS OF STATE**

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THE PURPOSE OF THIS STATEMENT

- 1 The purpose of this statement is to illustrate from my personal experience as Minister of Public Enterprises (from 11 May 2009 to 31 October 2010) the extent to which the former President of South Africa, President Jacob Zuma (President Zuma), improperly and recklessly interfered in matters relating to the appointment of Board Directors and Chief Executive Officers (CEOs) of State Owned Enterprises (SOEs). In doing so, I will make specific reference to SOEs such as Eskom and Transnet. The actions of President Zuma, set out below, damaged the performance of these entities and embedded an ethos of political cronyism, nepotism, lack of accountability and corruption in our body politic.

PERSONAL HISTORY

- 2 I was born and schooled in Benoni, and I obtained an Honours degree in Development Studies from the University of the Witwatersrand.
- 3 I joined the African National Congress ("ANC") as an underground political activist in 1977. In 1979, I enrolled for a Master's degree focusing on unemployment in South Africa.
- 4 In 1981, I was detained and sentenced to ten years imprisonment, having been found guilty of high treason relating to my political activities as a member of the ANC. During my incarceration, I enrolled for a Bachelor of Commerce degree and midway through my Honours degree, I was released, a week after the ANC was unbanned on 9 February 1990.
- 5 In April 1990, I was appointed by the Interim Leadership Core of the ANC, under the direction of Walter Sisulu, to the Interim Leadership Committee of Gauteng which was mandated to set up the structures of the ANC in Gauteng. Later that year, I was elected as the full-time General Secretary of the Gauteng ANC, a position I held until the end of 1992.
- 6 In 1994, I was elected as an ANC MP in the National Assembly and served mainly on the Portfolio Committee on Finance (which I chaired from 1999 to 2004) and on the

Standing Committee on Public Accounts. I also chaired the Standing Committee on Oversight of the Auditor-General's Office.

- 7 I participated in the Finance Theme Committee that formulated the financial clauses of the Constitution for the duration of the Constitutional Assembly, and I was later appointed to the Accounting Standards Board.
- 8 In September 2008, the President of South Africa, President Kgalema Motlanthe, appointed me to his Cabinet as the Minister of Health.
- 9 On 11 May 2009, following the national elections, President Zuma appointed me as the Minister of Public Enterprises and Mr Enoch Godongwana (Mr Godongwana) was appointed as the Deputy-Minister of Public Enterprises.

STRUCTURE OF OWNERSHIP AND CONTROL OF SOEs

- 10 A total of 9 (nine) SOEs and public entities fell within the jurisdiction of the Department of Public Enterprises (DPE), including Eskom, Transnet, SAA, SA Express, Denel, Infraco, PBMR, Alexkor, and SAFCOL. All of these are classified as Schedule 2 Major Public Entities in terms of the Public Finance Management Act No 1 of 1999.
- 11 When SOEs were corporatised in the 1990's, the structure of ownership and accountability was similar to any other company under the legal jurisdiction of the Company's Act, 71 of 2008 but with some differences. Simply put, the CEO and senior management run the SOE and are accountable to the Board of Directors who provide the shape and strategic direction of the SOE. These directors ensure compliance with the laws and obligations applicable to the SOE. Directors have onerous fiduciary responsibilities and must act at all times in the interests of the SOE.
- 12 Unlike in profit-oriented companies, the focus of major SOEs such as Eskom and Transnet is on performance, because in both these cases they provide the essential infrastructure (energy and freight transport) on which the entire economy and South Africans depend. Of course, they must produce a financial surplus sufficient enough to cover operating costs and to maintain a healthy level of reserves. They must also operate as efficiently and economically as possible so as not to impose punitive tariffs

on services they provide to the public, municipalities, corporates and to the whole economy.

- 13 These large SOEs raise the bulk of their capital from user tariffs, from the raising of loans for big capital projects and through the issuing of bonds. At that time, government provided virtually nothing in the form of equity and, when I was there, National Treasury would sometimes have to issue loan guarantees to maintain a SOE as a going concern. SAA is a case in point. These become contingent liabilities on the State. Financial risk and debt is a major issue in these SOEs and that is why ratings agencies and National Treasury carefully monitor them.
- 14 DPE is not a policy department. Other departments such as the Department of Transport and Department of Energy develop policies for their sector and once these are approved by Cabinet, and hopefully by Parliament, it is the responsibility of DPE to align the work of SOEs with these policies via the mechanism of a Shareholders' Compact that is reviewed regularly.
- 15 As the representative government shareholder, the Minister of Public Enterprises (the Minister) must appoint Directors to the Boards of SOEs as and when vacancies arise or terms of office of Directors expire. This is usually done at the Annual General Meeting (AGM) of the SOE. It is the job of the Minister to screen and carefully select professional, competent and experienced Board members to ensure that a Board has the right mix of skills and experience, and also to give due regard to the demographics of the country in accordance with government's commitment to transformation.
- 16 In most companies, the Board appoints the CEO and other senior management and that is the norm that applies to SOEs as well; however, a Memorandum of Incorporation or the founding legislation of a particular SOE may empower the Minister to appoint the CEO of that SOE, as was the case with Transnet.
- 17 However, a Minister would not unilaterally appoint a CEO above the heads of a Board, because a CEO is ultimately accountable to the Board, and not the Minister. Similarly, it is the Board that enters into an employment contract with the CEO, not the Minister. As such, there should always be consultation between the Board and the Minister when appointing the CEO of a SOE.

- 18 A general illustration of the appointment process of a CEO and / or Board member during my tenure as the Minister of the DPE was that, under the direction of the Director General of DPE ("DG"), the DPE would conduct professional searches, head hunt candidates, follow up on recommendations by industry experts or, in some cases, recommendations by the Board. Mr Godongwana and I would constantly engage on these issues and the DG would draw on the skills and expertise of specialist sectoral units within the DPE with respect to suitable candidates.
- 19 Once I had approved of the composition of a Board, I would send a Cabinet Decision Memorandum to the Economics Sub-Committee of Cabinet for approval, and then to Cabinet for final approval. A Minister may make a special appeal to the President to by-pass the sub-committee process and proceed straight to Cabinet for final approval of matters that are urgent.
- 20 Sub-Committees of Cabinet meet every second week and Cabinet meets in the week following the Sub-Committee meeting. The President chairs Cabinet meetings and approves the Agenda drawn up by the Cabinet Secretariat, so he has a decisive role on what goes on to the Agenda. As part of the Cabinet collective, ministers do, however, tend to involve Cabinet in the exercise of their powers to appoint the CEO, both as the Executive Authority in terms of the Public Finance Management Act and as the shareholder representative on behalf of the State.
- 21 The Department of Public Enterprises conducted an assessment of the extent of Cabinet's involvement in order to establish the trend and the nature of its involvement. To this end, a review was conducted of previous decisions of cabinet spanning from April 2002 to February 2009 relating to appointments of CEOs of a variety of SOEs. The results showed that Cabinet's involvement varied between approval (ten times), concurrence (six times), and noting (twice) of the relevant Minister's decision, indicating that every CEO appointment is dealt with on a case by case basis, having considered the size, importance and circumstances facing the SOE at the time of making the appointment.
- 22 In practice however, there were parallel behind-the-scenes processes. As the ruling party, the ANC had expectations that they would have influence over who was appointed to Boards via the Deployment Committee of the ANC. When the ANC came into power in 1994, the Deployment Committee played a useful role in identifying appropriate candidates from among the ranks of progressive forces to fill crucial

positions as the State, at that time, was staffed entirely by previous apartheid government appointees.

- 23 However, the usefulness of such a Deployment Committee these days is debatable. How can just a handful of people possibly have the institutional knowledge and resources to pronounce on suitable candidates for every senior position in government and the private sector? It cannot be that closeness to or membership of the ANC, or any of its Alliance structures (or to factions within these structures), should be the determining factors in the selection of candidates for senior positions. In this day and age, there are a host of capable black and white professionals (women and men) from which to choose, who clearly understand and have an appetite for making the economy grow. Directorships on Boards should never be granted to the favoured few, as a reward for loyalty to a party or a faction of a party, or as a retirement benefit for the well-connected.
- 24 When I took office, 18 months after the divisive Polokwane conference, those in power in the ANC, including the Tripartite Alliance, were intent on rolling back the so-called neo-liberalism of the Mbeki era and on installing an interventionist Developmental State.
- 25 Regrettably, these factional battles in the ANC only served to encourage and entrench nepotism and patronage from within the ranks of the ANC and the Tripartite Alliance, and this would have very damaging consequences for SOEs and, by extension, for our economy which I will illustrate below with regard to my experiences in the appointment of board members and CEOs of Transnet and Eskom, during my time as the Minister of DPE.
- 26 It is important to note that there were three damaging processes afoot in my time with regard to SOE related appointments: there were the very public political maneuverings of certain elements within the ANC and Tripartite Alliance to get their way; then there were the ways that President Zuma, and some Cabinet colleagues, **thwarted my** attempts to get Cabinet approval for Board appointments; and finally, the inexcusable interference with my responsibilities as a Minister by President Zuma that eroded my executive authority.

- 27 In the international literature on SOEs it is common cause that political interference is one of the greatest risks encountered by parastatals. If anything, the narrative that follows shows how great that risk is. The experiences I had during my time as Minister were just the beginning.

TRANSNET

- 28 A simple but important job of appointing a CEO to Transnet, after the resignation of Maria Ramos at the end of February 2009, became the site of an ugly protracted battle between President Zuma and I, in which he thwarted all the legal and legitimate procedures that I took to obtain Cabinet approval for any appointments whatsoever to Transnet, including the appointment of a CEO. As a consequence, Transnet had an Acting Chairperson, an Acting Group CEO (GCEO), an Acting CFO, and later on, an Acting CEO in one of their divisions, Transnet Freight Rail (TFR), for one and a half years.
- 29 When Maria Ramos resigned as the CEO of Transnet in February 2009, the Transnet Board, after a careful selection process, and extensive engagement with the then Minister of Public Enterprises, Bridget Mabandla (Minister Mabandla), recommended Pravin Gordhan (Mr Gordhan) as their only candidate for the CEO position. I attach hereto marked Annexure "A1", a memorandum dated 13 February 2009 indicating the Board's decision to appoint Mr Gordhan as the CEO of Transnet and, as Annexure "A2", a letter dated 9 March 2009 from the then Chairperson of the Transnet Board, Mr Fred Phaswana (Mr Phaswana), addressed to Minister Mabandla, wherein Mr Phaswana confirms that *"...the Nominations Committee fully supported by the Board, recommended the appointment of Mr Pravin Gordhan on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed... Each of the other previously shortlisted candidates was not recommended for appointment for various reasons..."*
- 30 A week later, Mr Gordhan withdrew his candidature and several months later, he became the Minister of Finance after the General Elections of May 2009. A fiction arose at that time, which was untrue, that Siyabonga Gama (Mr Gama), then CEO of TFR, was second on the list of preferred candidates for the position of Transnet CEO. There was no such preferential list. The Transnet Board was adamant that Mr Gordhan stood head and shoulders above the rest, and that he was the only

candidate that they wanted to recommend for the position. But this fiction of a second in line candidate, Mr Gama, did not go away.

- 31 After Mr Gordhan's withdrawal, the Board had difficulties getting a firm direction from government. They wanted to commence with a new search but could not get an unequivocal endorsement to do this. At this point, the election period had begun. There are many correspondences in this regard, including the letter from Mr Phaswana to Minister Mabandla (Annexure A2) and a memorandum dated 19 March 2009 from the then DG. Minister Mabandla did however approve the appointment of the Chief Financial Officer ("CFO") of Transnet, Mr Chris Wells ("Mr Wells"), as the acting CEO of Transnet and Anoj Singh, a Transnet employee, as the acting CFO of Transnet.
- 32 The Transnet Board nevertheless embarked on a further search, as they felt that they could not abandon their fiduciary responsibilities. On the 18th of June 2009, the Transnet Chairperson Mr Phaswana, met with me and submitted a memorandum, dated 9 June 2009, which has been attached hereto marked Annexure "B" which, amongst other things, recommended the appointment of a candidate for the position of CEO. This was a highly capable and experienced black candidate who had the requisite experience and admirable managerial capabilities. Again, it is important to note that the Board had nominated only one candidate for appointment. However, the fiction persisted that Mr Gama was next in line. They did not recommend an internal candidate, although, as noted by the Board, *"the preference was to appoint a suitably qualified internal candidate, after consideration of the current global 'meltdown' and the global recession, its current and future potential impact on Transnet, and a thorough consideration of these individuals, the Corporate Governance and Nominations Committee, fully supported by the board, recommends the appointment of Mr X ["Mr X" our insertion] on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed."*
- 33 Approximately a month after my appointment as the Minister of DPE, I met with President Zuma and gave him a full background about the developments in Transnet. I informed him that the Transnet AGM was coming up very soon and that a GCEO and a Chairperson of Transnet would have to be appointed as a matter of urgency. I briefed him about the Board's candidate of choice (whom I too endorsed) and the inquiry potentially implicating Mr Gama.

- 34 I was shocked and disappointed when President Zuma informed me that he was adamant that Mr Gama was his only choice for GCEO. I informed him that that was not possible and that Mr Gama was not the Board's choice and I could not override the Board as they had undergone a very professional selection process. I further informed President Zuma that Mr Gama was the subject of an inquiry into procurement irregularities and it would be very messy to appoint a GCEO who could potentially be facing fairly serious charges. President Zuma said that, if that was my view, no appointment whatsoever was to be made at Transnet until Mr Gama's disciplinary process was over. We agreed that I would provide him with more detailed information for him to further apply his mind to.
- 35 The problem was that President Zuma, two of my Cabinet colleagues and elements within the ANC and the Tripartite Alliance, including the Secretary-General, Gwede Mantashe, were very vocal that the candidate of their choice, Mr Gama, would become the next GCEO of Transnet, despite the fact that the black dominated Board of Transnet, after a rigorous and professional selection process, were clearly of the view that Mr Gama was not an appropriate candidate. In fact, the Board had nominated a highly recommended person who had scored well in all the professional assessments and had the requisite experience.
- 36 There were further complications that were very worrying. After several whistle-blower tip-offs, an investigation into procurement irregularities had already started in 2008, which was raising concerns about Mr Gama's role in irregularly signing off contracts. Unfortunately, one of these contracts was with a company that had been owned at the time by a Cabinet colleague, Mr Nyanda. In this regard, I attach hereto, marked **Annexure "C"**, a letter dated 6 March 2009 annexed to a summary report by Transnet Internal Audit into the aforementioned investigation.
- 37 Notwithstanding all this, Mr Gama's supporters claimed he was being victimized by an anti-transformation white cabal that had instituted an inquiry (and later disciplinary proceedings) to prevent him from being appointed the GCEO. Moreover, it was falsely claimed that Mr Wells himself wanted to be GCEO and had started the inquiry in order to eliminate his rival, Mr Gama. Mr Wells had, in fact, put his name forward to apply for the GCEO position in November 2008 when the process started, but retracted his application within days of applying.

- 38 In the months to come, Mr Wells was to face a tirade of insults, slander and racist slurs for the rest of the time he was at Transnet.
- 39 Mr Gama was later found guilty of unwarranted criticism of Transnet Executives, a charge serious enough to warrant dismissal.
- 40 On or around 28 July 2009, I sent President Zuma a comprehensive report, attached hereto marked Annexure "D", with annexures detailing the selection process, the strong motivation for the appointment of the candidate that had been recommended to me by the Transnet Board, details of the procurement irregularities under investigation by the Transnet Audit Committee, the corporate governance aspects of CEO appointments, including the legal opinions prepared by Michael Katz and Advocate Wim Trengove SC in this regard. However, President Zuma did not respond.
- 41 The Transnet AGM was postponed from July 2009, and took place on 11 August 2009. I was in an embarrassing position as I could not appoint a CEO or a Chairperson, nor could I fill the four vacancies on the Board. I endorsed the continuation of office of the existing Board members for their terms of office were due to expire the following year.
- 42 The inability to appoint a Chairperson and a CEO of Transnet at the AGM was a very serious breach of corporate governance. In all good faith, the Transnet Board had conducted a thorough and very professional search for a CEO, always in close consultation with Minister Mabandla and then with myself when I took over. I can count no less than 18 engagements between Transnet and the Government in that six-month period with regard to the GCEO succession. I am however mindful that the political turmoil of the time, the turbulence of a general election, and the ascension to power of a new political elite aligned to President Zuma probably made decision-making for an out-going Minister very problematic. As for myself, it was the absolute dogged insistence of President Zuma that no-one be appointed to any position in Transnet until his candidate of choice, Mr Gama's disciplinary case was over, that prevented me from making an appointment.
- 43 Cabinet was due to meet on 26 August 2009 and recognizing the urgency of the situation in Transnet, and still not having received a reply from President Zuma, I sent

an urgent letter on 25 August 2009, attached hereto marked "Annexure E", requesting his assistance to expedite the placement of Cabinet Memo 7/2009 on the Cabinet Agenda. He gave me instructions to withdraw the Cabinet Memo and now wanted the names of three potential chairpersons for Transnet.

- 44 Mr Gama was formally charged by Transnet and later suspended on 1st September 2009. Immediately before, and in the days following his suspension, Minister Jeff Radebe, ("Gama will become CEO"), Minister Sipiwe Nyanda ("Gama is being persecuted like Jacob Zuma"), and also the ANC, the SACP, the South African Transport Workers Union (SATAWU) and the ANC Youth League (under Julius Malema at the time) all issued strong and harsh statements in support of Gama, accusing Transnet of persecuting him¹. This was reflected in numerous statements and reports in the media, which I attach hereto marked Annexure "F1" to "F13".
- 45 I quote from SATAWU's statement made by the General Secretary, Randall Howard, attached hereto marked Annexure "G":

"SATAWU will ensure that no puppet appointment takes place until the disciplinary process of Gama is completed even though at the cost of keeping the untransformed cabal in place a little longer. SATAWU is in the process... to clean up the lily white Transnet Capital Projects..."

- 46 The accusations of an "untransformed" cabal and "puppet appointments" was outrageously insulting of the Transnet Board and the proposed candidate. The candidate was black, as were the majority of the members of Transnet Board who were also very senior and professional people. All I could conclude from this fusillade of insults hurled at Transnet was that there were concerted attempts to improperly and irregularly influence the appointment process of the Transnet CEO, with blatant disregard for the Board and myself as Minister.
- 47 An editorial in the City Press on 13 September 2009, attached hereto marked Annexure "H" warned:

"The level of political interference at Transnet does not bode well for the effective management of parastatals...The question of who is right and

¹ Zwelenzima Vavi, the then General Secretary of COSATU, did not add his voice to these criticisms as he had his reservations.

who is wrong is not for the ANC to determine. Neither is it terribly good practice to level the race card at the Board and the executive team at Transnet. The Board is diverse... Their reputations are being sullied and it will be little surprise if they walk in the next fortnight."

- 48 On 7 October 2009, the South Gauteng High Court handed down its judgement, which is attached hereto marked Annexure "I", dismissing with costs Mr Gama's application to have his suspension set aside on the grounds of bias against him and faulty procedures. Paragraph 107 of the judgement reads: *"There is also no case made out of the perceived bias that can affect the legality of the process. Much less that of institutional bias"*.
- 49 On 4 June 2010, Mr Gama was found guilty on 3 out of 4 charges, namely, exceeding his delegated authority by approving a GNS Security Contract; failure to comply with the Board's stipulated condition for the 50 like-new locomotives contract, and unwarranted criticism of Transnet's Executives. Mr Gama was not found to have personally benefitted; however, he was found to have acted negligently by signing off on contracts without properly applying his mind.
- 50 The outcome of the disciplinary enquiry conducted into the conduct of Mr Gama, which is attached hereto marked Annexure "J", confirms in paragraphs 364 and 365 that,
- "...A reasonable person in Gama's position would not in my view have been prepared to utter the criticisms which he did, some in public and others in correspondence, unless he had certain evidence in support of his claims which it appears Gama did not have. The statements are critical of Wells in particular, but also infer a wider criticism of Transnet executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama."*
- 51 After Mr Gama had been found guilty, a separate, independent hearing on what sanctions should be applied, found that the charges were serious enough to warrant dismissal on each charge. **Accordingly, on 28 June 2010, Mr Gama was fired from Transnet.**

B/K

52 I, together with my Deputy-Minister, Mr Godongwana, proceeded to put together a Cabinet Memorandum (finally dated 27 October 2010), which is attached hereto marked Annexure "K" for the appointment of a new Transnet Board who would then commence a fresh search for a new CEO as the last proposed candidate had withdrawn. The Transnet Board, Acting GCEO and Chairperson at the time had shown remarkable resilience in keeping the show on the road, but they were approaching exhaustion: no-one should have to bear the level of abuse and government dysfunctionality which they endured.

53 In a letter to President Zuma dated 8th September 2010, attached hereto as Annexure "L", I thanked him for the telephonic conversation I had had with him the previous evening regarding the Transnet Chair, and I attached two CV's of my proposed candidates for his ease of reference and requested a meeting with him prior to submitting to Cabinet. I was targeting the Cabinet meeting of 15th September 2010. In the same letter I stated:

"Given the importance of Transnet to the SA Economy, and the need for stable leadership at the Board level, it is absolutely necessary to proceed with the appointment of a Chairperson and other Board members with the requisite skills. To this end my department has prepared a Cabinet Memorandum for discussion at Cabinet [15th September 2010] but which it has not yet submitted. This is because we agreed that we would discuss the matter first so that I can ascertain your final views on the composition of the Board and in particular the Chairperson."

54 On 10th September, and again on the 11th September 2010, my office sent reminders to the President's office regarding the request for a meeting, and providing times of my availability. I heard nothing.

55 The Transnet Memorandum (9/2010) (Cabinet Memo 9/2010) did not appear on the Cabinet Agenda of 15 September 2010 (Annexure "K").

56 On 27 October 2010, I sent a Letter to the Presidency requesting his assistance to expedite the placing of the Transnet Cabinet Memo 9/2010 onto the Cabinet Agenda. I did not get a reply.

- 57 Three days later, on Sunday 31 October 2010, the President's office called me to a meeting with him and in the presence of Gwede Mantashe, the Secretary-General of the ANC, President Zuma said that the NEC had decided to re-deploy me as the Ambassador to Finland. I declined the re-deployment and informed them that I would be resigning as a Member of Parliament.
- 58 I immediately packed up my office and left the following day, requesting a handover meeting with the incoming Minister, which is the norm in government. Minister Gigaba declined my request.
- 59 My Transnet Cabinet Memo 10/2010 appeared 3 days later as an Agenda item on the Cabinet ESEID Sub-Committee of 3 November 2010, and was withdrawn. (This meeting took place 3 days after President Zuma dismissed me.)
- 60 On 8 December 2010, Cabinet approved Mr Gigaba's recommendations for the Board at Transnet. Iqbal Sharma, a former business partner of Gupta associate, Salim Essa, was on that list and was later appointed as head of the procurement committee at Transnet.
- 61 On 16 February 2011, Cabinet approved the appointment of Brian Molefe as Group CEO Transnet and a little while later Mr Gama was re-appointed as CEO of TFR on the grounds that his misconduct had not been serious enough to warrant his dismissal.
- 62 On 16 March 2011, the Transnet Board approved the re-appointment of Mr Gama as CEO of TFR, justifying it on the grounds that the findings in his disciplinary hearing had not warranted a dismissal.

ESKOM

- 63 During a robust Eskom Board breakaway session on 28 October 2009, Mr Jacob Maroga, the CEO of Eskom, offered to resign and left the room so that the Board could discuss the matter. At that point, Mr Bobby Godsell, the Chairperson of Eskom, said that he too offered his resignation and left the room for the Board to consider both offers of resignation.
- 64 The Board agreed that they would accept Mr Maroga's resignation and delegated two directors to inform him of that fact. This was done at a dinner meeting that evening, and

arrangements were made to meet the following day to discuss the content of a communication informing the public of the CEO's resignation.

- 65 I came to the Eskom Head Office early the next morning on Friday 29 October 2009, and whilst meeting with Mr Godsell in his office, Mr Maroga walked in and handed me a letter which stated, amongst other things, that he had not offered to resign and that he was not offering to resign. This letter is attached hereto marked **Annexure "M"**.
- 66 I thereupon met with the Board and requested each and every member of the Board to tell me their view of the account that Mr Maroga had offered to resign and that they had accepted his offer - a decision that Mr Maroga had accepted the previous night. I said that if any Board member were not in agreement, they should say so and there would not be any repercussions.
- 67 Every Board member confirmed that Mr Maroga had offered to resign and that they had accepted his resignation. They felt Mr Maroga was dishonest. They had accepted his resignation because of their deep frustration at his poor performance as a CEO, for example, failing to consistently appreciate the enormity of Eskom's financial crisis; a failure to re-negotiate long-term contracts with aluminium producers and long term coal contractors; and the development of a strained relationship with his executive team.
- 68 I thereupon sought legal advice from my Department and senior counsel and conferred with the Deputy-Minister, Mr Godongwana, at the offices of Eskom. I requested the Deputy-Minister to meet privately with Mr Maroga and try to persuade him to take an elegant exit to prevent further damage to himself, because it was clear that he was not going to easily win his argument with the Board, and Eskom could certainly not afford a public crisis of this order.
- 69 Mr Godongwana and Mr Maroga met the next day, Friday 30th October 2009, and the latter said that he would revert by the following Sunday on his proposed terms of exit. However, Mr Maroga did not revert back on the proposals and refused to meet with Mr Godongwana, stating that he would only meet with me.
- 70 Thereafter, the Board issued a letter to Mr Maroga confirming his resignation and stating that his incapacity as a manager constituted further grounds for terminating the relationship, should the resignation dispute not be settled. I was unaware that this letter had been sent.

- 71 I met with Mr Maroga on Wednesday 4 November 2009 and offered him a dignified exit, or mediation or arbitration as options to resolve the dispute. He refused all of those options, insisting that I confirm his appointment as the CEO of Eskom and return him to his office. I refused his request, because it was not my job to be interfering in a relationship between a CEO and a Board from a corporate governance point of view and because the employment contract was between Mr Maroga and the Board; not with me. After the meeting, I informed the Chairperson of the Board that there was nothing further that I could do to resolve the dispute, and that the Board should go ahead with whatever they needed to do.
- 72 The next day, 4 November 2009, I briefed Acting President Motlanthe on developments and informed him that Eskom would be announcing Mr Maroga's resignation that same day. President Zuma was abroad at the time.
- 73 The Chairperson of Eskom announced the resignation of Mr Maroga to a large gathering of senior managers at Eskom on the morning of Thursday 5 November 2009. Whilst this was happening, I was in my office and received a call from an enraged President Zuma asking me bluntly what did I think I was doing? (He was briefly in the country en route to Mozambique). He furiously instructed me to tell Bobby Godsell to stop immediately. I warned President Zuma of the dire consequences this would have, but he would not listen. He said he would speak to me again once he was in Mozambique, in an hour or so, but he did not take my repeated calls thereafter. I informed Acting President Motlanthe and said that, much against my better judgment, the President had issued me with an instruction which I was bound to obey. It made me deeply unhappy.
- 74 As a consequence of President Zuma's instruction, Bobby Godsell was forced to cancel the media briefing scheduled to announce Mr Maroga's resignation after he had finished briefing the staff; the media were already sitting waiting. This really put the cat amongst the pigeons: the media speculation about whether Mr Maroga was, or was not, the CEO of Eskom reached a crescendo, hitting headlines, newscasts and talks shows. There was great consternation in the country. This was not at all good for Eskom's reputation, given its financial and operational problems. Neither I, nor the Board, were in a position to provide any clarity whatsoever and the President was simply unavailable. I was lambasted for my silence.

- 75 I finally managed to get an appointment with President Zuma on the morning of Friday 6 November 2009. He had just finished breakfast and told me that he could only meet with me for 10 minutes. I briefed him and then he said he had to go to a NEC meeting in Kempton Park and would meet with me at lunchtime to continue our conversation. No meeting took place and, although I waited the whole day in Kempton Park, I was never summoned as he had promised.
- 76 That night, and the following day, I lodged my strongest objections with Jessie Duarte, who was Chief of Operations in the Presidency and made repeated calls to the Presidency to try and set up a meeting with President Zuma.
- 77 Finally, I got to see the President on Sunday 8 November 2009 in Kempton Park in the midst of a media uproar. He really did not want to discuss anything, he just informed me that he had decided that Mr Maroga will return to Eskom and, over a certain period, he would write his version of events and the Board would do the same and then I, the Minister, would decide. I was horrified. I said to the President that if that was the route he wanted to take then he, not I, should convey this to the Board and Mr Maroga, as I thought this was a disastrous path to take. We agreed, finally, that I would inform the Board of his decision, he would inform Mr Maroga and I would make arrangements for his meeting with Mr Maroga. Upon contacting the President's Housekeeper to make arrangements for Mr Maroga to meet the President that afternoon, my secretary was rather puzzled because she was told that Mr Maroga had already met with President Zuma earlier on, and asked if Mr Maroga wanted to see President Zuma again?
- 78 That same day, I met with the Board and informed them of the President's decision. They were not at all happy but finally agreed, in the interests of settling the media furor about the CEO position. But there was one condition: that they personally meet with the President. He very reluctantly agreed and they extracted a concession from the President that Mr Maroga would immediately go on leave once he returned to Eskom. They were very worried about his disruptive presence at Eskom.
- 79 I met with the Board later that night after their meeting with the President to plan the process going forward. In the middle of the meeting, I got a call from President Zuma saying that Mr Maroga does not accept the deal. The Board was furious and Bobby Godsell resigned.

- 80 The following day, 9 November 2009, President Zuma phoned me to say that he had given Mr Maroga permission to return to Eskom as the CEO and that Mr Maroga would then proceed to write out his version of events, as discussed before. President Zuma and I had a heated argument on the matter. On the same day, 9 September 2009, Mr Maroga arrived at Eskom, accompanied by Jimmy Manyi and a few others, and went upstairs to his office.
- 81 Mr Maroga then proceeded to send a letter, dated 9 November 2009, addressed to me, the Board, EXCO and the Chairperson of the Portfolio Committee in Parliament, which is attached hereto marked **Annexure "N"**, announcing that he remained the CEO and Director of Eskom and that the shareholder at the highest level had confirmed that all decisions regarding his status must be formally requested from and granted by the shareholder, and all unauthorized actions taken by the Board since 28 October 2009 were rescinded.
- 82 Mr Godongwana and I were so shocked that we were both of a mind to resign. I was going to ask for a special slot in Parliament to make an announcement about the matter and prepared to leave for Cape Town, as Ministers are accountable to Parliament. Mr Godongwana took the letter to Luthuli House in an absolute fury and a little while later, the President phoned Mr Maroga and instructed him to immediately vacate his office at Eskom, leave the building and return only once I had given him permission to do so.
- 83 On the following day, I requested Yunis Shaik (at that time the labour advisor to DPE) and the Acting Chairperson of Eskom, Mr Mpho Makawana, to meet with Mr Maroga to negotiate his terms of departure. They reached a stalemate and, finally, Mr Maroga left Eskom with no package.
- 84 On 12 November 2009, I made an announcement in Parliament that Mr Maroga was no longer CEO of Eskom and Eskom did likewise.
- 85 Yunis Shaik informed me that the President had requested that I ask Mr Godsell to return as Chairperson of the Board, which I did. Later, however, the President phoned me and asked me to tell Mr Godsell that he will not return as Chairperson of the Board. Gwede Mantashe made a similar demand, although during this entire episode he had made it quite clear to me that he did not support what the President was doing.

86 As a consequence of this fiasco, Eskom, like Transnet, had an Acting Chairperson and an Acting CEO.

87 Later, Mr Maroga sued Eskom and I for R85 million compensation. He lost the case as well as the appeal.

SAFCOL

88 The South African Forestry Company Ltd (SAFCOL) was due to have its Annual General Meeting on 28 September 2010. In preparation therefor, I submitted a Cabinet Memorandum (7/2010) dated 26 August 2009 for the appointment of Non-Executive Directors, including the Chairperson, to the Board of SAFCOL, retaining some Board members and appointing new ones, including the Chairperson.

89 In a letter to the President dated 8th September 2010, attached hereto marked Annexure "O" and headed 'SAFCOL Chairperson', I thanked him for the telephonic conversation I had had with him the previous evening regarding the SAFCOL Chairperson and I attached the CV of my proposed candidate for the position of Chairperson.

90 In this same letter of 8th September 2010, I said to the President that,

"in order for us to have a more meaningful opportunity to discuss this position before taking it to Cabinet, early yesterday, I withdrew the item from the agenda of today's ESEID [Cabinet Sub-Committee] meeting. However given the urgency of the matter as a result of the AGM for SAFCOL[and] Parliamentary and other legislative reporting requirements, I trust then that you will revert to me with your views on the proposed candidate for Chairperson quite soon and before the next Cabinet meeting. Kindly note that I have written to your office for permission to submit the memo to the next Cabinet meeting. I am available to meet with you at any time....."

91 On 10th and 11th September 2010, my Personal Assistant, Ms. Nthabiseng Borotho sent follow-up reminders to President Zuma's office for the meeting and giving details of my availability. I heard nothing.

92 On 15th September 2010, Cabinet approved my Memorandum, despite an attempt by the President to have it withdrawn at the actual meeting itself.

ISSUES RELATING TO THE TERMINATION OF SOUTH AFRICAN AIRWAYS' SOUTH AFRICA – MUMBAI ROUTE

93 In early June 2010, I was part of an official South African state visit to India, led by President Zuma. Whilst I was there, I was informed by my special advisor, Ms F Hassan, that she had received information that South African Airways (**SAA**) intended to terminate its South Africa – Mumbai route. On receipt of this information, I sent a text message to the then Chairperson of the SAA Board, Ms Cheryl Carolus ("**Ms Carolus**"), enquiring whether this information was true. The text, which was sent on the 2nd of June 2010, stated as follows:

"Cheryl, I am in India with the President now. Is there any truth to the rumour that SAA is going to terminate its route to Mumbai? This is a rumour here and we need clarity".

94 It should be noted that as part of the same conversation, Ms Carolus stated:

"No, we will not be terminating Mumbai. It must be Jet Airways still lobbying for this. We remain on the route with full frequencies. All the best for India."

The abovementioned SMSs are attached hereto marked **Annexure "P"**.

95 It should further be noted that during the course of my visit to India as part of President Zuma's state visit, the Chairperson of Jet Airways, Mr Naresh Goyal, was persistently following me around and attempting to arrange a meeting with me. I declined to engage with Mr Goyal as I did not have the authority to make any business decisions on behalf of the SAA Board.

96 It should be noted that during the state visit to India, referred to above, as part of the visit, we attended a fashion show. At the conclusion of the fashion show, I was walking out of the hall and Mr Goyal literally jumped over the chairs and came and stood in front of me and said "*Minister I need to see you*". I said to him "*Before you meet with me you have to meet with the Board and with the CEO. I have nothing to say to you.*"

97 On the 30th of August 2010, Ms Carolus sent me another text message, attached hereto marked **Annexure “Q”** stating as follows:

“Note that the CEO from Jet Airways will be in South Africa for the India/South Africa meeting. He is lobbying hard for SAA to end the Mumbai flight. We reject this. Please let me know if he is trying to meet you, so that we can brief?”

98 On the 31st of October 2010, I was removed from office by President Zuma. SAA's Mumbai flight was later cancelled.

VYTJIE MENTOR

99 It should be noted that during the latter part of my tenure as the Minister of Public Enterprises, there were rumours circulating that I would be dismissed as the Minister of Public Enterprises. In this regard, on 7 June 2010 I received an SMS (A screen shot of which is attached as **Annexure “R ”**) from my special advisor, Ms F Hassan, stating as follows:

*“Rumours
Dm becomes min
U Dm for health
VM the Dm for DPE”*

100 It is acknowledged that there were numerous rumours circulating at that time, however the specificity in mentioning Vytjie Mentor by name is worth noting.

101 On the 31st of October 2010, I was dismissed from my post as Minister of Public Enterprises by President Zuma.

CONCLUSION

102 The legal framework for the appointment of boards of SOEs and hence the CEOs of SOEs is comprehensively set out in the opinion of Michael Katz of Edward Nathan Sonnenbergs as well as Advocate Wim Trengove SC (**Annexure D**). Suffice to say that this information was conveyed to President Zuma on a number of occasions including in my memorandum to President Zuma on the 28th of July 2009 (**Annexure D**), wherein I state the following in paragraph 3.1.8:

"This was also confirmed by senior counsel's advice, attached as Annexure "A". Counsel advised that the Minister is the functionary who holds the shares and exercises the rights on behalf of the State. The Minister's exercise of the shareholder rights is part of her exercise of the State's executive powers. If Cabinet has formulated policy relating to such exercise, then the Minister should exercise the powers within the parameters of such policy. The Minister is not obliged to consult Cabinet in the exercise of his/her power, but may choose to do so as a matter of personal discretion or any protocol or custom developed in this regard. Counsel advised that the Minister's exercise of her shareholder powers on behalf of the State remain valid in law even if Minister does not adhere to any Cabinet policy developed on this issue."

- 103 The facts set out above bear testimony to my repeated, and unsuccessful, attempts to appoint a CEO at Transnet, over one and a half years, as well as those of the Board, which attempts by the Board to appoint a CEO of Transnet had commenced some time prior to my appointment as Minister. The conduct of President Zuma and certain members of his Cabinet in relation to Transnet and Eskom was not only negligent, it was reckless and designed to frustrate the sincere attempts of the boards of those state owned entities to exercise their fiduciary duties as directors and the exercise of sound corporate governance in their respective state owned entities.
- 104 The above course of conduct by President Zuma in relation to Transnet and Eskom was improper and irregular. His conduct revealed, at best, a fundamental misunderstanding and misconception of his role as President of South Africa, and the exercise of his presidential duties and functions. His actions not only undermined me as the Minister responsible for Public Enterprises, but undermined the efforts of the boards of Transnet and Eskom, and many of their senior management, who attempted to carry out their responsibilities and duties in a professional manner under very trying circumstances.
- 105 It is not for me to speculate as to what the motives of President Zuma were in unduly and improperly influencing the appointment of CEOs and board directors in certain of the state owned entities, referred to above. Suffice to say that, in my view, the actions set out above resulted in severe and extremely detrimental consequences for Transnet and Eskom, which consequences undermined and broke the morale of

Boards, staff and management, and also resulted in severe reputational damage to those entities and negative consequences for their efficient functioning.

- 106 It is submitted that the nature of the interventions described by me in Transnet and Eskom manifested the beginnings of the President, and certain members of his Cabinet, unduly influencing the appointments of key executives and board members in SOEs. We now know that this course of conduct escalated over the years and has resulted in a litany of maladministration, abuse of resources and theft from state owned entities in South Africa. The consequences of such actions are public knowledge, as are the disastrous economic effects on the state of the South African economy. They are the reason for this Commission of Inquiry.
- 107 Once there is collusion between the CEO of a state owned entity and the chairperson of the board of that state owned entity in order to influence the conduct of business of that entity, particularly the allocation of contracts and tenders, the decline and the effects thereof will be felt for years to come.
- 108 It is my firm belief that my resistance to the strong views of President Zuma in relation to the appointment of certain preferred candidates to the positions of CEO and members of boards of directors, including the CEO and Chairperson of Transnet, at the time that I was Minister, led him to the conclusion that I would not do his bidding and behave improperly and unlawfully. I believe that it was for that reason that I was dismissed by President Zuma as Minister of Public Enterprises on the 31st of October 2010.
- 109 I would like to place it on record that while my resistance to the attempts of President Zuma to improperly influence the appointments of CEOs and boards of directors at SOEs may have had a significant negative effect on my own career, I deeply regret that the actions of President Zuma and others during the course of the Transnet and Eskom sagas, set out in detail above, also had a significant negative impact on the careers and reputations of a number of fine South Africans who were only attempting to fulfill their responsibilities in terms of their appointments in the entities referred to above.

Dated at JOHANNESBURG on this 8th day of October 2018.


BARBARA HOGAN

ANNEXURE "A1"
TRANSNET

Office of Fred Phaswana, Chairman

Memo:

Date : 13 February 2009

Addressed to: - Ms B Mabandla, MP
Minister of Public Enterprises

RECOMMENDATION FOR APPOINTMENT OF THE GROUP CHIEF EXECUTIVE TRANSNET LIMITED

1. PURPOSE

To request Shareholder approval for the intended appointment of the Group Chief Executive of Transnet Limited ("Transnet").

2. BACKGROUND:

The Group Chief Executive of Transnet, Ms Maria Ramos, gave notice to resign from the Company with effect from end of February 2009. Subsequent to making the requisite announcements, the Transnet Board, through the Corporate Governance and Nominations Committee, commenced with the implementation of senior executive succession planning in line with the mandate of this Committee.

The process followed by the Transnet Board in filling the vacancy that had arisen included the following steps:

- The Company procured services of an independent external Executive Search Company, Memela Pratt & Associates;
- A specification for the position was developed and submitted to the Shareholder Representative, along with the document outlining the process to be followed.

A decision was taken that the Company would conduct both an internal and external search, simultaneously. The members of the Transnet Group Executive Committee interested in being considered for the position were invited to participate in the selection process.

2.1 The External Search included the following:

- Identifying individuals who are heading up suitably large organizations or Divisions within agreed sectors and their no. 2 individuals who could be promoted into the 'top position';
- conducting background research on each of the potential external candidates and sourcing brief public relations profiles on each of them.
- Requirement for full disclosure of all business interests for each candidate, including all Board appointments and all shareholder equity interests.

Based on the approved specification, the following sectors were researched:

- The JSE listed entities in the Industrial and Construction sectors- Group level;
 - Non listed large entities in the Industrial and Construction sectors with revenue greater than R2 billion;
 - All state owned enterprises and large Divisions within these state owned entities, with a revenue of more than R2 billion;
 - All other large manufacturing and telecommunication organizations, and large Divisions within large manufacturing and telecommunication organizations, in South Africa, with a revenue of greater than R2 billion.
- All potential candidates were contacted and initially interviewed by the Executive Search Company;
 - The Corporate Governance and Nominations Committee considered all the reports submitted by the Executive Search Company and agreed on a list of candidates to be interviewed for the position;
 - Interviews of all proposed candidates (internal and external) took place from 9 - 10 February 2009.

2.2 Selection Criteria

- A relevant degree
- A strong career track record running a large, matrix organization for a minimum period of 5 years
- A successful track record in project management
- An individual who is a South African and who is perceived to be committed to change and transformation and has political acceptance in this regard
- An ability to maintain a mature leadership stance beyond 'political correctness', and one that integrates strong commercial acumen. An inspirational, strong leader.
- Strong strategic competence and track record
- A strong South African market knowledge within the broader business and macro economic landscape
- Commercial astuteness and seasoned business judgment
- High levels of integrity
- Strong negotiation, interpersonal and communication skills
- An individual who adds to the cultural and gender diversity of the organization
- A persuasive individual who is emotionally mature, assertive and diplomatic
- An individual who has the respect and relates well to diversity in the workplace
- Tenacious, resilient and tough minded

2.3 The Interviews

All interviews were competency based, measuring and evaluating the individuals' competency for the specific position. Services of an independent Counseling Psychologist, Anne Newman, were procured to assist with a Labour law compliant screening process.

The screening process incorporated competency based screening techniques; strategic and cultural fit as well as competency assessments.

3. CANDIDATES SHORTLISTED

NAME	EMPLOYER/DEPARTMENT	RANK/POSITION
Ms M Moses	Transnet Limited	Group Executive
Mr S Gama	Transnet Limited	Div Chief Executive Officer
Mr T Dloti	Old Mutual Investment Group	Chief Executive Officer
Mr K Gordhan	Rand Merchant Bank	Executive
Mr P Gordhan	SARS	Commissioner

4. RECOMMENDATION:

- The Corporate Governance and Nominations Committee conducted interviews of the shortlisted candidates;

Although the preference was to appoint a suitably qualified internal candidate, after consideration of the current global 'meltdown' and the global recession, its current and future potential impact on Transnet Limited, and a thorough consideration of these individuals, the Nominations Committee, fully supported by the Board, recommend the appointment of Mr Pravin Gordhan on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed;

- **Profile of Mr Pravin Gordhan.** He is in possession of the following qualification: a Bachelor of Pharmacy (B Pharm) degree, University of Durban Westville;
- During the interview process the panel was very impressed with the skills, experience, track record, and knowledge of Mr Gordhan. The Board are of the opinion that Mr Gordhan, who is currently Commissioner of South African Revenue Services, has demonstrated the ability and track record to effectively lead and manage the strategic challenges and key responsibilities related to the post of Group Chief Executive Officer, owing to his extensive experience, knowledge and ability in leading and transforming a large government entity particularly given the scope of the transformation track record he has achieved at SARS including but not limited to: people and cultural transformation at all

levels in the organization whilst building skills capacity, and transforming the Employment Equity mix of SARS including race, gender, and management capability; promote and sustain a culture of high levels of integrity that have built the reputation and credibility of SARS; created new leadership, capacity and innovations in IT service as seen in the tax process, the systems and controls; implemented world class performance and service delivery standards; the financial achievements and revenue collections and the positive impact of this on government expenditure reducing poverty and inequality; the implementation of good governance measures and ethical practices; creating a positive compliance culture amongst South African tax paying citizens both individuals and corporate tax payers; his strengthening of customs and the impact of this on the SA Customs Union which has also developed his understanding of the logistics and transport system in South Africa from a different perspective. He also Chairs and sits on International Forums.

- Mr Gordhan has also positioned SARS as a leading, organization in South Africa and a credible organization internationally. He is Chair of Council of World Customs Organisation for five years (2002- 2007) and he is currently Chair of Tax Administration. He has been a solid and reliable leader who has consistently sustained the effort and increased the performance of SARS, over a decade.
- Mr Gordhan has also demonstrated his passion and commitment to transforming South Africa to improve the life of all South Africans. He is well respected amongst senior government representatives. He has been a political activist from a young age and worked 'underground' from June 1986. He was a member of Parliament from 1994 until 1998. He was Chair of the Portfolio Committee on Constitutional Affairs, Chair of the Local Government White Paper Committee formulating a new policy framework for local government, a member of the Constitutional Committee and the Constituent Assembly negotiating the new Constitution.
- Mr Gordhan has also demonstrated the strategies and processes that will be put in place to ensure the drive for efficiencies and growth in Transnet Limited as well as the necessary linkages and support with the relevant role players and stakeholders.
- **Independent Assessment:** His suitability in terms of his leadership style, his cognitive level of functioning to handle the complexity of an organization as large as Transnet, his personality to lead with maturity, his drive, and his integrity, have all been independently assessed by an independent Counselling Psychologist, Anne Newman, confirms he has the requisite skills, competences and attributes. In summary, he is assessed as having an excellent all round profile. He has very good thinking skills and the potential to be very effective in this Executive leadership role. He has particularly good analytical and logical reasoning skills, and the ability to manage the complexity of the job at this high level. He has a high level of learning potential and can be expected to engage effectively in new learning situations.
- He has good social skills and an inspirational style of leadership. He is good at motivating and encouraging people but will confront underperformance when he needs to do so. He forms good relations with people and has a great respect for diversity and individual differences. He likes to listen to people and guide them rather than direct them, although he can be strong and assertive when the situation requires strong leadership. He is assertive in a quiet manner and manages situations with sensitivity. He can be direct and straight forward.
- He responds positively to change and embraces opportunities for advancement and challenge and thus would bring energy and enthusiasm to this role.

- **Citizenship, credit, criminal, qualification checks and verification and reference checks:** All relevant suitability checks were conducted for Mr Gordhan (documentary proof attached) including:
 - Criminal record checks
 - Citizenship verification
 - Credit/ financial/ asset record checks
 - Qualification/ degree verification
- In light of the above Mr Pravin Gordhan is regarded as the most suitable candidate for the post of Group Chief Executive Officer for Transnet Limited.
- A copy of his *curriculum vitae* is attached for information



5. IMPLEMENTATION PLAN

- A three year contract is to be concluded with Mr Gordhan
- An acting Group Chief Executive Executive Officer will be appointed by the Transnet Board with effect from the 1st March 2009 when Ms Maria Ramos vacates the position.

6. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

- The relevant post exists. The appointee will fill the position vacated by Ms Ramos
- Quality, holistic feedback will be provided to all internal applicants with opportunities for their personal development and recommendations regarding their future career development in the organization will be discussed

7. FINANCIAL IMPLICATIONS

A total cost to company remuneration package that is in line with current Executive remuneration levels at Transnet will be offered.

8. COMMUNICATION IMPLICATIONS

- The Chairman will inform the candidate of his appointment, once the Shareholder approval is obtained.
- The Chairman of the Board will also inform the internal candidates of the outcome of the process.
- The other external candidates will be informed by the Executive Search Company, Memela, Pratt & Associates.

All the candidates will be given quality feedback.

Once all the requisite internal announcements have been made, a press release will be issued by Transnet.

Handwritten signature/initials

9. CONSTITUTIONAL IMPLICATIONS

None

10. IMPLICATIONS FOR VULNERABLE GROUPS

None


11. SECURITY IMPLICATIONS

Preliminary security vetting has been completed in respect of all shortlist candidates. Mr Pravin Gordhan in his current position as Commissioner South Revenue Services has already been granted a security clearance.

12. RECOMMENDATIONS

It is recommended that the Shareholder approves the appointment of Mr Pravin Gordhan to the position of Group Chief Executive Officer of Transnet Limited with effect from a date to be agreed with the Minister of Finance and the successful candidate.

Recommended by Transnet Board of Directors



Mr FTM Phaswana
Chairman

Date : 13th February 2009



IRANS

Mrs Brigitte Mabandla, MP
Minister of Public Enterprises
Suite 401
Infotech Building
1090 Arcadia Street
Hatfield
PRETORIA

Dear Minister

APPOINTMENT OF THE GROUP CHIEF EXECUTIVE: TRANSNET LIMITED

I refer to your letter dated 02 March 2009 relating to the above.

As you are aware, subsequent to the resignation by Ms Ramos, the Transnet Board through its Corporate Governance and Nominations Committee, commenced with the implementation of senior executive succession planning in line with the mandate of this Committee.

As indicated in the Transnet Board Memorandum ("the Memorandum") recommending the then preferred candidate, the process followed by the Board in filling the Group Chief Executive vacancy included the following steps:

- The Company procured services of an independent external search agency, Memela Pratt & Associates;
- A decision was taken to conduct both the internal and external search simultaneously; and
- The members of the Transnet Group Executive Committee interested in being considered for the position were invited to participate in the selection process.

The approved job specification and process documents were agreed upon and formally submitted to you as the Shareholder Representative. For avoidance of doubt I, once again, attach hereto marked "Annexure A" the job specification and the document outlining the process followed in the selection of a proposed suitable candidate for the position of the Group Chief Executive at Transnet Limited.

As you are further aware, services of an Independent Counselling Psychologist, Ms Anne Newman, were procured to assist with a Labour Law compliant screening process and competency assessments for the candidates.

Interviews of all shortlisted candidates were conducted by the members of the Corporate Governance & Nominations Committee as well as the Chairman of the Transnet Board Remuneration Committee from 09 to 11 February 2009.

Transnet Limited
Registration Number
1990/000900/06

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150 Commissioner Street
Johannesburg
2001

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South Africa, 2122
T +27 11 308 2309
F +27 11 308 2315

Directors: PTH Phaswana (Chairman) CP Wells (Acting Group Chief Executive) Dr I Abadian, Prof GJ Erasmus, JBR Gaba, M J Hankinson
Or NG Hlathe OBE* PG Joubert, MIA Ndlovu, MP Nkomo, BT Ngcuka, HR Ntshingila, KC Ramon, A Singh (Acting Chief Financial Officer)
Executive: British

Group Company Secretary: Z Stephen

www.transnet.net

As stated in the Memorandum, the candidates initially shortlisted were the following individuals:

NAME	EMPLOYER/DEPARTMENT	RANK/POSITION
Ms M Moses	Transnet Limited	Group Executive
Mr S Gama	Transnet Limited	Div Chief Executive Officer
Mr T Dloti	Old Mutual Investment Group	Chief Executive Officer
Mr K Gordhan	Rand Merchant Bank	Executive
Mr P Gordhan	SARS	Commissioner

I attach hereto, marked "Annexure B", copies of the shortlisted candidates' profiles as requested in your letter.

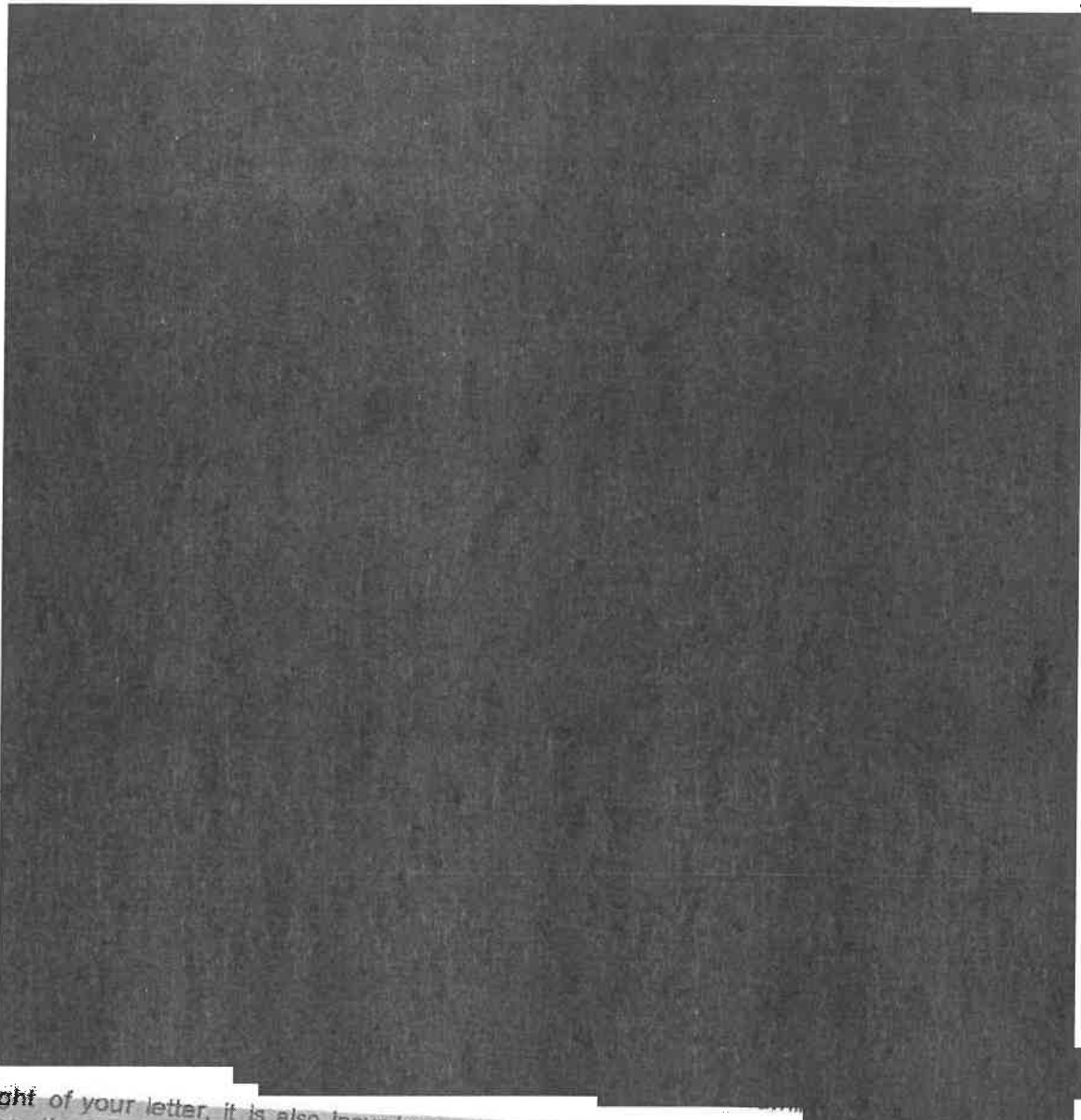
Although the preference was to appoint a suitably qualified internal candidate, after consideration of the current global 'meltdown' and the global recession, its current and future potential impact on Transnet Limited, and a thorough consideration of these individuals, the Nominations Committee, fully supported by the Board, recommended the appointment of Mr Pravin Gordhan on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed.

The Board was of the opinion that Mr Gordhan, has demonstrated the ability and track record to effectively lead and manage the strategic challenges and key responsibilities related to the post of Group Chief Executive Officer, owing to his extensive experience, knowledge and ability in leading and transforming a large government entity particularly given the scope of the transformation track record he has achieved at SARS including but not limited to: promoting and sustaining a culture of high levels of integrity that have built the reputation and credibility of SARS; implementing world class performance and service delivery standards; the financial achievements and revenue collections and the positive impact of this on government expenditure reducing poverty and inequality; people and cultural transformation at all levels in the organization whilst building skills capacity.

At the time of submitting the Memorandum I did not deem it necessary to dwell on the candidates that were not being recommended for appointment.

Each of the other previously shortlisted candidates was not recommended for appointment for various reasons including, amongst others, the following:

BW


In light of your letter, it is also incumbent upon me to highlight that in respect of Mr Gama, the Transnet Board has received documentation and reports, including but not limited to a recent forensic report from Transnet's Internal auditors, which detail serious allegations of misconduct on the part of Mr Gama that require the Company to conduct investigations to ascertain the truth thereof and decide on any appropriate action against the individual involved. I annex hereto marked "Annexure C", correspondence from Transnet's Internal Auditors relating to the matters in question, which sets out some summarised information (and not the full details) relating to the main allegations against Mr Gama. Both the incident in relation to the contract for new locomotives and

BN

that regarding the award of the security services contract involve substantial sums of money (in the case of the locomotives contract, the contract value was R875 million and in the case of the security services contract, the value thereof was approximately R20 million). It is of course not yet known whether Mr Gama is guilty of any of these allegations in question and they will have to be determined (in all probability in a disciplinary process) but, given this inherent pending uncertainty and the reasons summarised above as to why he was not recommended for appointment in the first place, the Board remains of the view that Mr Gama should not now be appointed to the position.

The withdrawal of Mr Pravin Gordhan has resulted, in the Board's view, in the need to commence a new appointment process as none of the other short listed candidates are at the level required for such a key position for the organization and, indeed, for the country given the central role that Transnet must play in the Government's economic and infrastructural development plans.

I trust you find the above in order. If you require any further information or clarity, please do not hesitate to contact me.

Kind regards



FRED PHASWANA
Chairman
Date: 9 March 2009



Fred Phaswana, Chairman

ANNEXURE "B"

TRANSNET



Ms B A Hogan, MP
Minister of Public Enterprises
Suite 401, Infotech Building
1090 Arcadia Street
Hatfield
0028

BY HAND

RECOMMENDATION FOR THE APPOINTMENT OF THE GROUP CHIEF EXECUTIVE: TRANSNET LIMITED

1 PURPOSE

To request Shareholder approval for the intended appointment of the Group Chief Executive of Transnet Limited ("Transnet").

2 BACKGROUND

The Group Chief Executive of Transnet, Ms Maria Ramos, gave notice to resign from the Company with effect from end of February 2009. Subsequent to making the requisite announcements, the Transnet Board of Directors ("the Transnet Board"), through the Corporate Governance and Nominations Committee, commenced with the implementation of senior executive succession planning in line with the mandate of this Committee.

The process followed by the Transnet Board in filling the vacancy that had arisen included the following steps :

- The Company procured the services of an independent external Executive Search Company, Memela Pratt & Associates; and
- A specification for the position was developed and submitted to the Shareholder Representative, along with the document outlining the process to be followed.

A decision was taken that the Company would conduct both an internal and external search, simultaneously. The members of the Transnet Group Executive Committee interested in being considered for the position were invited to participate in the selection process.

Transnet Limited	47 th Floor	P.O. Box 72501
Registration Number	Carlton Centre	Parkview, Johannesburg
1990/000900/06	150 Commissioner Street	South Africa, 2122
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	2001	F +27 11 308 2315

Directors: FTM Phaswana (Chairman) C F Wells* (Acting Group Chief Executive) Dr I Abedian Prof GK Everingham NBP Gcabe MJ Hankinson
Dr ND Haste OBE[†] PG Joubert NNA Matyuma MP Moyo BT Ngcuka NR Ntshingila KC Ramon A Singh* (Acting Chief Financial Officer)
*Executive *British

Group Company Secretary: A N C Cebe


www.transnet.net



2.1 The External Search included the following :

- a. Identifying individuals who are heading up suitable large organisations or Divisions within agreed sectors and their number 2 individuals who could be promoted into the "top position";
- b. Conducting background research on each of the potential external candidates and sourcing brief public relations profiles on each of them.
- c. Requirement for full disclosure of all business interests for each candidate, including all Board appointments and all shareholder equity interests.
- d. Based on the approved specification, the following sectors were researched :
 - o The JSE listed entities in the Industrial and Construction sectors – Group level;
 - o Non listed large entities in the Industrial and Construction sectors with revenue greater than R2 billion;
 - o All state owned enterprises and large Divisions within these state owned entities, with a revenue of more than R2 billion;
 - o All other large manufacturing and telecommunication organisations, and large Divisions within large manufacturing and telecommunication organisations, in South Africa, with a revenue of greater than R2 billion.
- e. All potential candidates were contacted and initially interviewed by the Executive Search Company.
- f. The Corporate Governance and Nominations Committee considered all the reports submitted by the Executive Search Company and agreed on a list of candidates to be interviewed for the position.
- g. Interviews of all proposed candidates (internal and external) took place from 9 - 10 February 2009, and further on 2 June 2009.

2.2 Selection Criteria

- A relevant degree;
- A strong career track record running a large, matrix organisation for a minimum period of 5 years;
- A successful track record in project management;
- An individual who is a South African and who is perceived to be committed to change and transformation and has political acceptance in this regard;
- An ability to maintain a mature leadership stance beyond "political correctness", and one that integrates strong commercial acumen. An inspirational, strong leader;



- Strong strategic competence and track record;
- A strong South African market knowledge within the broader business and macro economic landscape;
- Commercial astuteness and seasoned business judgment;
- High levels of integrity;
- Strong negotiation, interpersonal and communication skills;
- An individual who adds to the cultural and gender diversity of the organisation;
- A persuasive individual who is emotionally mature, assertive and diplomatic;
- An individual who has the respect and relates well to diversity in the workplace;
- and
- Tenacious, resilient and tough minded.

2.3 The Interviews

All interviews were competency based, measuring and evaluating the individuals' competency for the specific position. Services of an independent Counseling Psychologist, Ms Anne Newman, were procured to assist with a Labour law compliant screening process.

The screening process incorporated competency based screening techniques; strategic and cultural fit as well as competency assessments.

3. CANDIDATES SHORTLISTED

Out of the 2 interview processes that were conducted in February and June 2009 respectively, the following candidates were shortlisted for the position of the Group Chief Executive of Transnet:

NAME	EMPLOYER	RANK/POSITION
Ms M Moses	Transnet Limited	Group Executive (Transnet Capital Projects)
Mr S Gama	Transnet Limited	Chief Executive (Transnet Freight Rail)
Mr T Dloti	Old Mutual Investment Group	Chief Executive Officer
Mr K Gordhan	Rand Merchant Bank	Executive: Private Equity
Mr K Phihlela	Transnet Limited	Chief Executive (Transnet National Ports Authority)
Mr S Maseko	BP Africa	Chief Executive Officer
Mr T Morwe	Transnet Limited	Chief Executive (Transnet Port Terminals)



4 RECOMMENDATION

The Corporate Governance and Nominations Committee conducted interviews of the shortlisted candidates and have identified three preferred shortlist candidates who could fill the position, Mr Siphso Maseko (external candidate), Mr Tau Morwe (internal candidate) and Mr Khomotso Phihlela (internal candidate).

Although the preference was to appoint a suitably qualified internal candidate, after consideration of the current global "meltdown" and the global recession, its current and future potential impact on Transnet, and a thorough consideration of these individuals, the Corporate Governance and Nominations Committee, fully supported by the Board, **recommends the appointment of Mr Siphso Maseko** on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed.

4.1 Profile of Mr Maseko:

He is in possession of the following qualifications :

A Bachelor of Arts degree completed at the University of the Witwatersrand in 1992 and an LLB (Law) degree, completed at the University of Kwa-Zulu Natal (the former University of Durban-Westville) in 1995.

During the interview process, the panel was very impressed with the skills, experience, track record, and knowledge of Mr Maseko. The Transnet Board are of the opinion that Mr Maseko, who is currently Chief Executive Officer of BP Africa, has demonstrated the ability and track record to effectively lead and manage the strategic challenges and key responsibilities related to the post of Group Chief Executive, owing to his extensive experience, knowledge and ability in leading and transforming a large, complex multinational organisation across Africa. He has a stable track record in BP and has successfully improved operational efficiencies, reduced costs, increased service delivery and managed risk in a highly volatile, foreign currency based revenue stream, and dealt with issues and challenges presented by regulatory authorities and constraints in infrastructure development. His leadership style contributes to a transformed and streamlined organisation.

He has demonstrated an ability and track record at BP:

- (i) People and cultural transformation at all levels in the organisation whilst building skills capacity, and transforming the Employment Equity mix;
- (ii) Enhancing a 'performance' culture and ensuring and sustaining a culture of integrity;
- (iii) Establishing high levels of 'safety' standards and track record within a rigorous multinational environment;
- (iv) Working within an uncertain regulatory environment; and

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- (v) understanding infrastructure constraints and delivery requirements from a customer perspective.

He displays very sophisticated interpersonal skills and has an ability to communicate, influence and negotiate effectively at all levels, with all stakeholders. Mr Maseko has successfully implemented world class standards in terms of operational efficiencies, quality standards, cost structures, process, service delivery and safety standards. His innovative flair has enabled him to effect meaningful Black Economic Empowerment structures and partnerships for the organisation. He is well schooled in all aspects of governance and has a high integrity reputation. In the past two years in BP Africa he has successfully refocused the business, significantly reducing costs by 60%, moving the South African Head Office, and remodeling the interface between the Africa satellite operations and South Africa.

Mr Maseko also spent time early in his career, with the Financial Services Board, a regulatory authority, assisting BP with their transition from their pension fund to a provident fund.

Mr Maseko has restructured and repositioned BP as a leading organisation in South Africa and Africa. He has had global experience working with the Head: Retail BP global, to fast track him to lead the African operation. He has been a solid and reliable leader who has consistently sustained the effort and increased the performance of BP Africa for the past two and a half years.

Mr Maseko has also demonstrated his passion and commitment to transforming the country to improve the life of all South Africans. He is well respected within the new government and regulatory authorities. He has been a political activist from a young age and was a member of the Black Consciousness Movement. In the early '90s, he was the national leader of the Student wing of Azapo, the Azanian Student Congress. His father in law spent time on Robben Island and was a close friend of the late Mr Steve Biko. Mr Maseko is a passionate South African and African, who is motivated to leave a meaningful legacy and to make a notable 'difference' to the economy and in the lives of ordinary South Africans.

Mr Maseko has also demonstrated the requisite track record to ensure the strategies and processes will be put in place to ensure the drive for efficiencies and growth in Transnet as well as the necessary linkages and support with the relevant role players and stakeholders.

Independent Assessment :

His suitability in terms of his leadership style, his cognitive level of functioning to handle the complexity of an organisation as large as Transnet, his personality to lead with maturity, his drive, and his integrity, have all been independently assessed by an independent Counseling Psychologist, Ms Newman, who confirms

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he has the requisite skills, competences and attributes for the job. In summary, he is assessed as having a good all round profile. He has good thinking skills and the potential to be very effective in this Executive leadership role. He is particularly good at dealing with detailed complexity and he spends a lot of time thinking through problems in order to consider all the ramifications. He has a high level of learning potential and can be expected to engage effectively in new learning situations.

He has sophisticated social skills and an inspirational and supportive style of leadership. He is good at motivating and encouraging people but will confront underperformance when he needs to do so. He forms good relations with people and has a great respect for diversity and individual differences. He likes to listen to people and guide them rather than direct them, although he can be strong and assertive when the situation requires strong leadership. He is assertive in a quiet manner and manages situations with sensitivity. He can be direct and straight forward.

He responds positively to change and embraces opportunities for advancement and challenge and thus would bring energy and enthusiasm to this role.

Mr Maseko's preferred style of problem solving is explorative and reflective when faced with an unfamiliar or new business environment or industry. This indicates that in a new, large organisation like Transnet, he would benefit from an experienced mentor and coach who fully understand the complexity of the organisation, the industry and the challenges, and will fast track his learning and decision making in this environment.

Citizenship, credit, criminal, qualification checks and verification and reference checks :

All relevant suitability checks were conducted for Mr Maseko (documentary proof attached) including :

- Criminal record checks;
- Citizenship verification;
- Credit/financial/asset record checks; and
- Qualification/degree verification.

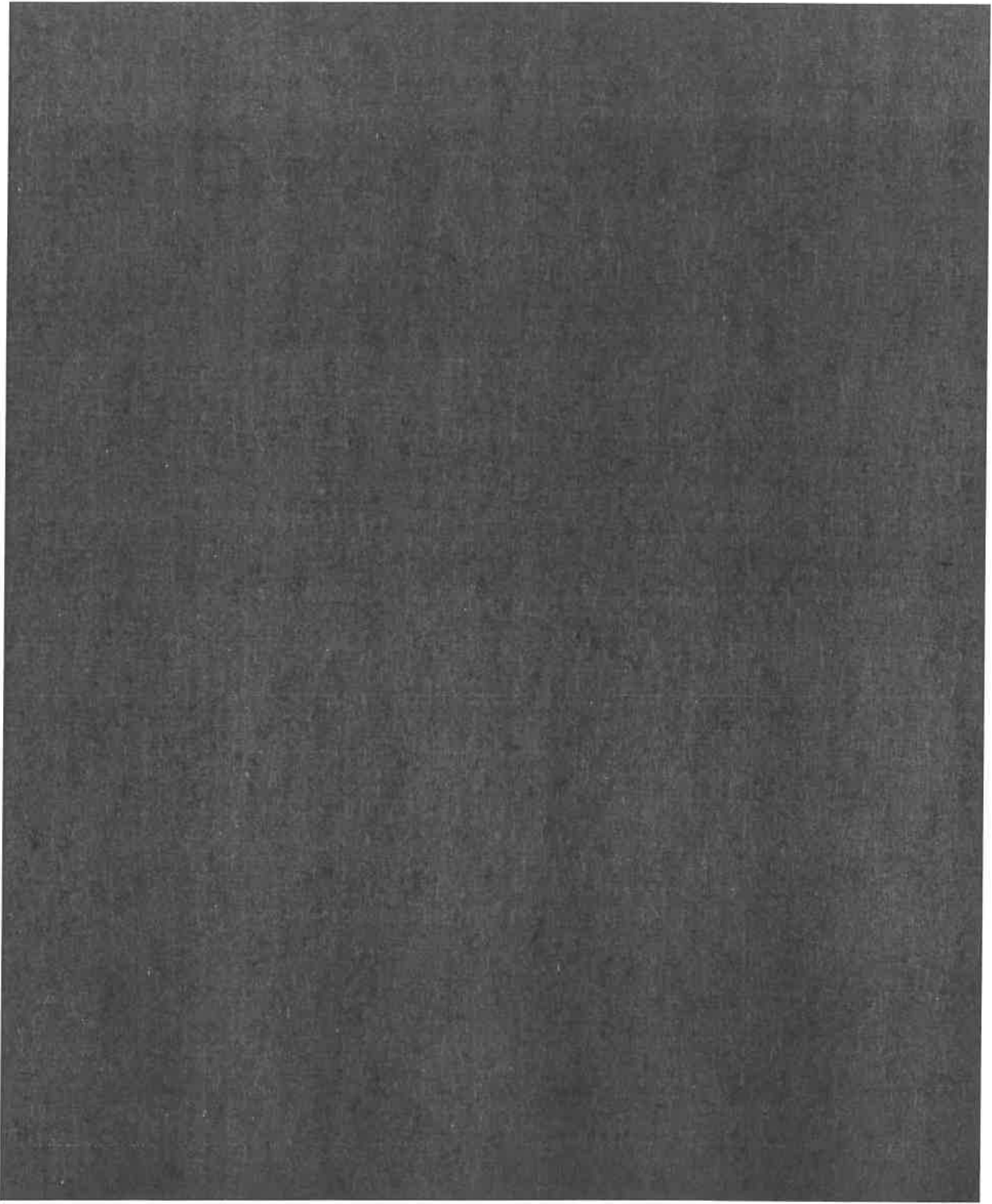
In light of the above, Mr Sipho Maseko is regarded as the most suitable candidate for the position of Group Chief Executive for Transnet.

A copy of his *curriculum vitae* is attached for information



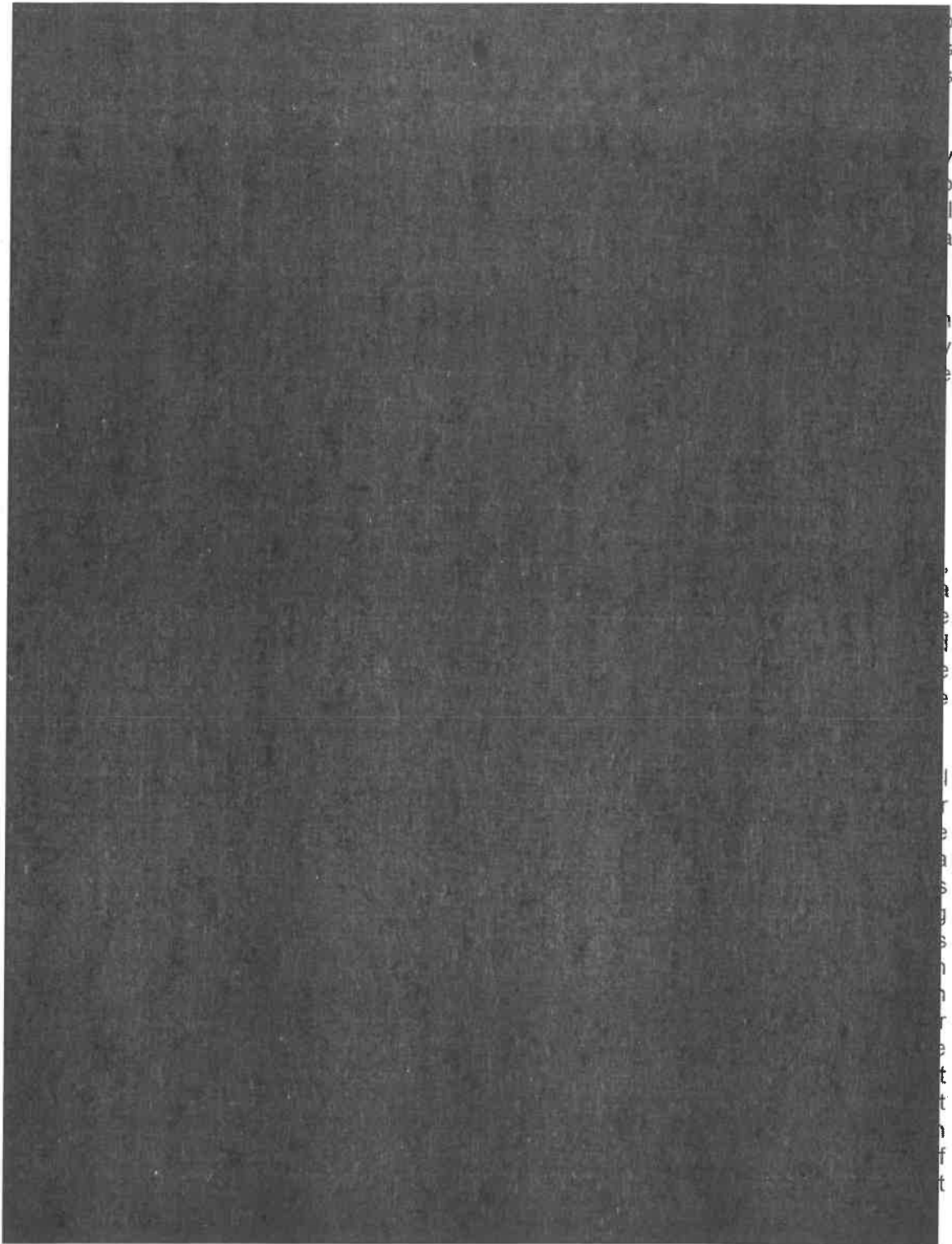
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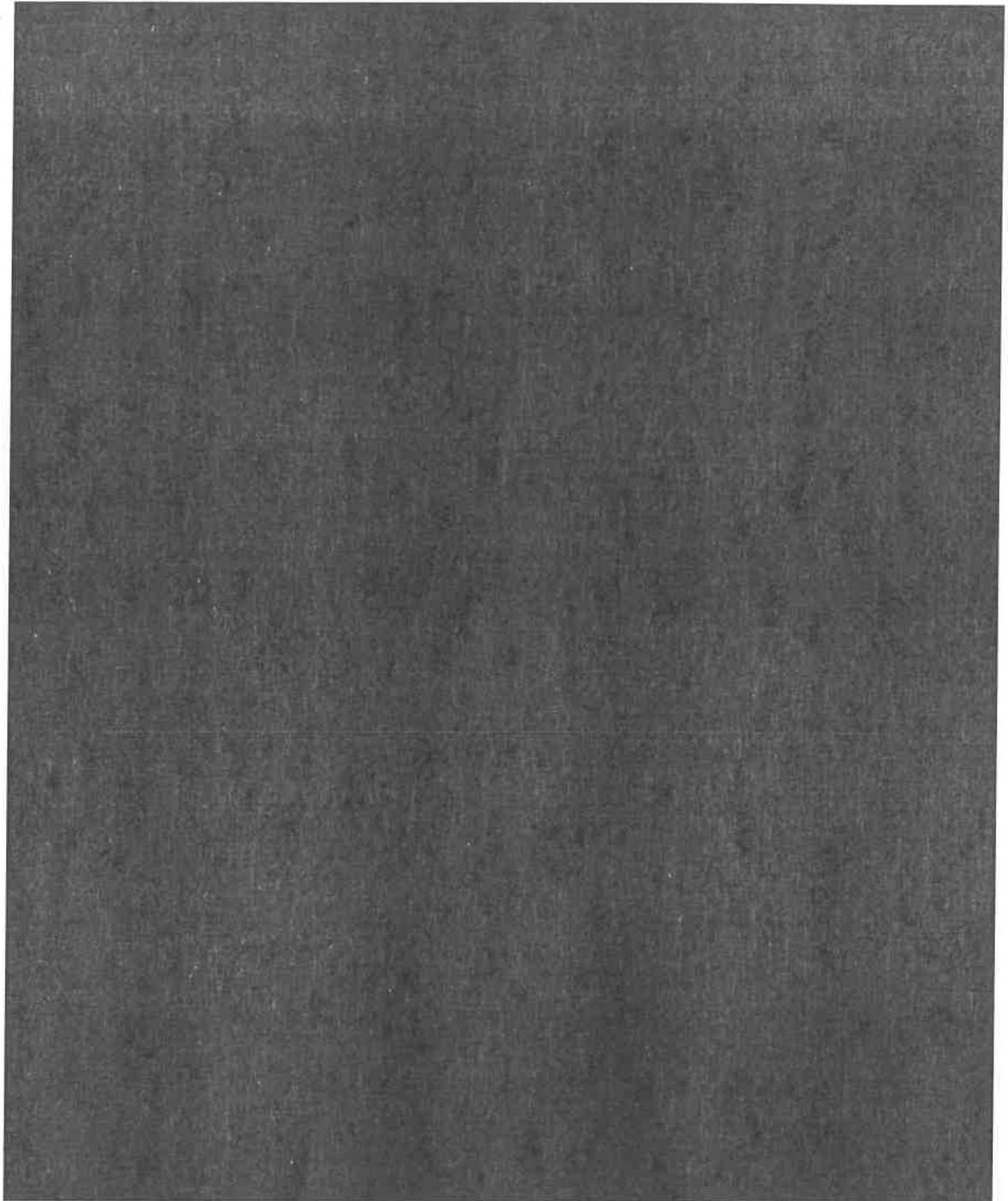
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6 IMPLEMENTATION PLAN

- 6.1 A three year contract is to be concluded with Mr Maseko.
- 6.2 An acting Group Chief Executive Officer, Mr Chris Wells, was appointed by the Transnet Board with effect from 1st March 2009 when Ms Ramos vacated the position.

7 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

- 7.1 The relevant post exists. The appointee will fill the position vacated by Ms Ramos.
- 7.2 Quality, holistic feedback will be provided to all internal applicants with opportunities for their personal development and recommendations regarding their future career development in the organisation will be discussed.

8 FINANCIAL IMPLICATIONS

A total cost to company remuneration package that is in line with current Executive remuneration levels at Transnet will be offered.

9 COMMUNICATION IMPLICATIONS

- 9.1 The Chairman of the Board will inform the candidate of his appointment, once the Shareholder approval is obtained.
- 9.2 The Chairman of the Board will also inform the internal candidates of the outcome of the recruitment process once the Shareholder process has been finalised.
- 9.3 The other external candidates will be informed by the Executive Search Company, Memela Pratt & Associates.
- 9.4 All the candidates will be given quality feedback.
- 9.5 Once all the requisite internal announcements have been made, a press release will be issued by Transnet.

10 CONSTITUTIONAL IMPLICATIONS

There are no constitutional implications.

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**11 IMPLICATIONS FOR VULNERABLE GROUPS**

There are no implications for vulnerable groups.

12 SECURITY IMPLICATIONS

Preliminary security vetting has been completed in respect of all shortlist candidates. Mr Siphso Maseko will require a security clearance.

13 RECOMMENDATIONS

It is recommended that the Shareholder approves the appointment of Mr Siphso Maseko to the position of Group Chief Executive of Transnet Limited with effect from a date to be agreed with the Minister of Finance and the successful candidate.

Further, due to the critical nature of the position, it is recommended that the matter be concluded on urgent basis.

The matter has been recommended by Transnet Board of Directors.

Kind regards

Mr F T M Phaswana
Chairman

Date : 09 JUNE 2009

Copy to : Ms Portia Molefe, Director-General, Department of Public Enterprises

ANNEXURE "C"

6 March 2009

The Chairman
Transnet Limited
49th Floor
Carlton Centre
150 Commissioner Street
Johannesburg
2000

Attention: Mr F Phaswana

Dear Mr Phaswana

RE: INVESTIGATIONS BY TRANSNET INTERNAL AUDIT INTO ALLEGATIONS
RELATING TO TRANSNET FREIGHT RAIL ("TFR")

We have been requested to provide a summary on certain investigations which
Transnet Internal Audit are currently undertaking relating to two matters,
namely:-

- The acquisition of diesel locomotives; and
- The awarding of a security contract.

Please note that these investigations have not been finalised and that the
attached summary report should be viewed in that light and be treated as
confidential.

Should you require any further information please do not hesitate to contact
us.

Yours Faithfully

Viv Oates
Transnet Internal Audit

Transnet Limited
Registration Number
1990/000900/08

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150 Commissioner Str.
Johannesburg
2001

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Directors: F M Phaswana (Chairman), M Rana* (Group Chief Executive), Dr Tabeche* Prof G K Ewingham, NBP Gciza, M D Madikane
Dr M D Madikane, PG Jeyaraj, M A Mphahlele, M P Moyo, S T Ngweni, M D Nkomo, K C Rooder, C F Venter* (Chief Financial Officer)
Executive: G. Nkomo
Group Company Secretary: Z. Stepien

www.transnet.net

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SUMMARY REPORT BY TRANSNET INTERNAL AUDIT INTO ALLEGATIONS
RELATING TO TRANSNET FREIGHT RAIL ("TFR")

DIESEL LOCOMOTIVES

Background

A hotline report was received by the Public Service Commission on 9 November 2007. In this report, various allegations were made involving a Transnet tender for the supply of "Like New" locomotives.

The hotline report was forwarded to Mr F Phaswana, Chairman of Transnet Limited by Mr A Erwin, Minister of Public Enterprises on 31 January 2008.

From our review we have determined that Electro-Motive Sibanye Joint Venture ("Joint Venture" or "Contractor"), of which Sibanye Trade Services is a party, was awarded the 50 "Like New" locomotive contract, signed on 1 May 2007.

Findings

Our key findings to the above allegation are as follows:-

- Following a proposal by the Contractor to provide Transnet with 50 "Like New" locomotives the Transnet Board of Directors passed the following resolution on 13 February 2007:
"The Board RESOLVED that it grants approval for:
 - The implementation of the critical phase of the locomotive fleet modernisation plan which includes an investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet GFB;
 - The confinement of the tender to Electromotive Diesel (EMD);
 - The conclusion, signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature; and
 - The condition for the above approval is that Sibanye Trade and Services would not be involved in the contract and that Transnet would carry out all engineering on assembly and maintenance."

- This was later amended by the Transnet Board of Directors on 26 April 2007 to read as follows:

"The Board RESOLVED that it grants approval for:

- The implementation of the critical phase of the locomotive fleet modernisation plan which includes an investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet General Freight Business;
- The confinement of the tender to Electromotive Diesel (EMD);
- The conclusion, signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature; and
- The condition for the above approval is that Transwerk would carry out all engineering on assembly and maintenance."

- The contract for the supply of 50 "Like New" locomotives was signed on 1 May 2007 by the Chief Executive Officer of TFR, Mr S Gama;
- The contract did not take into account the resolution passed by the Board of Directors in ensuring that "Transwerk would carry out all engineering on assembly and maintenance";
- In terms of clause 7 (Key Contractors), the Contractor had to procure sub-contractors prior to the Effective date, and the agreements reached needed to be detailed and set out in the format described in Schedule 005 of the contract. The signed contract does not contain a schedule 005, and there was no contract in place between the Contractor and TRE; and
- As a result of not complying with the resolution passed by the Board of Directors, or alternatively not complying with clause 7 of the agreement, Transnet may incur significant additional direct or indirect costs.

Conclusion

- The signatories of the contract did not comply fully with the Board of Directors' resolution dated 26 April 2007, and clause 7 of the Contract, and consequently disciplinary action must be taken against the relevant signatories to the agreement. The presiding officer of the disciplinary hearing should take into consideration the implications to Transnet of the non-compliance and resultant additional costs to Transnet in determining an appropriate sanction; and
- The agreement must be rectified to fully reflect the resolution undertaken by the Transnet Board of Directors in the award of the Contract.

Handwritten signature and initials, possibly 'B11', in the bottom right corner.

SECURITY CONTRACT

Background

A number of allegations were raised relating to the TFR Security department. These were reported in two (2) anonymous call reports received from Tip-offs Anonymous ("TOA") on 21 October 2008 and 30 October 2008 respectively. Furthermore, an anonymous undated letter was received by the office of the Group Chief Executive, Ms Maria Ramos ("Ms Ramos"), on 18 September 2008, followed by an anonymous e-mail on 19 November 2008. The allegation which is specific to this summary report is as follows:

"GNS - We were further made aware of the origin of this company which we need fully investigation. In a nut-shell: GNS is an abbreviation of, "General Nyanda Security". All in SA will confirm that we are right. This company was given special treatment because of its association with famous MK soldiers.... They did not go through proper tender process like the rest....."

Due to the potential seriousness and sensitivity of the allegations raised, Transnet Internal Audit ("TIA") was requested to investigate the allegations raised in the call reports and e-mail correspondence.

Findings

Our key findings to the above allegation are as follows:-

- The original RFP reference number 103098739 ("RFP 1") for the supply of security services was incorrectly cancelled and replaced with a new process;
- Subsequent to the cancellation of RFP 1, an additional three (3) security service providers were identified;
- The process of obtaining the three (3) further security service providers was not clearly documented nor communicated;
- Confinement, evaluation and award of the security contract was made to General Nyanda Security Risk Advisory Services (Pty) Ltd ("GNS") with effect from 1 December 2007. However, there was no clear documentary evidence of the confinement, evaluation and award to determine that the process was fair, equitable, transparent, competitive, and cost effective as required by the Constitution and PFMA.

- The evidence indicated that GNS was only registered with PSIRA on 9 June 2008;
- In terms of Section 20 (1) (a) of the PSIRA Act, no person except a security service contemplated in Section 199 of the Constitution (Act No 108 of 1996), may render security service for remuneration, reward, a fee or benefit, unless such person is registered as a security service provider in terms of this Act;
- It was confirmed that a company rendering services before being registered by PSIRA, would be in contravention of the PSIRA Act;
- The GNS confinement was approved on 5 December 2007 by Mr Gama;
- In accordance with section 5.4.2 of the Transnet Limited Delegation of Authority Framework dated 30 October 2007 ("Framework"), Mr Gama did not have the authority to approve the GNS confinement; and
- The contract for security services was only signed by TFR management on 4 June 2008, although services commenced on 1 December 2007.

Conclusion

- The delegated authority limit with regard to the approval of all confinement contracts should be adhered to in all instances and appropriately documented;
- Appropriate disciplinary action should be taken against Mr Gama, TFR CEO, as he did not have the authority to approve the confinement;
- Transnet should ensure that a single approved list of all security service providers for all security types, including specialist services, be used. Future RFPs should consider these service providers only and any deviations from the approved (accredited) list should be dealt with appropriately;
- TFR Management should take disciplinary action against officials who have not maintained appropriate and adequate documentation supporting decisions taken during the RFP and/or confinement process;

- " Disciplinary action should also be considered against relevant TFR employees who have overlooked the registration requirements of security services providers in terms of the PSIRA Act; and
- " Training and awareness of the DPP, should be considered for all CEO's, CFO's, and CIO's and any other parties that deal with the tender and procurement process in order to strengthen their understanding of the policies and procedures.



ANNEXURE 'D'



public enterprises

Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

DECISION MEMORANDUM

TO : MR J ZUMA

PRESIDENT

FROM : MS BARBARA HOGAN

DIRECTOR-GENERAL

FILE REF :

IDMS REF :

SUBJECT RECRUITMENT AND SELECTION OF THE GROUP CHIEF EXECUTIVE OFFICER

DATE : 28 JULY 2009

1. PURPOSE

To brief the President on the following matters:

- 1.1 the legal framework governing the appointment of a Group Chief Executive Officer (CEO) for Transnet Limited (Transnet);
- 1.2 the CEO the recruitment and selection process undertaken by Transnet's Board of Directors (the Board) to employ a CEO;
- 1.3 investigations into allegations of corruption at Transnet impacting one of the candidates for the position of CEO; and
- 1.4 assessment of the recruitment and selection process undertaken by the Board; and
- 1.5 the recommended process forward and the risks involved in the appointment of the CEO.

Lefapha la Dikgwebo tsa Puso • Lefapha la Dikgwebo tsá Mmusó • UMnyango wezinkampani zikaHulumeni • Muhasho wa Mabindu a Muvhuso
• Departement van Openbare Ondernemings • Kgoro ya Dikgwebo tsá Setshaba • Ndzawulo ya Mabhindzu ya Mfumo • LiTiko leTemabhezini
aHulumende • ISebe lezaMashishini oMbuso

- Confidential -

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PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE CHIEF EXECUTIVE OFFICER

2. SUMMARY

- 2.1 Following the resignation of Ms. Ramos, the Board initiated a CEO recruitment process to ensure continuity in Transnet's business operations. As a consequence of the withdrawal of the Board's unanimously recommended preferred candidate, Mr Pravin Gordon, the Board extended its search for a suitable candidate and has now recommended a further preferred candidate and two other shortlisted preferred candidates for appointment as CEO.
- 2.2. The recruitment and selection process conducted by the Board raised questions regarding the appropriate authority to appoint the CEO as well as the correct process to follow. Analysis of relevant legal and good corporate governance sources indicate that the Transnet CEO should be appointed by the Minister of Public Enterprises with the approval of Cabinet.
- 2.3 The recruitment process was initiated at an unfortunate time when the Board was also undertaking investigations into alleged corrupt activities against some of the senior executives at Transnet. This time overlap may have raised concerns regarding the process and criteria followed in the recruitment and selection of candidates. The process conducted by the Board has been assessed and found to be robust insofar as it was referenced to labour law compliant and internationally recognised candidate profiling.
- 2.4 Due to the delay in the appointment of the CEO and media speculation, it has now become critical for the shareholder to resolve on the appointment of the CEO and to re-establish leadership stability at Transnet. This memorandum serves to address questions and concerns raised with a view to agreement on the way forward in appointing a CEO for Transnet as soon as possible.

3. DISCUSSION

3.1 The Legal Framework

- 3.1.1 The legal framework regulating the appointment of the governing structures of a company is set out in various sources, which include the founding legislation of a SOE, the Companies Act (both old and new), as well as the King Codes on Corporate Governance.

PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE CHIEF EXECUTIVE OFFICER

- 3.1.2 The founding legislation of Transnet, the Legal Succession Act, 1989 does not include provisions on the appointment of Board members and executive management.
- 3.1.3 Company law provides the most instructive and meaningful guide and direction on the appointment of a company's governing structures. This is appropriate since company law is the law of general application to the incorporation and governance of companies and SOE are themselves commercial entities which should be regulated by company law similarly to other commercial entities.
- 3.1.4 Typically a company has two governing bodies, the shareholders in a general meeting and the Board of directors appointed by the shareholders. The Companies Act and the Articles of Association often regulate the distribution of powers and the roles and duties between these two organs. The Companies Act, similar to the Public Finance Management Act (PFMA), 1999, regulates the removal of directors, including the CEO of a company and does not specifically provide for the appointment of CEOs. This is so because the CEO is primarily appointed as an employee of the company. Oftentimes, the Articles of Association of the company provide for the appointment of the CEO for the specific company. However, where the articles are silent common law principles provide that the shareholders appoint the Board to direct and manage the company on behalf of the shareholders. The Board, in turn, and pursuant to this management function, appoints the CEO and executive of the company, who, in turn appoint the remaining management and employees of the company.
- 3.1.5 Transnet's Articles of Association do provide specifically for the appointment of the Board and the CEO. Articles 69 and 71 vest the power to appoint the CEO with the shareholder (the Minister) in a general meeting. Article 69 specifically addresses the appointment of Executive Directors i.e. the CEO, the Chief Financial Officer (CFO) and any other Executive Director whilst article 71 deals with Non-Executive Directors.
- 3.1.6 Given the practicalities of the Board having direct management and control over the company and thus exercising direct oversight of Transnet, it follows that the Board is best placed to initiate and direct the recruitment and selection process. However, disclosure and transparency of such processes must be determined and agreed in consultation with the shareholder to enable proper designation of the CEO by the shareholder in the general meeting. This practice is also encouraged by the King III

PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE CHIEF EXECUTIVE OFFICER

Report on Corporate Governance which recommends that the Board must appoint an efficient and effective CEO.

- 3.1.7 Therefore, notwithstanding the fact that the Board may direct the recruitment and selection process of the Transnet CEO, the shareholder retains the power to appoint such CEO.
- 3.1.8 This was also confirmed by senior counsel advice, attached as **Annexure "A"**. Counsel advised that the Minister is the functionary who holds the shares and exercises the rights on behalf of the State. The Minister's exercise of the shareholder rights is part of her exercise of the State's executive powers. If Cabinet has formulated policy relating to such exercise, then the Minister should exercise the powers within the parameters of such policy. The Minister is not obliged to consult Cabinet in the exercise of his/her power, but may choose to do so as a matter of personal discretion or any protocol or custom developed in this regard. Counsel advised that the Minister's exercise of her shareholder powers on behalf of the State remain valid in law even if Minister does not adhere to any Cabinet policy developed on this issue.
- 3.1.9 As part of the Cabinet collective, Ministers do, however, tend to involve Cabinet in the exercise his/her power to appoint the CEO, both as the Executive Authority in terms of the PFMA and as shareholder representative on behalf of the State. The Department of Public Enterprises conducted an assessment of the extent of Cabinet's involvement in order to establish the trend and the nature of its involvement in this regard. To this end, a review was conducted of previous decisions of Cabinet spanning from April 2002 to February 2009 relating to appointments of CEOs of a variety of State Owned Entities across the board, i.e, including those not falling under my portfolio. The results did not show conclusive dominance of any particular trend, with Cabinet's involvement varying between approval (10 times), concurrence (6), and sometimes noting (twice) of the relevant minister's decision, as the case may be.
- 3.11 This indicates that every CEO appointment has been dealt with on a case by case basis, having presumably considered the size, importance and circumstances facing the SOE at the time of making the appointment. My predecessors in the portfolio of public enterprises have followed both the route of Cabinet noting the appointment of a

PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE CHIEF EXECUTIVE OFFICER

CEO (examples being past appointments of the CEOs of Eskom, Denel and SAA) as well as recommending a CEO for approval or concurrence by Cabinet (examples being the appointment of Ms Ramos and Mr Mkwana as CEOs of Transnet). The appointment of Ms. Ramos was a "formal cross-over" from National Treasury to Transnet as CEO designate so that she will be in a position to commence her responsibilities as CEO. Further, in 2000, the former Minister of Public Enterprises, Mr Radebe approached Cabinet to seek its concurrence on the appointment of Mr. Mafika Mkwana as the Managing Director of Transnet once the Board had recommended Mr. Mafika Mkwana as the best suitable candidate.

- 3.12 Although the Handbook on the appointment of persons to serve on Boards of State Controlled Institutions proposed by the Department of Public Service and Administration (which was approved by Cabinet in September 2008) does not contain provisions relating to the recruitment and appointment of CEOs specifically, it does recommend that Board appointments of significant enterprises be referred to Cabinet for approval; the Handbook does not define significant, however, considering the importance of Transnet to the economy, it may be considered to be significant.
- 3.13 In view of the aforementioned, it is considered prudent that the Board, in consultation with the relevant Minister conducts a recruitment and selection process for an CEO and recommends suitable candidates to the Minister for consideration and appointment, subject to approval by Cabinet.

3.2 Recruitment and Selection Process of Transnet CEO

- 3.2.1 Prior to the commencement of the recruitment process, the Board recommended to the former Minister of Public Enterprises in writing dated 5 December 2008, an appropriate process, job specification, selection criteria and time-line. The Minister was also requested to nominate potential candidates she wishes be considered for the position.
- 3.2.2 Thereafter, the Board conducted the recruitment process through its Corporate Governance and Nominations Committee chaired by Mr Bulelani Ngcuka. The Corporate Governance and Nominations Committee comprises of the following Board members, Messrs F.T.M Phaswana, B.T Ngcuka, Prof G.K Everingham, Dr N.D Haste, Ms N.B.P

PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE CHIEF EXECUTIVE OFFICER

Gcaba and Ms N.N.A Matyumza.¹ The Committee enlisted the services of external service providers, including an independent Counselling Psychologist to assist with screening process and competency assessments for the candidates to supplement Board's assessment of the suitability of candidates. All candidates were subjected to the same independent competency screening techniques that are labour law compliant and include, the Saville and Holdsworth advanced managerial test battery for managers and cognitive test profiling.

3.2.3 Members of the Transnet Group Executive Committee (EXCO) were invited to apply for the position, whilst the service provider conducted a search for potential external candidates. Internal candidates who applied for the position included Ms Moira Moses and Messrs Siyabonga Gama, Karl Sokicwa, Christopher Wells, Vuyo Kahla, Tau Morwe and Kgomoetso Phihlela. Messrs Christopher Wells and Karl Sokicwa subsequently withdrew their candidacies. The application, search and interview processes for internal and external candidates were conducted simultaneously.²

3.2.4 Interviews with shortlisted candidates were conducted from 09 to 11 February 2009 and thereafter on 13 February 2009 the Board unanimously recommended Mr Pravin Gordhan as the preferred candidate suitable for appointment. In its correspondence to the Minister of Public Enterprises of 13 February 2009, the Board indicated that "although its preference was to appoint a suitably qualified internal candidate, after consideration of the current global "meltdown" and the global recession, its current and future impact on Transnet Limited, and a thorough consideration of the shortlisted individuals, the Corporate Governance and Nominations Committee, fully supported by the Board, recommend the appointment of Mr. Pravin Gordhan on the basis of the strengths he displayed against the competency profile and in comparison with the other candidates who were interviewed".

3.2.5 In addition, the Board disclosed the names of all the candidates shortlisted for final interviews. The list was not presented in order of priority and comprised of the following names: Ms. Moira Moses (internal), Mr. Siyabonga Gama (internal), Mr. Thabo Dloti (external), Mr. Ketso Gordhan (external) and Mr. Pravin Gordhan (external). Regarding

¹ According to the records of the Transnet Company Secretary, all the members of the Committee were present during the meetings in the interview period.

² We are awaiting confirmation as to whether Messrs Morwe and Phihlele applied and were considered in the initial round of interviews.

PROCESS UNDERTAKEN BY THE TRANSNET BOARD REGARDING THE RECRUITMENT OF THE
CHIEF EXECUTIVE OFFICER

the assessment of the other candidates, the Board reported to the Minister that "the other candidates were found to be less suitable for the position or not suitable at all. The preferred internal candidate, Mr. Siyabonga Gama, was thoroughly considered but the Board is of a view that his assessment showed that there are important gaps, relative to the requirements for the position. According to the independent assessment and Board evaluation, he currently requires greater cognitive development to handle the complexity of this position.

- 3.2.6 On 20 February 2009, the former Minister was informed by the Board that its preferred candidate had withdrawn his candidacy; the Board also advised that it would proceed with an extended search to establish "whether there are any other prospective candidates not previously considered in the initial process". The Board was subsequently, on 2 March 2009, requested by my predecessor to provide detailed reports on the other shortlisted candidates for the Minister's consideration before embarking on an extended search.
- 3.2.7 On 9 March 2009, the Transnet Board provided the Minister with a summary of assessments of all the shortlisted candidates and, in addition, informed the Minister of allegations of misconduct involving one of the shortlisted candidates, Mr. Siyabonga Gama (a report on these allegations follows in 3.3 below). The Board cited the reasons why Mr. Siyabonga Gama was not recommended for appointment in the first place and the inherent pending uncertainty regarding the outcome of investigations against him as why he should not now be appointed to the position of CEO. The Board re-iterated its view that none of the other candidates shortlisted for final interviews were at the level required to fill such a key position and again expressed the need to extend the search for a suitable candidate.
- 3.2.8 I have been advised by the Board that, although they may have erred in continuing with an extended search in the absence of a formal go-ahead from the former Minister, the Board's motivation to establish stability in leadership at Transnet was a high priority in terms of its fiduciary duties to the company.
- 3.2.9 The Chairperson of the Board has also advised that the Board sought audience with the former President Kgalema Motlanthe to brief the President on the CEO recruitment process and to request the President to identify candidates for selection if any. In addition,

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the Board requested a meeting to brief former Minister Mabandla and Radebe on the recruitment process.

- 3.2.10 I have also been advised by the Board that at the time that the Board deliberated on the shortlisted candidates the Board was aware of the investigation of allegations relating to Transnet Freight Rail but was not aware of the findings thereof, particular in respect of the conduct of one of the shortlisted candidates, Mr. Siyabonga Gama. The Board was briefed on the findings of the investigation by Ms. Ramos following its deliberations on the appointment of the new CEO.
- 3.2.11 Upon the completion of the extended search, the Corporate Governance and Nominations Committee compiled a shortlist of seven potential candidates for interviews. All internal candidates were again considered for shortlisting. The process of the extended search delivered three additional candidates namely, Messrs Kgomotso Phihlela (internal), Siphso Maseko (external) and Tau Morwe (internal). I have been advised by the Chairperson of the Board, Mr Fred Phaswana that Mr. Siphso Maseko is a former colleague of his and therefore he recused himself from the Board discussion regarding this particular candidate.
- 3.2.12 After the interviews were conducted the Corporate Governance and Nominations Committee recommended three preferred candidates who could fill the position of CEO, namely, Messrs Siphso Maseko, Mr Tau Morwe and Mr Kgomotso Phihlela and with full and unanimous support of the Transnet Board recommended Mr. Siphso Maseko for appointment as CEO. Mr. Siphso Maseko is recommended on the basis of the strength he displayed against the competency profile and in comparison with the other candidates who were interviewed. According to the assessment provided by the Board, Mr. Siphso Maseko has also demonstrated the requisite track record to ensure the strategies and processes will be put in place to ensure the drive for efficiencies and growth in Transnet as well as the necessary linkages and support with the relevant role players and stakeholders. These recommendations were submitted to the Minister of Public Enterprises in writing on 18 June 2009 along with detail on the assessment of the preferred candidates. The recommendation by the Transnet Board is attached and marked Annexure "B").

3.3 Investigation of Procurement Irregularities at Transnet Freight Rail

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- 3.3.1 In December 2007, the Director-General of the Public Service Commission (PSC) informed the Department of Public Enterprises (DPE) of allegations of corruption reported on the National Anti-Corruption Hotline against Transnet. In compliance with the Prevention and Combating of Corrupt Activities Act No.12 of 2004, the PSC must report such allegations to the DPE for investigation. The allegations involved a R650 million locomotives tender against one of the Executive Committee ("EXCO") members of Transnet Freight Rail who was alleged to have granted a tender to an acquaintance long before the tender was made public. It should be noted that none of the candidates interviewed were identified as allegedly being involved.
- 3.3.2 Recognising the serious nature of the allegations due to their nature and in the context of Transnet and Government's wide and long-term infrastructure investment programme, the Minister requested the Board under the leadership of the Chairperson to investigate the allegations and assess the irregularities and to brief the Department on the outcome of the said investigation.
- 3.3.3 The Board instructed the Transnet management to investigate these allegations as well as allegations made via Tip-Off Anonymous and in an anonymous undated letter to the former CEO, Ms Ramos. Transnet management instituted an internal investigation through Transnet's Internal Audit Forensic Department (Ernst & Young). In its correspondence of 9 March 2009, the Board provided the Minister with a summary report by Ernst & Young on the allegations related to Transnet Freight Rail (TFR). Ernst & Young found that::
- The Transnet Board granted approval for a contractor "to provide Transnet with 50 "Line New" locomotives and that the condition for the approval is that Transwerk would carry out all engineering on assembly and maintenance";
 - The contract for the supply of the 50 "Line New" locomotives was signed on 1 May 2007 by the Chief Executive Officer of TFR, Mr S Gama;
 - The Contract did not take into account the resolution passed by the Board in ensuring that "Transwerk would carry out all engineering on assembly and maintenance";

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- In terms of clause 7 [of the contract], the contractor had to procure sub-contractors prior to the Effective Date, and the agreements reached needed to be detailed and set out in the format described in Schedule 005 of the contract. The signed contract does not contain a schedule 005, and there was no contract in place between the contractor and Transnet Rail Engineering;
- As a result of not complying with the resolution passed by the Board, or alternatively not complying with clause 7 of the agreement, Transnet may incur significant additional direct and indirect costs.
- In respect of : the process followed in awarding the tender relating to 212 Class 40 Diesel Locomotives was flawed. These findings were validated through extensive consultations with Transnet own external legal counsel;
- the Chairperson of the Transnet Freight Rail Adjudication Steering Committee was conflicted in that he had a relationship with a tenderer which had not been disclosed at the time of the tender, and which at the very least created a perception of bias;
- the scoring of the tender had been incorrectly performed;
- there was no evidence of fraudulent activity; and
- there were other irregularities that were revealed with regard to another locomotive contract.

3.3.4 In respect of the allegations referred to by Tip-Off Anonymous and an undated anonymous undated letter, Ernst & Young found as follows:

- The original RFP (RFP 1) reference number for the supply of security services was incorrectly cancelled and replaced with a new process;
- Subsequent to the cancellation of RFP 1, an additional 3 security providers were identified;
- The process of obtaining the 3 further security service providers was not clearly documented nor communicated;

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- Confinement, evaluation and award of the security contract was made to General Nyanda Security Risk Advisory Services (Pty) Ltd. (GNS) with effect from 1 December 2007. However, there was no clear documentary evidence of the confinement, evaluation and award to determine that the process was fair, equitable, transparent, competitive, and cost effective as required by the Constitution and PFMA;
- The evidence indicated that GNS was only registered with PSIRA on 9 June 2008;
- In terms of Section 20(1)(a) of the PSIRA Act, no person except a security service contemplated in Section 199 of the Constitution may render security services for remuneration, reward, a fee or benefit, unless such person is registered as a security service provider in terms of the Act;
- It was confirmed that a company rendering services before being registered with PSIRA, would be in contravention of the PSIRA Act;
- The GNS confinement was approved on 5 December 2007 by Mr Gama;
- In accordance with section 5.4.2 of the Transnet Limited Delegation of Authority Framework dated 30 October 2007, Mr Siyabonga Gama did not have the authority to approve the GNS confinement; and
- The contract for security services was only signed by TFR management on 4 June 2008, although services commenced on 1 December 2007.

3.3.5 I have been advised by the Board that although one of the candidates interviewed, Mr Gama, was not directly implicated in the allegations made and, as yet, conclusions of fraud or criminality has not been reached, the findings raise concerns regarding negligence and/or poor judgement by Mr Gama. I have been assured that Mr Gama has had access to the findings of Ernst & Young to enable him to respond. In this regard, Mr Gama has been requested to respond to a number of questions in order to finalise the investigation and has been given an opportunity to determine the date of his response. Mr Gama's response was received on 20 July 2009 and is currently under assessment. In the Board's view, the materiality of these findings cannot be

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ignored as doing so will be a breach of the directors' fiduciary duties both in terms of the Public Finance Management Act (PFMA) and the Companies Act.

3.3.6 In terms of section 51 of the PFMA, the Board must *"take effective and appropriate steps 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 section further provides that the Board must *"take effective and appropriate disciplinary steps against any employee who makes or permits an irregular expenditure or a fruitless and wasteful expenditure"*. Failure by the Transnet Board to investigate and institute disciplinary proceedings, where necessary, may result in criminal liability on the Transnet Board under the PFMA.

3.4 Assessment of the Recommendations by the Transnet Board

3.4.1 As Executive Authority and Shareholder Representative of the State, it is incumbent upon the Minister of Public Enterprises to exercise the rights of the shareholder to appoint the CEO of Transnet in general meeting. In keeping with company law and corporate good governance codes such as King III, it is important that the shareholder engages in a meaningful and constructive fashion with the Board in selecting a CEO to lead the company. In this regard, finding a suitable candidate for appointment as Transnet CEO considering the company's impact on the economy, the magnitude of its infrastructure build programme and global economic context, is a task with high impact and potential risk.

3.4.2 In view of the recruitment process and consultations having been conducted during a transition in administration, I have ensured that I am as comprehensively briefed as possible to ensure that I am in a position to take an independent view of the recruitment process and recommendations made by the Transnet Board in order to decide whether the Board's recommendations should be endorsed.

3.4.3 I have also sought independent legal advice to ensure that the appointment is concluded with minimal risk to both Government and Transnet. Counsel advised that, although as the shareholder representative I have freedom and wide discretion in terms of the Transnet's Articles of Association to appoint the CEO, it is important to note that the Board is the most appropriate body to appoint the CEO since it is fully

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knowledgeable of the company's business and its needs as to who is best suited to be its leader.

3.4.4 Furthermore, the opinion highlights that the key criteria in deciding whether a candidate should be considered for appointment should be whether such candidate is the most suitable and best candidate for the position and any pending investigation against a candidate should only become relevant once that particular candidate is found to be the most suitable and best for appointment. Should the candidate under investigation be found to be most suitable and best for appointment, it is then my duty to establish whether the charges are "trumped-up" or trivial and should I find that the charges are not "trumped-up" or trivial, then to decide whether in these circumstances it would be appropriate to appoint the candidate under investigation. I am advised that the question asked is not whether the candidate is guilty of the allegations. I am further advised that should I find that charges against a candidate are "trumped-up" or trivial and such candidate is the best candidate, I should be able to evaluate the candidate in question against the other candidates, without reference or consideration to the alleged misconduct and make an appointment accordingly.

3.4.5 Based on my assessment of correspondence, reports and consultations with the Board, I have concluded as follows:

- Although the consultations between the Transnet Board and the Minister of Public Enterprises were not always ideal, the recruitment process conducted by the Board has been robust in assessing both internal and external candidates with reference to labour law compliant (confirmed through independent legal advice) and internationally recognised screening techniques for one of the top and most challenging executive management positions in South Africa today; and
- The investigation of alleged misconduct on the part of Mr. Siyabonga Gama is not "trumped-up" or trivial but potentially significant and the Board will be failing in its fiduciary duty if it does not complete the investigation in accordance with due process;
- The Board is confident that the substance and method of the recruitment and selection process were kept discrete from the investigation;

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- At no stage did the Board indicate that it has shortlisted Mr. Gama as a second-in-line preferred candidate to Mr. Pravin Gordhan and the Board embarked on an extended search after the withdrawal of Mr. Pravin Gordhan as it was not confident that the other candidates available, including Mr. Siyabonga Gama, were suitable for the position;
- I have had an opportunity to peruse the independent assessments in respect of all the candidates interviewed by the Board and have confidence in the recommendation by the Board that Messrs Sipho Maseko, Tau Morwe and Kgomoitso Phihlele are, in the order of preference, the most suitable candidates for appointment as CEO; I have not as yet taken a decision to discuss these assessment reports with the individuals who conducted the psychometric assessments. For ease of reference, I have attached these assessment reports as Annexure "C";
- In the interest of establishing leadership stability at Transnet, an appointment of a CEO be made without undue delay and that the ultimate criteria should be the confidence that the Board and shareholder has in the competence of the candidate to lead the organisation.

3.4.6 Accordingly, I intend approaching Cabinet via the Infrastructure Development Cluster, with a view to approving my recommendation to appoint Mr Sipho Maseko as the CEO of Transnet, as also recommended by the Board. I am particularly informed by the risk to executive management stability at Transnet at a time when it will be approaching the capital markets to fund its build programme, its ability to remain focused on delivery and the morale of its Executive Management. I have been advised that Mr Sipho Maseko may be re-considering his availability due to the protracted recruitment process and that Mr. Chris Wells is also expressed a concern about the impact of negative publicity regarding the appointment of the CEO. Regarding the position of Mr Siyabonga Gama, the Board has assured me that it will continue to ensure that due process is followed in the investigation involving him and that he is not prejudiced. Should any litigation follow from the investigation, it is best processed discretely from the appointment of the CEO. I have been informed that whilst the Board may be willing to work with Mr Siyabonga Gama, should he be appointed, senior management executives may opt to leave the company.

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- 3.4.7 In the event that Cabinet does not approve the appointment of any of the preferred candidates recommended by the Board, consideration should be given to commencing a new process of recruitment and selection conducted by the shareholder in order to immunize the process from any further controversy. However, in the interest of the company, this is not a preferred route to follow.

4. FINANCIAL IMPLICATIONS

None for this memo.

5. RECOMMENDATION

- 5.1 It is recommended that the President:

- 5.1.1 notes the contents of this memorandum; and
- 5.1.2 approves the submission of a Cabinet Memorandum recommending the appointment of Mr Siphosiso Maseko as Transnet CEO.

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MK003/DM003/02/0292323

our ref
 your ref

Ms Sandra Coetzee
 Department of Public Enterprises

03 July 2009

Per E-Mail : Sandra.coetzee@dpe.gov.za

Dear Sandra

Appointment and Removal of Directors of State-Owned Entities**1. Introduction**

1.1. We have been instructed to investigate the broad principles which should be applied to the appointment and removal of directors of state owned entities ("SOE"s), with particular reference to the appointment and removal of Chief Executive Officers ("CEO"s).

1.2. The governing provisions relating to the appointment and removal of directors of SOEs can be found in a number of sources -

1.2.1. in the first instance, provisions relating to the appointment and removal of the directors of a specific SOE may be found in the enabling legislation of that particular SOE in the event that such SOE was established by legislation;

1.2.2. In addition there may be other legislative sources and instruments which govern the appointment and removal of directors of SOE's including :-

1.2.2.1. the Companies Act, 61 of 1973 (the "Existing Companies Act");

1.2.2.2. the Companies Act, 2008 (the "New Companies Act");

1.2.2.3. the Public Finance Management Act, 1 of 1999 (the "PFMA"); and

1.2.2.4. the Protocol on Corporate Governance in the Public Sector (the

PROTOCOL

directors &
 executives

edward nathan sonnenbergs Incorporated registration number 2006/018200/21

M.M. Katz (chairman) P.C. Faber (chief executive) M. Mgudhwa (deputy chief executive) R.J. Alcock A.C. Alexander R. Appelbaum G.C. Badenhorst* J. Balkin A. Bennett J.P. Blignaut L. Blignaut* A. Brand* J. Brodbeck* T. Buchler T. Calmeyer V.O. Chaplin B.N. Conradie B.J. Croome* P.H. Cronin* P.J. Dachs C. Daniels M.S. Damsot G.E. de Smit P. Descroizilles L. Donaldson B. du Plessis* I. du Plessis J.C. du Preez F. Ebrahim E. Ellis B. Faber H. Farrand K. Fazel A.C. Feinstein* M.J. Feinstein* J.B. Ferraz A.F.M. Ferreira J.R. Flax R.M. Gerd D. Ganasen M.J. Gaiden C. Gelbart M.W. Bradidge C.L. Green R.A.L. Harper S.W. Harrison S.B. Hayes L. Helman J.D. Herbert A.C. Hoebe* Prof D.B. Hutchison* G.D. Hyde* I.O. Immelman A.V. Ismail Prof A.J. Itzkowitz* D. Joffe C.V. Johnson M. Jordaan* S. Kassen J. Katz L.C. Kitz G.P.J. Koffman* J.M. Langford P.J. Lategan E.S. Le Grange S.C. Lederman J.C. Lee S.B. Levelan S.A. Lewis N. Lopes N.J. Mabandla S.A. Mackey-Davidson S. Mahkangu K.W. Makhubele G.F. Malan K. Markman N.N. Mbangeleteli* S.L. Mbatia Y.A. Mendelsohn A. Mendes* D.B. Messerschmidt M.D. Molepo C. Morgan M.G. Morrison N.H. Nolan C.M. Ntuta G.J. Dortei J.T. Oosthuizen S.P. Osborne T.D. Papler M. Parker* S. Patel J.P. Pretorius C. Raffinelli M.V. Ratshimbilani P. Raybren A.D. Richards* R.S. Rudolph M.L. Sarenbock B. Schubach* B.J. Serebro N. Smil C.A. Smith* H.M. Snyckers S.J. Spamer R.T. Stein S. Stelzner A.W. Symington M.P. Tshiseke J.M. Velkin V.L. van Coppenhagen L.M. van der Merwe* M. van der Westhuizen N.J. van der Westhuizen T. van Deventer C. van Loggerenberg G.M. van Niekerk G.C. Viljoen* J. Viviers G. Vogelmann* S.R. von Schirnding H. Wessels C.L. Wolfsohn J.M. Ziell

* not attorney/not director, * consultant

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1.2.3. generally the *specific* provisions relating to the appointment and removal of directors are found in the constitutional documents of each individual SOE and thus may well differ from one SOE to another;

1.3. In this memorandum we have undertaken a comprehensive review of all the general legislation and policy documentation referred to in paragraph 1.2.2 above. In doing so we deal not only with the appointment and removal of directors generally but also with the position of the Chief Executive Officer ("CEO").

2. Existing Companies Act

2.1. General

The Existing Companies Act does not distinguish SOEs from other categories of companies and accordingly, the provisions applicable to all companies also apply to SOEs. Section 9 of the New Companies Act does enable the Minister to make specific provisions for SOEs.

2.2. Appointment of Directors

2.2.1. Section 208 of the Companies Act provides that every public company shall have at least two directors and every private company shall have at least one director.

2.2.2. The Companies Act provides that prior to the appointment of any directors of the company, all of the subscribers to the memorandum of the company shall be deemed to be directors of the company and that the first directors may be appointed in writing by a majority of the subscribers to its memorandum.

2.2.3. The appointment of each director of a company shall be voted on individually, by ordinary resolution at a general meeting of the company. The general meeting of a company, may, however, unanimously agree to pass a motion to appoint two or more persons as directors in a single resolution before such resolution.

2.2.4. A person who is appointed as a director shall lodge with the company his/her ~~written consent to such appointment in the prescribed form~~ within twenty eight days, or such longer period as the Registrar may allow, after the date of such appointment.

2.2.5. Unless the articles of a company provide to the contrary, a casual vacancy arising from the removal or disqualification of a director of the company that is not filled at the same meeting at which the director is removed, may be filled as

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a casual vacancy in accordance with the procedures stipulated in the articles of the company.

2.2.6. Section 214 of the Existing Companies Act provides that the acts of a director of a company shall be valid notwithstanding any defect that may afterwards be discovered in his/her appointment or qualification.

2.2.7. If a director of a company is required in terms of its articles to hold a specified number of qualification shares and does not hold such qualification shares, the director will be required to vacate his/her office if he does not obtain such qualification shares within two months, or such shorter period as may be provided in the company's articles, from the date of his/her appointment and shall not be eligible for re-appointment until he/she has obtained such qualification shares.

2.3. Disqualification of Directors

In terms of sections 218 and 219 of the Existing Companies Act certain persons are disqualified from being appointed or acting as directors of a company. The persons who are *per se* prohibited from acting as directors of a company include a body corporate, a minor or any other person under legal disability. Unless a court otherwise authorises, an unrehabilitated insolvent, a person removed from office on account of misconduct, a person who has at any time been convicted of certain listed offences and a person who has, in terms of an Act of Parliament, been removed from office for not being a fit and proper person, shall be prohibited from acting as a director. Furthermore, there are certain circumstances in which a court may make an order directing that a person shall not, without the leave of the court, be a director of a company.

2.4. Removal of Directors

2.4.1. A company has a statutory right to remove a director, without cause, before the end of his/her period of office by passing an ordinary resolution at a general meeting. Section 220(1) of the Existing Companies Act provides that:

"A company may, notwithstanding anything in its memorandum or articles or in any agreement between it and any director, by resolution remove a director before the expiration of his period of office."

2.4.2. The following procedure for the removal of a director in terms of section 220 of the Existing Companies Act must be complied with:

2.4.2.1. special notice shall be lodged with the company of any proposed resolution to remove a director, or to appoint any person in the

stead of a director so removed at the meeting at which the director is to be removed.

2.4.2.2. when the company receives the notice of the proposed resolution, the company shall immediately deliver a copy of the notice to the director. The director is entitled to be heard on the proposed resolution at the meeting, whether or not the director is a member of the company (s 220(2)).

2.4.2.3. the director is entitled to make representations regarding the proposed resolution for removal. If the director makes representations in writing which do not exceed a reasonable length and requests that the members of the company be notified of the representations, the company shall, unless such representations are received too late, state that such representations have been made in any notice of the resolution given to the company's members. The company shall also send a copy of the representations to every member to whom notice of the meeting is sent, whether the notice is sent before or after the company has received the representations (s 220(3)).

2.4.2.4. the director may require that the representations be read at the meeting, if a copy thereof has not been sent to the members for whatever reason (s 220(4)).

2.4.3. The effect of s 220(1)(a) is that directors do not have security of tenure. Control of the company may at any time be resumed by the shareholders. In Barlows Manufacturing Co Ltd and Others v RN Barrie (Pty) Ltd and Others, Conradie J stated:

"Save where, in terms of an agreement binding the members of a company and a director, the members are precluded from voting for the removal of the director from office; a director has no security of tenure. Section 220(1)(a) of the Companies Act 61 of 1973 provides that a company may, notwithstanding anything in its memorandum or articles, or in any agreement between it and a director, by resolution remove that director before the expiry of his term of office. If his removal occurs in breach of a contract with the company he may claim damages. That is provided in s 220(7). But, and this is the significant point, this is his only remedy. The shareholders may at any time resume effective control."

2.4.4. If a director's removal from office amounts to a breach of contract he may have a claim for damages against the company. In Nelson v James Nelson & Sons

Ltd the board of directors agreed to appoint a director as managing director for an indefinite period. In terms of the articles the directors could make the appointment "for such period as they deem fit, and may revoke such appointment." When the managing director was removed by a board resolution he sued for damages. It was held that the boards' power to make the appointment was not unfettered and their right to revoke the appointment in terms of the articles only existed if the agreement specifically so provided. The agreement contained no such provision and it was accordingly held that the dismissed director was entitled to damages.

- 2.4.5. Where a director has been appointed but his/her term of office has not been fixed, the company may at any time remove him from office. In Appel v Sher and Others, Clayden J said:

"The first question to be decided is whether the company has the power to remove from office a director appointed for no fixed term. If there is a company in which no provision is made by the Articles of Association that a director shall remain a director for a fixed period there seems to be no reason why the company which appointed him a director should not decide that he is no longer to be a director, apart from any question whether that act is in breach of an undertaking to the director as director and not as shareholder."

There is then no variance of "the contract entered into between the members, the Articles of Association, and no need first to alter that contract in accordance with itself so that what is done becomes an act consonant, and not at variance, with that contract. In the present case the Articles of Association are quite silent as to the term of office of a director. They only provide that there are to be directors. If the Articles of Association are read alone it seems to me that the company can appoint a director and then, when it pleases, remove that director" [at 228-9]. Notwithstanding the foregoing, and without derogating from same, a director may also be removed by resolution if so provided in the company's Articles of Association. Oftentime an article is inserted in the company's Articles of Association which states that a director may be removed by resolution in writing signed by all his co-directors."

3. New Companies Act

3.1. General

- 3.1.1. The New Companies Act will repeal the Existing Companies Act on a date to be proclaimed. The New Companies Act was signed by the President on 8 April 2008 and Gazetted on 9 April 2009 under Gazette number 32121 (Notice No. 421). The New Companies Act comes into operation on a date fixed by the President by proclamation in the Gazette, which may not be earlier than one

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year following the date on which the President assented to the New Companies Act. It is expected to come into force in July 2010.

- 3.1.2. The New Companies Act recognises SOEs as a separate and distinct category of company, and defines them as follows:

"state-owned company" means an enterprise that is registered in terms of this Act as a company, and either-

(a) falls within the meaning of "state-owned enterprise" in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or

(b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise listed in paragraph (a); "

- 3.1.3. Section 9 of the New Companies Act provides that all of its provisions that apply to public companies shall also apply to SOEs.

3.2. Appointment of Directors

- 3.2.1. Section 66(2) of the New Companies Act provides that the board of a public company shall comprise at least three directors. Section 66(11) provides that any failure by a company at any time to have the minimum number of directors required by the New Companies Act or its memorandum of incorporation (which is the document which replaces the memorandum and articles of association of the Existing Companies Act), does not limit or negate the authority of the board or invalidate anything done by the board or the company.

- 3.2.2. Each incorporator of a company shall serve as a director of the company. If the number of incorporators of a company is fewer than the minimum number of directors required for the company in terms of the New Companies Act or its memorandum of incorporation, the board is required to call a shareholders' meeting within forty business days after incorporation of the company to fill any vacancies on the board.

- 3.2.3. Directors of a company are to be elected by persons entitled to exercise voting rights in respect of such election, to serve for an indefinite term, or for such term as is specified in the company's memorandum of incorporation. The New Companies Act has introduced a measure of flexibility regarding the rights that may attach to a share. Therefore, shareholders need not necessarily have the same voting rights in respect of the election of directors.

- 3.2.4. Each candidate for election as a director shall be voted individually at a general meeting and in each vote to fill a vacancy on the board, each voting right may only be exercised once. A vacancy will only be filled if a majority of the voting rights exercised support the candidate.
- 3.2.5. Unless the memorandum of incorporation of the company provides to the contrary, if a person ceases to be a director and a vacancy arises on the board, such vacancy may be filled by the board on a temporary basis, until such time as the vacancy is filled by election at a general meeting.
- 3.2.6. Section 20 of the New Companies Act deals extensively with vacancies on the board, including what constitutes a vacancy and how the various types of vacancies should be filled.
- 3.2.7. An entirely new feature of the New Companies Act is contained in section 66(4) thereof which allows for the appointment of directors other than by the shareholders. Section 66(4) of the New Companies Act reads as follows :-

"66 (4) A company's Memorandum of Incorporation -

(a) may provide for -

- (i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;
- (ii) a person to be an *ex officio* director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)(a); or
- (iii) the appointment or election of one or more persons as alternate directors of the company; and

(b) in the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors."

The new feature that arises from the provision of section 66(4) of the New Companies Act is that it permits of the appointment as directors by persons other

than shareholders. In the case of a company for profit other than a state-owned company at least 50% of the directors must be elected by the shareholders.

3.3. Disqualification of Directors

3.3.1. Section 69 of the New Companies Act provides that a person is ineligible to be a director of a company if that person is a juristic person, an unemancipated minor or under similar legal disability or does not satisfy any qualification set out in the company's memorandum of incorporation. Certain persons shall furthermore be disqualified from acting as directors, including an unrehabilitated insolvent, a person prohibited in terms of a public regulation from being a director, a person removed from office on account of misconduct and a person who has been convicted of certain listed offences.

3.3.2. A person so disqualified shall not be prohibited, however, from acting as a director of a private company if all of the shares in that company are held by such disqualified person alone or such disqualified person together with persons related to him who have consented in writing to his/her appointment as director.

3.4. Removal of Directors

3.4.1. Section 71 of the New Companies Act provides that:

"despite anything to the contrary in a company's memorandum of incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director".

3.4.2. It is to be noted that the provisions of section 71 of the New Companies Act for the removal of directors by shareholders applies only in the case of those directors who are appointed or elected by the shareholders and not to other directors who, pursuant to the provisions of section 66(4), are appointed by persons other than shareholders.

3.4.3. The following procedure for the removal of a director in terms of section 71 must be complied with:

3.4.3.1. the director concerned shall be given notice of the meeting and the proposed resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether the director is a shareholder of the company; and

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3.4.3.2. the director shall be granted a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the proposed resolution is put to a vote.

3.4.4. If a company has more than two directors, and a shareholder or director has alleged that a director of the company has become ineligible or disqualified other than on the grounds set out in section 69, or incapacitated to the extent that the director is unable to perform the functions of a director and is unlikely to regain capacity within a reasonable time, or has neglected or been derelict in the performance of the functions of a director, the board may resolve to remove such director.

3.4.5. In the circumstances contemplated in paragraph 3.13 above, the director concerned shall be given:

3.4.5.1. notice of the meeting, together with a copy of the proposed resolution and a statement setting out the reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

3.4.5.2. a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to the vote.

4. PFMA

4.1. The PFMA is silent on the appointment of directors of SOEs, and only regulates their removal in certain circumstances, namely in cases where the "accounting authority" (i.e. the board, or the board of its holding company) is guilty of "financial misconduct" as contemplated in section 83(1) of the PFMA.

4.2. Section 83(2) of the PFMA provides that "if the accounting authority is a board or other body consisting of members, every member is individually and severally liable for any financial misconduct of the accounting authority".

4.3. Where the board or particular members of the board are found to have committed financial misconduct, the board and/or the particular members should be suspended or dismissed. Section 83(4) of the PFMA stipulates that "*Financial misconduct is a ground for dismissal or suspension of, or other sanction against, a member or person referred to in subsection (2) or (3) despite any other legislation*".

- 4.4. In terms of regulation 33.1.3 of the National Treasury Regulations¹ issued under the PFMA, the executive authority of the SOE (being the relevant government Minister responsible for the entity) is obliged, where a board member is alleged to have committed financial misconduct, to initiate an investigation into the matter. Should the director be found guilty of misconduct, then the executive authority must ensure that the appropriate disciplinary steps are taken. This can include the removal of the director from his/her position in terms of section 83(4).
- 4.5. Additionally, we note that the Regulations to the PFMA make provision for shareholders compacts, which are compulsory agreements entered into between the SOE and the relevant executive authority on an annual basis. Regulation 29.2.1 states that *"The accounting authority for a public entity listed in Schedule 2, 3B or 3D must, in consultation with its executive authority, annually conclude a shareholder's compact."*
- 4.6. Regulation 29.2.2 provides that the shareholder's compact must document the mandated key performance measures and indicators to be attained by the public entity as agreed between the board and the executive authority. Thus, the purpose of the compact appears to be aimed at performance as opposed to formal procedures (such as the appointment or removal of directors).
- 4.7. While the Regulations do not expressly limit the scope of what matters may be agreed and provided for in the shareholder's compact and so it is technically possible for the compact to deal with the appointment and removal of directors, we are not currently aware of any SOE shareholder's compacts which do so.
- 4.8. Finally, the definition in section 1 of the PFMA dealing with "Ownership Control" does not detract from any of the foregoing observations. "Ownership Control" is simply a defined term and does not confer any powers on any party; on the contrary the converse is true in that the concept of "Ownership Control" presupposes the possession of the powers referred to in the definition but does not grant those powers.

5. The Protocol

5.1. General

The Protocol was published by Department of Public Enterprises in 1997 with a view to inculcating good governance in the SOEs in accordance with the King Code of 2002 (King II). The Protocol thus does not have legislative effect but sets out the principles of corporate

¹ GNR 225 of 15 March 2005.

governance for SOEs. The Protocol also deals with the appointment, disqualification and removal of directors.

5.2. Appointment of Directors

5.2.1. The provisions relating to the appointment of directors are found in Section 5.1.6. These are very general:

"5.1.6.1 The performance of the SOE depends on the capabilities and performance of its board. It is therefore imperative that when appointing directors, the shareholder should ensure that the board is properly constituted. In this regard, the board should, at all times, comprise of individuals with integrity and accountability, competence, relevant and complimentary skills, experience and expertise. This is aimed at avoiding possible dominance by any one director or blocks of directors and, above all, ensuring commitment to the success of the SOE and the satisfaction of the shareholder."

5.1.6.2 The board should, preferably comprise a majority of non-executive directors and each director's appointment should be in writing and limited to a maximum period of three years..."

5.3. Disqualification of Directors

Section 5.1.10 of the Protocol provides that any individual who holds the position of director in an SOE, may be disqualified on the grounds of legal disability, insolvency, misconduct requiring or justifying removal from the office of trust, or criminal record, for example theft, fraud or forgery. Any individual who is disqualified from being a director cannot hold (or continue to hold) the office of director. Any contravention of this principle may attract criminal liability for the individual in question and any other director who knows, or should have known that the said individual is or was so disqualified.

5.4. Removal of Directors

5.4.1. Section 5.1.9 states that: "The shareholder may, however, at its discretion, subject to the terms and conditions of the employment contract, remove a director prior to the completion of this term of office."

5.4.2. The Section further provides that – "In the event of the SOE not performing satisfactorily, the shareholder may initiate prompt remedial action, including dismissal of the director, more particularly, in the case of failure to keep the

shareholder adequately informed and in situations of ongoing underperformance in respect of financial and other aspects of the operation of the business."

- 5.4.3. The Protocol recommends that directors be appointed only for periods of 3 (three) years. Section 5.1 provides that at the expiry of the three-year period of appointment or such other shorter period as the circumstances may demand, a director's term of office shall lapse. Subject to the directors' performance and their skills continuing to be relevant to the business, they may be re-appointed for a second term of three years.

5.5. Provisions relating specifically to the appointment and removal of the CEO

- 5.5.1. The Protocol provides that the board of an SOE has absolute responsibility for the performance of the SOE and is fully accountable to the shareholder for such performance.
- 5.5.2. The board therefore is responsible for, *inter alia*, giving strategic direction to the SOE concerned, ensuring that an effective succession plan is in place for all directors and key executives and, in concurrence with the shareholder, appoint the CEO.²
- 5.5.3. Section 5.1.3 provides that unless otherwise agreed in a shareholders' agreement or shareholder compact governing a SOE, the shareholder for such enterprise should appoint the CEO in consultation with the board about its preferred candidate for the position and allowing the board sufficient time to consider the candidate and to respond prior to the appointment being made. Section 5.1.6.1 further provides that when appointing directors, the shareholder should ensure that the board is properly constituted.
- 5.5.4. In terms of Section 5.1.6.3, in the event that a SOE is not performing satisfactorily, the shareholder may initiate prompt remedial action including dismissal of a director.

² Clause 5.1.1.1

6. The Articles of Association of a Company

6.1. The Articles of Association of a company, together with a Memorandum of Association constitute the constitution of the company. The Articles of Association typically provide for the governance of the company, including :-

- 6.1.1. the allocation of powers as between the directors and the shareholders;
- 6.1.2. the method of appointment and removal of directors;
- 6.1.3. the procedure for the convening of meetings at director and shareholder level, the quorum for such meetings, the majority of votes required to pass a resolution.

6.2. There is considerable flexibility as to the provisions that may be contained in Articles of Association regarding matters relating to the governance of companies. In this regard the New Companies Act will provide even greater flexibility than the Existing Companies Act with regard to the governance of companies.

6.3. Having regard to the flexibility as to the provisions that may be contained in Articles of Association regarding matters relating to the governance of companies it may be pointed out that the Articles of Association may contain specific provisions relating to the appointment by a company of its CEO, including any one or more of the following :-

- 6.3.1. that the CEO must be appointed from one of the existing directors of the company or must be appointed as a director if the CEO was not already a director;
- 6.3.2. that the directors must appoint the CEO subject to the approval of the shareholders;
- 6.3.3. that the directors must nominate a CEO who must be appointed by the shareholders; and
- 6.3.4. that the shareholders must appoint the CEO without any nomination from the directors.

6.4. Hahlo's South African Company Law Through The Cases Sixth Edition states at page 252 :-

"A director may hold office under the articles; under a service contract entirely independent of the articles; or under a service contract which, expressly or by implication, embodies the relevant provisions of the articles. Should a service contract embody the relevant provisions of the articles, it is a matter of construction of the contract whether the company has retained

the power to change the terms of the contract unilaterally by altering the articles. As a rule, part-time 'outside' directors hold office under the articles, which full-time 'inside' directors hold office under service contracts."

- 6.5. In the absence of any specific provisions contained in the Articles of Association of a company relating to the appointment of a CEO of that company, the following general principles of company law would apply :-

6.5.1. the shareholders would appoint the directors; and

6.5.2. the board, pursuant to its function of directing and managing the company, would appoint the CEO as an executive of the company as they would appoint all other senior members of management.

- 6.6. Notwithstanding anything to the contrary in the Articles of Association a director may at any time, in terms of the Existing Companies Act and the New Companies Act, be removed by an ordinary resolution of shareholders even without cause.

7. The Relationship Between The Articles of Association of a Company and a Shareholders' Agreement

- 7.1. In terms of existing company law principles it has been held by the Supreme Court of Appeal in Gohlke and Schneider vs Westies Minerale Eiendoms Beperk 1970 (2) SA 685(A) that the Articles of Association of a company have contractual and not statutory effect. Thus, if a shareholders' agreement has been concluded and the parties to that agreement are the company and all the members of the company then the provisions of that shareholders' agreement would prevail over the provisions of the Articles of Association to the extent of any conflict between the two.

- 7.2. In terms of section 15(7) of the New Companies Act any provision in a shareholders' agreement that is inconsistent with the Memorandum of Incorporation will, to the extent of the inconsistency, be void.

8. Constitutional Aspects Relating to the Exercise of Powers by the Minister of Public Enterprises

- 8.1. You will recall that Advocate Wim Trengove SC previously gave us an opinion relating to the constitution law principles applicable to the exercise by the Minister of Public Enterprises of her powers as the representative of the State in its capacity as shareholder of an SOE.
- 8.2. As requested, I attach herewith a copy of the aforementioned opinion of Advocate Wim Trengove SC.



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9. Kindly acknowledge receipt.

Kind regards

Yours sincerely



MICHAEL KATZ
Chairman

Cc Ms Ursula N Fikelepi
Mr Nkhangweni Ndou



THE DEPARTMENT OF PUBLIC ENTERPRISES LIMITED

THE CONTROL OF PUBLIC ENTERPRISES

OPINION

by

Wim Trengove SC

for

Mr M M Katz of Edward Nathan Sonnenbergs

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INTRODUCTION

1. The Department of Public Enterprises seeks advice on a number of questions relating to the powers and functions of the Minister for Public Enterprises in relation to the control of state-owned enterprises. The Department is particularly interested in the Minister's powers in relation to the appointment, terms of office and removal of the Chief Executive Officers of SOEs. Its questions relate to SOEs generally but we have also been asked to focus more specifically on Transnet and South African Airways.
2. Mr Michael Katz has been asked to focus on the company law aspects and Mr Martin Brassey SC on the labour law aspects of the advice the Department seeks. I have been asked to focus on the constitutional law aspects. I shall do so and, where I stray into company law or labour law territory, it is only because these areas of law overlap with constitutional law and are not clearly demarcated. I obviously defer to Mr Katz and Mr Brassey on their areas of expertise.
3. I shall confine my discussion to the SOEs accountable to the Department. They are according to its website, Alexkor, Broadband Infraco, Denel, Eskom, PBMR, SAA, SA Express, Safcol and Transnet. The state of course owns a wide variety of other SOEs accountable to other departments of state.

THE STATE AS SHAREHOLDER

4. The SOEs are typically companies of which the state is the sole or majority shareholder. The Minister holds the shares and exercises the rights under them on behalf of the state.¹
5. The enabling statutes under which the SOEs were incorporated, generally do not define the powers and functions of the state as shareholder of the SOEs. Its powers

¹ See for instance s 4 of the Alexkor Limited Act 116 of 1992; s 3(3) of the Broadband Infraco Act 33 of 2007; s 3(3) of the South African Airways Act 5 of 2007; s 3(3) of the South African Express Act 34 of 2007; s 2(4) of the Management of State Forests Act 128 of 1992 and ss 2(2) and (3) of the Legal Succession to the South African Transport Services Act 9 of 1989.

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are accordingly those conferred on the state as shareholder under the memorandum and articles of association of every SOE read with the provisions of the Companies Act 61 of 1973:

- 5.1. The state's powers as shareholder typically include powers relating to the appointment, terms of office and removal of directors of the SOE including its CEO, but the nature and extent of these powers depend on the memorandum and articles of each company.
- 5.2. The Companies Act of course also includes very many powers vested in shareholders generally. They include the power to remove directors from office in terms of s 220 and the restriction on the payment of compensation to directors for loss of office imposed by s 227(1). These are however matters within Mr Katz's domain.

THE EXERCISE OF THE STATE'S RIGHTS

6. The Minister holds the shares in the SOEs and exercises the rights under them, on behalf of the state. The state is the shareholder. The Minister is merely the functionary who holds the shares and exercises the rights on his behalf. The Minister does so in the exercise of the executive powers of the state.
7. The exercise of all executive powers of the state, is regulated by the Constitution:
 - 7.1. The President has two capacities under the Constitution. He is both head of state and head of the national executive.²
 - 7.2. In his capacity as head of state, the President exercises a range of specified powers and functions entrusted to him in that capacity.³ He does so on his own and without participation of his cabinet.

² Sections 83(a) and 84(1).

³ Section 84(2)

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7.3. In his capacity as head of the national executive on the other hand, the President acts together with the members of his cabinet. Section 85(2) provides that they do so jointly by,

- "(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policies;
- (c) co-ordinating the functions of state departments and administration;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation."

7.4. The individual members of cabinet are responsible for the powers and functions of the executive assigned to them by the President.⁴ Even when national legislation entrusts powers and functions to a particular minister, the President may transfer them to any other member of cabinet.⁵

7.5. The members of the cabinet are accountable collectively and individually to Parliament for the exercise of their powers and performance of their functions.⁶

8. The implications of this constitutional scheme for the exercise by the Minister of the state's powers as shareholder of the SOEs, are as follows:

8.1. It is the prerogative of cabinet in terms of s 85(2)(b) of the Constitution, to develop national policy. Cabinet may, in the exercise of this power, develop a policy on SOEs. It may determine, not only whether there should be such a policy, but also what it is and to what level of detail it goes. The only limitation

⁴ Section 92(1)

⁵ Sections 97 and 98

⁶ Section 92(2)

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on this cabinet prerogative is that the policy must be consistent with and may not contradict national legislation.

- 8.2. It is in the first place for the Minister to determine how to exercise the state's powers as shareholder of the SOEs on its behalf. If cabinet has however formulated a policy on the matter, then she is bound to exercise her powers within its parameters.
- 8.3. The Minister may consult cabinet on the exercise of her powers but is not obliged to do so. Whether she does so, is in the first place a matter of cabinet protocol and custom but not law, and in the second place a matter of personal discretion.
- 8.4. The Minister is bound in law to exercise her powers in accordance with these rules. It does not follow however that, if she fails to do so, the exercise of her powers is invalid. Despite a High Court judgment to the contrary,⁷ I am of the view that the Minister's exercise of her powers remain valid in law even if she fails to adhere to national policy determined by cabinet. The external validity of the Minister's conduct does not depend on her compliance with the internal policy laid down by cabinet. The remedy for any failure by the Minister to adhere to cabinet policy, is for the President to dismiss her from cabinet in terms of s 91(2) or to strip her of her powers by transferring them to another member of cabinet in terms of s 97 of the Constitution.

THE PFMA

9. The Department asks whether the Public Finance Management Act 1 of 1999 has a bearing on the Minister's exercise of the state's powers as shareholder of the SOEs. The answer is that it does not do so directly. What it does though, is to impose a range of duties on the boards of the SOEs in relation to the control and management of their affairs.

⁷ President of the RSA v Elsberg & Associates 2005 (1) SA 247 (C) 258

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10. The PFMA makes different sets of rules applicable to different categories of organs of state. The SOEs are generally classified as "public entities" listed in Schedule 2 of the PFMA.⁸ Section 49(2)(a) provides that the board of such a public entity is its "accounting authority". Sections 46 to 62 impose a range of duties on the board of a public entity in its capacity as its accounting authority. They include the following:

10.1. Section 50(1) recognises that there is a fiduciary relationship between a public entity and its board. It provides that the board must,

- "(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;
- (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;
- (c) on request, disclose to the executive authority responsible for that public entity (that is, to the Minister in the case of the SOEs) or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decision or actions of the executive authority or that legislature; and
- (d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state."

10.2. In terms of s 51(1)(b)(ii), the board of a public entity must,

"take effective and appropriate steps 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."

10.3. Section 51(1)(e)(iii) provides that the board of a public entity must take "effective and appropriate disciplinary steps" against any employee of the public entity who "makes or permits an irregular expenditure or a fruitless and wasteful expenditure".

⁸ Schedule 2 classifies them as "major public entities".

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10.4. In terms of s 54(2) the board of a public entity must, before it enters into certain transactions, submit particulars of the transaction to its "executive authority", that is, to the Minister in the case of the SOEs, for approval. The transactions subject to this requirement are,

- the establishment or participation in the establishment of a company;
- any participation in a significant partnership, trust, unincorporated joint venture or similar arrangements;
- the acquisition or disposal of a significant shareholding in a company;
- the acquisition or disposal of a significant asset;
- the commencement or cessation of a significant business activity; and
- a significant change in the nature or extent of its interest in a significant partnership, trust, unincorporated joint venture or similar arrangement.

10.5. If the board of a public entity wilfully or negligently,

- fails to comply with any of these requirements, or
- makes or permits any irregular, fruitless or wasteful expenditure,

then the board itself is guilty of financial misconduct in terms of s 83(1) for which every member of the board is individually liable in terms of s 83(2).

TRANSNET

11. Transnet is currently constituted in terms of the Legal Succession to the South African Transport Services Act 9 of 1989.

12. In terms of ss 2(1) to (3) read with s 4(1), Transnet is a public company, the state is its only shareholder and the Minister exercises the rights of the state as shareholder on its behalf.

13. The state's rights as shareholder exercised on its behalf by the Minister, include the following:

13.1. The appointment and removal of the CEO and directors of Transnet are regulated by its articles. They vest the state as its sole shareholder acting as the company in general meeting, with the power to appoint all the members of

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its board including the CEO and to determine their remuneration and terms and conditions of appointment.⁹

13.2. In terms of s 220 of the Companies Act, the state as the sole shareholder of Transnet acting in its capacity as the company in general meeting, may by resolution remove any director before the expiration of his or her term of office. Such a resolution may only be passed by a prescribed procedure. It does not deprive directors so removed from office, of such claims for damages as they might otherwise have in law.

13.3. In terms of s 227(1)(a) of the Companies Act, Transnet may not pay any compensation to a director or former director for loss of office or as consideration for or in connection with his or her retirement from office, unless it is first approved by special resolution passed by the state in its capacity as Transnet's sole shareholder. In terms of s 227(6) this requirement does not apply to a payment to a director made in good faith, by way of damages for breach of contract or by way of pension.

SAA

14. SAA was a division and later a subsidiary of Transnet. The South African Airways Act 5 of 2007 provided for it to be transferred to the state and converted into a public company. We are instructed that the SAA Act has come into operation and has been implemented. The following analysis is based on this instruction.

15. In terms of s 3(3) of the SAA Act, the state is the sole shareholder of SAA and the Minister exercises its rights as shareholder on its behalf.

16. The state's rights as shareholder so exercised by the Minister, include the following:

16.1. SAA's articles vest Transnet and certain erstwhile minority shareholders with the power to appoint, determine the terms of office and remove the members

⁹ Articles 68 to 74

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of its board.¹⁰ These articles are however no longer applicable because they are based on the premise that SAA's shares are held by Transnet and the erstwhile minorities. Now that the state is the only shareholder of SAA, these articles are silent on the appointment, terms of office and removal of directors. In these circumstances, the power to appoint, determine the terms of office and remove directors, vests in the company in general meeting, that is, in the state represented by the Minister.¹¹

- 16.2. Article 21.1 vests the power to appoint and remove SAA's CEO, in its board and not in the state as its shareholder:

"The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term and at such remuneration ... as they may think fit and may revoke such appointment subject to the terms of any agreement entered into in any particular case."

- 16.3. In terms of s 220 of the Companies Act, the state as the sole shareholder of SAA acting in its capacity as the company in general meeting, may by resolution remove any director before the expiration of his or her term of office. Such a resolution may only be passed by a prescribed procedure. It does not deprive directors so removed from office, of such claims for damages as they might otherwise have in law.

- 16.4. In terms of s 227(1)(a) of the Companies Act, SAA may not pay any compensation to a director or former director for loss of office or as consideration for or in connection with his or her retirement from office, unless it is first approved by special resolution passed by the state in its capacity as SAA's sole shareholder. In terms of s 227(6) this requirement does not apply to a payment to a director made in good faith, by way of damages for breach of contract or by way of pension.

¹⁰ Articles 17.1 to 17.9

¹¹ Appel v Sher 1950 (2) SA 224 (W) 228 to 229

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THE DEPARTMENT'S PARTICULAR QUESTIONS

17. *"Who is empowered to appoint the CEO and the board of directors, executive and non-executive (of an SOE)?"*

This is usually a matter regulated by the articles of the SOE. If they are silent on the matter ~~however~~, the power vests in the state as sole shareholder of the SOE acting as the company in general meeting.

18. *"Who is the CEO contracted with?"*

The CEO's contract is with the SOE. It is represented in making the contract, by the body vested with the power of appointment, whether it be the state as the sole shareholder acting as the company in general meeting or the board of directors.

19. *"Is the CEO automatically a member of the board?"*

It is almost invariably the case but again depends on the articles.

20. *"Is assignment of decision-making powers to the Shareholder Minister the prerogative of the President or that of Cabinet?"*

The power to exercise the state's rights as shareholder, is typically in the first place vested in the Minister in terms of the underlying statute. The President may however transfer these powers to any other member of cabinet in terms of ss 97 and 98 of the Constitution.

21. *"What is the role of the Minister as a shareholder in accordance with the Companies Act and the PFMA amongst others? What are the exact decision-making powers bestowed on the Shareholder Minister?"*

The Minister's role and powers as shareholder of the SOEs on behalf of the state, are those discussed in the earlier parts of this opinion.

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22. *"In respect of which powers is the Shareholder Minister required to take decisions in consultation with Cabinet i.e. as a function of law as opposed to a function of protocol?"*

There is no rule of law which requires the Minister to consult with Cabinet on the exercise of her powers as shareholder of the SOEs on behalf of the state. Cabinet however has the power to require the Minister to do so. The nature and extent of its requirement is within its discretion. The Minister is obliged in law to comply with the requirement laid down by Cabinet. If she should fail to do so however, the exercise of her powers is not thereby rendered invalid. The remedy is for the President to dismiss her from Cabinet in terms of s 91(2) or strip her of her powers by transferring them to another member of cabinet in terms of s 97 of the Constitution, should he wish to do so.

23. *"Is it compatible with company law to have Cabinet as a shareholder of state-owned enterprises?"*

This is by definition a company law question but on my understanding it is the state and not Cabinet which is the shareholder of the SOEs. It is constitutionally competent for the state to be the shareholder of an SOE.

Wim Trengove SC

Chambers
Sandton
23 March 2009

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ANNEXURE "E"



MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Halfway, 0261 Tel: 012 431 1119 Fax: 012 431 1000
Private Bag X8079, Cape Town, 8001 Tel: 021 461 8379 Fax: 021 468 3046/1241

President Jacob Zuma
The Presidency
Republic of South Africa
Private Bag X1000
Cape Town
0001

MEMO WITHDRAWN

Dear President Zuma

REQUEST PERMISSION FOR THE LATE AND DIRECT SUBMISSION OF CABINET MEMORANDUM NO. 7 OF 2009: APPOINTMENT OF MR SIPHO MASEKO TO THE POSITION OF GROUP CHIEF EXECUTIVE OFFICER OF TRANSNET

I hereby request the President's permission for the late and direct submission of the above Cabinet Memorandum to the Cabinet Meeting scheduled for Wednesday, 26 August 2009.

There have been a number of issues raised by Cabinet relating to the recruitment process of the Chief Executive Officer position at Transnet. Following my brief to the President on this matter, I believe that it is imperative for me to brief Cabinet on the process thus far and, to request Cabinet's approval for the appointment of Mr Siphso Maseko, the preferred candidate for the position of Group CEO.

The late submission is regrettable but is necessitated by the sensitivity of the issues and the imperative to establish leadership stability and certainty at Transnet. Furthermore, the recent negative media reports surrounding the position of CEO at Transnet are affecting staff morale. Copies of the memorandum will be distributed at Cabinet on the morning of the meeting.

I trust that this submission will receive the President's favourable consideration.

Kind regards

MS B. HOGAN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE:

25 August 2009

NEED MORE NAMES FOR
THE CHAIRPERSON AS
SUGGESTED, MEETING
BETWEEN MIN + PRES.

ANC backs suspended Transnet boss

Sunday Times 30 Aug 2009 MOIPONE MALEFANE
ko if: hasImage



SUSPENDED: Siyabonga Gama was earmarked for top Transnet job

/ko

THE African National Congress has thrown its weight behind suspended Transnet executive Siyabonga Gama, with minister of justice Jeff Radebe describing his suspension as a "miscarriage of justice".

Gama, Transnet's chief executive of freight rail, was this week suspended over allegations that he breached procurement contracts — a move viewed by the ANC as an attempt to scupper his chances of becoming the parastatal's next chief executive.

Gama is believed to be among at least three candidates short-listed to take over as permanent CEO.

The Sunday Times can also reveal that the ANC national working committee (NWC) instructed minister of public enterprises Barbara Hogan about two months ago to appoint Gama as Transnet's CEO after the departure of the parastatal's former head, Maria Ramos, who joined Absa.

ANC insiders said Hogan was this week expected to submit Gama's name to cabinet for final approval.

She allegedly withdrew following what angry insiders said was "Transnet's manoeuvrings" by suspending him.

Hogan's spokesman, Ayanda Shezi, said the ministry could not comment on anything to do with the ANC.

ANC spokesman Brian Sokutu said Gama was "an executive who has been with Transnet for quite some years" and "credited for having turned things around both financial- ly and in terms of giving leadership".

"In other words, we say he has a track record. I am not aware of discussions about him at NWC or NEC level, but there is nothing stopping members of the ANC from discussing succession within parastatals," said Sokutu.

Speaking at the University of KwaZulu-Natal on Thursday, Radebe denounced the Transnet board and described the decision to suspend Gama as a "gross injustice".

Radebe lashed out at the board for suspending Gama without considering his testimony.

The Sunday Times could not confirm talk that a group of cabinet ministers had approached President Jacob Zuma to register their unhappiness with Gama's suspension.

On Thursday, Gama appeared before Pradeep Maharaj, the group executive for human resources, and the company's lawyers to give his side of the story after Transnet had served him with a letter on Monday informing him of its intention to suspend him following a board meeting.

Gama's lawyer, Themba Langa, said Transnet has been "working hard to get him suspended and there were no objective or reasonable grounds to have him suspended".

Allegations of impropriety against Gama apparently surfaced for the first time in June. His written responses, according to Langa, were not presented to the board.

According to NWC insiders, Gama was recommended by the party's deployment committee.

It is alleged the ANC was aware of "Transnet's intentions to ensure that Gama does not get the job".

ANC insiders said the contenders for the position at the time included Pravin Gordhan, who has since been appointed

minister of finance.

Both men were recommended for the job by the Transnet board selection committee at a meeting on February 13. Gordhan withdrew his candidature after being told he had been earmarked for a cabinet position.

An ANC deployment committee member said a very senior and long-serving cabinet minister, also a member of the deployment committee, was opposed to Gama's nomination. He was overruled by other committee members.

Another NWC member said some ANC officials had asked why Gama's appointment had not been implemented by Hogan.

A Transnet board member said Gama was not trusted by certain individuals in management, who thought he would reverse "multimillion contracts awarded to friends and families".

Transnet spokesman John Dlodlu said "a disciplinary process" had been instituted against Gama.

"This relates to alleged serious breaches in certain procurement contracts. This is an internal company matter, and we don't wish to comment further at this stage."

moiponem@sundaytimes.co.za

ANNEXURE "F2"

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Appoint Gama as Transnet CEO now - ANCYL

ANCYL
11 September 2009

Youth League says Africans are being denied positions of responsibility in economy

ANCYL CALLS FOR IMMEDIATE APPOINTMENT OF SIYABONGA GAMA AS TRANSNET CEO

The AFRICAN NATIONAL CONGRESS YOUTH LEAGUE calls for immediate appointment of Siyabonga Gama as Group Chief Executive Officer of Transnet Ltd. There is evidently a concerted agenda by the predominantly White Board of Directors and external role players to isolate Siyabonga Gama from Transnet and deny him the position of CEO of Transnet, despite his credentials.

Recurrently, Africans are denied positions of responsibility in key and strategic sectors of the economy and we should never egg walk around this absolute reality. The Employment Equity Commission Report recently released confirm the reality that those in control of the economy (White Males) refuse the integration of capable black people into key and strategic sectors of the economy.

Siyabonga Gama should be appointed a CEO and business goes on as usual in Transnet. Any attempt to persecute and isolate him will be met with massive resistance from the youth of South Africa. The suspension on Gama is a witch-hunt meant to block him from the CEO position and should be immediately withdrawn.

Statement issued by the ANC Youth League, September 11 2009

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ANNE KURE 'F.3'

THE STAR

Youth League slams Transnet

11 September 2009, 15:48

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- SACP cries foul over Gama

Transnet's suspension of Siyabonga Gama is a witch-hunt meant to stop him from becoming the parastatal's group chief executive officer, the ANC Youth League (ANCYL) said on Friday.

In a statement, it said the suspension should be withdrawn immediately.

The ANCYL also called for Gama to be immediately appointed as Transnet group chief executive officer.

"There is evidently a concerted agenda by the predominantly white board of directors and external role players to isolate Siyabonga Gama from Transnet and deny him the position of group CEO of Transnet, despite his credentials," the ANCYL said.

"Recurrently, Africans are denied positions of responsibility in key and strategic sectors of the economy and we should never egg walk around this absolute reality," it added.

The ANCYL said the Employment Equity Commission Report recently released confirmed "the reality that those in control of the economy (white males) refuse the integration of capable black people into key and strategic sectors of the economy."

It said any attempt to persecute and isolate Gama would be met with "massive resistance" from the youth of South Africa.

The Transnet board began its search for a new group chief executive officer late last year following the resignation of present Absa group chief executive officer Maria Ramos.

The board favoured Pravin Gordhan for the post, but when Gordhan became finance minister, Transnet re-started the process of finding a chief executive officer.

Justice Minister Jeff Radebe and the ANC have shown support for awarding Gama the parastatal's position of chief executive officer.

However, Gama was recently suspended, allegedly as a result of serious breaches in two procurement contracts.

Public Enterprises Minister Barbara Hogan has been summoned to Parliament next week to clarify the events around Gama's suspension and other matters related to Transnet's management. - Sapa



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SACP supports suspended Transnet boss

The South African Communist Party (SACP) has come out in full support of the suspended CEO of Transnet's rail freight division, Siyabonga Gama. He was suspended last week. A probe into allegations of a breach of corporate governance by Gama is currently underway at the transport parastatal.

"We wish to express serious concerns about what appears to be an attempt by certain elements within and outside of Transnet to clearly frustrate the appointment of Mr. Gama as CEO despite his illustrious career, commitment to public service and strong credentials," the SACP said.

It also expressed concern over what it said were attempts by some elements to capture state entities to advance their narrow interests rather than serve the interests of a developmental state. The SACP said it believed government was losing control of parastatals because intensive corporatisation had resulted in them behaving like private companies pursuing a capitalist agenda.

The party has called for a thorough audit of all state owned entities. Gama has meanwhile received support from the Justice Minister Jeff Radebe, the African National Congress (ANC), the SA Transport and Allied Workers' Union (Satawu) and the Black Management Forum (BMF). Radebe is on record as saying: "Some of us will ensure that he gets the job." - Additional reporting by Sapa

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SACP statement on the Transnet Board decision to suspend Mr Siyabonga Gama

7 September 2009

The SACP has noted the recent developments within Transnet and the subsequent suspension of Siyabonga Gama, CEO of its rail freight division. We wish to express serious concerns about what appears to be an attempt by certain elements within and outside of Transnet to clearly frustrate the appointment of Mr. Gama as CEO despite his illustrious career, commitment to public service and strong credentials.

The current shenanigans at Transnet are a classic illustration of the concerns we have raised as the SACP about the strategic role and developmental focus of state owned enterprises. Amongst those concerns have been attempts by a few, often parasitic, element capture these entities for reasons that are contrary to their developmental mandate. As the SACP we fully share the concerns raised by SATAWU on the matter, and we are deeply suspicious that there is an elite that is hell bent on capturing Transnet for its own narrow interests.

e SACP calls for speedy intervention to resolve this matter.

At its last Central Committee the SACP raised its concerns about the intensive corporatization of state owned enterprises and restructuring the relationship which increasingly operated as private companies and sites for accumulation on behalf of capital in general and specifically an emerging BEE capitalist stratum. We wish to reiterate our call for a thorough audit of SoEs as well as review of the shareholder compacts to align these to government priorities as contained in the ANC election manifesto.

In addition, we call upon for more appointments of people representing communities, NGOs and the labour movement into the boards of all SoEs and other public entities.

Issued by the SACP

Contact:

Malesela Maleka

SACP Spokesperson – 082 226 1802



F6

Crunch time for Hogan over Gama

ARTWELL DLAMINI
Transport Correspondent

PUBLIC Enterprises Minister Barbara Hogan faces crunch time tomorrow after being called to appear before Parliament to explain her handling of the succession process at Transnet and the suspension of Siyabonga Gama, CEO of the Transnet Freight Rail (TFR) division.

Vuyile Mentor, chairwoman of the public enterprises committee, confirmed yesterday that Hogan was due to appear before Parliament tomorrow, saying the minister would talk about the appointment of the group Transnet CEO and other "problems around this".

The post has been vacant since Maria Ramos — who served a three-month notice from November last year — left the

transport parastatal in February for Absa.

With the spotlight now aimed at Hogan, it is unclear whether she would fall in line with Luthuli House's drive to see Gama take the group CEO mantle.

When Gama was suspended on September 1, Hogan said the Transnet board would run the disciplinary process and "inform the shareholder", the government, of the "outcomes and any decisions to be taken".

But Justice Minister Jeff Radebe and Communications Minister Siphile Nyanda — Hogan's counterparts — have openly questioned Gama's suspension, and the African National Congress has thrown its weight behind Gama, pitting itself against the Transnet board. The

Continued on page 2

F7"

Crunch time for minister

Continued from page 1

board's preferred candidate, BP Africa CEO Sipho Maseko, has withdrawn his nomination, citing the furore surrounding the disciplinary action against Gama as a reason.

Mentor said the problems at Transnet were "running deep" and were "costing us a lot". Transnet still had an acting chairman and an acting chief financial officer. Since Gama was suspended two weeks ago, TFR has had no interim CEO. She said that the "ramifications" of delays in making these appointments were being felt, citing reports suggesting there was a go-slow at TFR because of the leadership issue.

The succession furore at Transnet, she

said, could have a ripple effect on the appointment of a CEO at South African Airways. "We want these issues resolved urgently," Mentor said.

Meanwhile, Gama will on Thursday launch an urgent interdict against Transnet to have his suspension reversed and the disciplinary proceedings dropped.

Transnet spokesman John Dladla said yesterday the group welcomed the opportunity to have the "matter put to rest in a court of law".

He said Transnet believed "that due process must be allowed to take its course and that Mr Gama ought to be afforded the full opportunity to respond to the allegations against him in a duly constituted process".

artvelid@bdlm.co.za

= F8'

Blood to flow in race for top job

SIYABONGA GAMA
and MOFFET MOFOKENG

THE controversy over who is to become chief executive of Transnet is proving to be damaging to the parastatal and the individual who may get to occupy the hot seat.

It has also become a political hot potato that could scorch Public Enterprises Minister Barbara Hogan.

"Barbara must go. She is still going to give us problems going forward. She appointed the white acting chairman and the CEO, so she must deal with them. We want Siyabonga Gama there," an ANC national working committee member said this week.

Gama is the chief executive of Transnet Freight Rail (TFR) and is currently being investigated by Transnet for alleged breaches of corporate governance.

"If she was a real ANC cadre she would have known that once the leadership had resolved that Gama was the preferred candidate she must implement," the member said.

Hogan did not comment despite numerous requests for her view. She is facing pressure from Luthuli House and Parliament.

The member did not explain why the ANC had allowed the board to lead the process of appointing a chief executive for Transnet when it already had a preferred candidate.

Since the ANC assumed power cabinet has always appointed the chief executives of parastatals, with little board involvement.

The articles of association, which govern the relationship between the government and Transnet, dictate that the government, through the public enterprises minister, appoints both the chief executive and the Transnet board.

The Transnet chief executive job became available after former boss Maria Ramos left in February to join banking group Absa.

The chief financial officer, Chris Wells, has since been acting chief executive. Anoj Singh is now acting chief financial officer.

The ANC knew that Ramos was leaving last November. At the time the public enterprises minister was Brigitte Mathera. It is not clear why the ANC did not move then to make the appointment.

That indecision means that Transnet now needs to fill the positions of chief executive, chief financial officer and chairperson, after Fred Phaswana left at the end of the board's term last month. Hogan has since appointed Geoff Everingham as acting chairperson and reappointed the board for another term. Vytie Menton, the chair of Parila-

ment's portfolio committee on public enterprises, said Hogan had been called to account for the Transnet saga.

"She is still coming to the committee. We are very, very worried. There are three executive positions that are affected by this. It must be resolved very quickly. I get a sense that people think they have time."

"We must fire up the leadership of Transnet so that it can focus on what the company must do," she said.

This week support for Gama increased. On Friday an ANC Youth League national executive committee member said they had discussed the matter and resolved "to fight for Gama's appointment both and

mail". Gama this week said he did not understand why charges had been brought against him because he had provided answers to both acting chief executive Wells and the board.

Transnet is investigating the circumstances under which Gama went beyond his authority in approving a R18-million security contract. Gama only has authority to approve fixed-term contracts of up to R10-million. Gama said the five-month contract he authorised was for R2.5 million.

"At the end of that period TFR had not concluded the awarding of any contract and the security manager entered the contract with existing suppliers on a month-on-month basis on the same terms. This is normal practice within the parastatal in such instances," he said.

Gama said it was impossible for him to know all the details of each of nearly 3 000 contracts that TFR had with different suppliers.

Another allegation is that Gama defied a board decision to include Transnet of Rail Engineering in a contract to build 60 new locomotives.

The locomotives are being built by a service provider.

Gama said the contract allowed the service provider to produce 10 locomotives. He has launched a high court action to clear his name.

The week also saw Sipho Maseko, the Transnet board's preferred candidate, withdraw from the race.

"It is important to point out that we understand fully the frustrations brought about by the delay in the selection process."

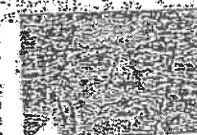
"However, we are doing all we can to ensure that the matter is speedily resolved," reads a Transnet statement.

This means that the job is Gama's, should he win his court case.

It is unclear if any other candidate would want the job after all the hype, if Gama remains in the race.



PREFERRED CANDIDATE...
Siyabonga Gama



IN HOT WATER... Public Enterprises Minister Barbara Hogan

BH

'F9'

ANCYL calls for Gama's appointment as chief of Transnet



WILLEM KROON says that it was 16 July the cabinet had to make a decision. On Thursday, ANCYL called for the appointment of a South African, who was a former member of the ANC, to the position of chief of Transnet. The ANCYL also called for the immediate appointment of the permanent chief executive, who is a former member of the ANC, to the position of chief executive of Transnet. The ANCYL also called for the immediate appointment of the permanent chief executive, who is a former member of the ANC, to the position of chief executive of Transnet.

Any attempt to persecute and isolate Gama would be met with massive youth resistance

It is understood that Gama was never released by the Transnet board for the up to 16 months he was in custody. Gama was a member of the ANC and was a former member of the ANC. He was a member of the ANC and was a former member of the ANC. He was a member of the ANC and was a former member of the ANC.

The ANCYL also called for the immediate appointment of the permanent chief executive, who is a former member of the ANC, to the position of chief executive of Transnet. The ANCYL also called for the immediate appointment of the permanent chief executive, who is a former member of the ANC, to the position of chief executive of Transnet. The ANCYL also called for the immediate appointment of the permanent chief executive, who is a former member of the ANC, to the position of chief executive of Transnet.

Stellenbosch, the chief executive of Transnet Freight Rail, has been named to head Transnet. He was suspended two weeks ago for alleged irregularities in the awarding of a contract to a private company.

BV

"F18"

Gama's lawyers file papers in court to fight his suspension

Mizwandle Jacks

TRANSNET's acting group chief executive, Chris Wells, and Mahara Pradeep, the group's human resource director, did not have the authority to bring disciplinary action against Siyabonga Gama, the suspended chief executive of Transnet Freight Rail (TFR).

This is according to an affidavit filed before the South Gauteng High Court last week.

Gama's lawyers are bringing an urgent application in the court on Thursday in a bid to set aside his suspension.

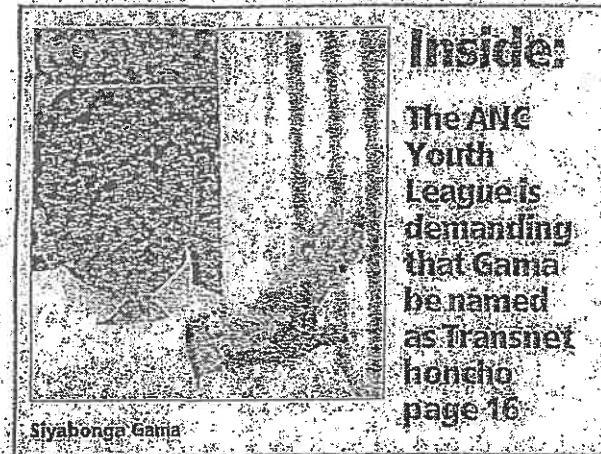
He was suspended about two weeks ago pending the outcome of an internal disciplinary hearing.

Gama faces charges related to the allocation of a contract to refurbish 50 locomotives to Sibanye Trade Services, which allegedly had little experience of renovating locomotives.

He also allegedly awarded a R19 million contract to a security firm that reportedly had links with Communications Minister Siphwe Nyanda. Gama had authority to sign off contracts only up to R10m.

His attorneys, Lange Attorneys, also want to interdict Transnet from pursuing any further disciplinary hearings against Gama "unless properly authorised" by the board.

According to the affidavit, Transnet's board is the only authority that can decide on his suspension and the board did not fairly authorise his suspension. The affidavit declares that Gama has not been suspended and that he is entitled to fulfil



Siyabonga Gama

Inside:

The ANC Youth League is demanding that Gama be named as Transnet honcho page 16

his duties at TFR.

Gama's attorneys also asked Transnet to give Gama copies of all documents in their possession that relate to any decision taken to suspend him.

Gama's suspension has sparked a political row, with high-powered ANC leaders backing him for the position of group chief executive.

Nyanda told a Sunday newspaper that Gama was being persecuted, saying very few people were as capable as Gama. He was quoted as saying: "What happened to JZ (President Jacob Zuma) is happening in this case. People vilify and cast aspersions on you."

It is understood that Gama was never really favoured for the chief executive post. While he was on the initial shortlist of five candidates for the position that the board compiled in February, it decided that one

candidate, Pravin Gordhan, was better than the rest and put forward only his name.

Gordhan was later named finance minister and pulled out of the race. The Transnet board then started the search process. It is alleged that Gama was not included on the new shortlist of three candidates.

John Dladla, Transnet's spokesman, confirmed to Business Report that the group was served with court papers last Thursday.

"We welcome the opportunity to have the matter put to rest in a court of law where the company will be defending this matter."

Transnet believed that due process had to be allowed to take its course and that Gama ought to be afforded the full opportunity to respond to the allegations against him in a duly constituted process.

BA

"F11"

No to cadre Gama

The ANC's disturbing habit of earmarking certain people for top positions regardless of flaws and allegations is evident in the utterances over Transnet.

A similar pattern was followed in Jacob Zuma's own anointment as President, and was followed even in the recent elevation of questionable lawyer Paul Ngobeni to become Defence Minister Lindiwe Sisulu's legal adviser. The DA has pointed out how several key posts in Zuma's office have been filled by people with questionable credentials.

In the case of Transnet two Ministers, plus the ANC, the

ANC Youth League and the SA Communist Party, have all publicly stated that Siyabonga Gama must be made CEO.

This despite Gama being suspended as CEO of a division, Transnet Freight Rail. He is being probed regarding a tender for 50 locomotives. He also allegedly gave a security contract worth R19 million to a company linked to Minister Siphile Nyanda, one of his backers on the ANC's National Working Committee.

We have already seen in enough corporations, the SABC for example, what happens when party loyalty trumps integrity. Transnet is too vast to have a dodgy driver.

B11

"f12"

Gama being 'persecuted like Zuma'

BUDDY NAIKU

MINISTER of communications and ANC heavyweight General Siphiwe Nyanda says suspended Transnet executive Syabonga Gama is being persecuted in the same manner as Jacob Zuma.

"He is a young man. Very few people are as capable or as suitable as he is. The challenge is that some people out there are really bent on ensuring that he is destroyed," said Nyanda. "What happened to JZ (President Zuma) is happening in this case. People vilify and cast aspersions (on you)."

Nyanda has previously said Zuma was the victim of a political conspiracy aimed at keeping him out of political office. His name has also been dragged into the Transnet leadership battle, which resulted in Gama's suspension as CEO of Transnet Freight Rail.

Gama is the front-runner to take over as group chief executive from Maria Ramos, who quit to join Absa. He has the backing of the ANC, the SACP, the ANC Youth League and senior management, who say he is being victimised.

Nyanda said he was "incensed" over recent events and attempts by "powerful interests" to stop Gama from taking over. He is the second ANC bigwig, after minister of justice and constitutional development Jeff Radebe, to throw his weight behind Gama.

"The problem is that I am also cited as a person who is involved or was associated with a company that got a contract with (Transnet) Freight Rail. So I don't think my comments would be viewed objectively. But what I can say is that there is a lot of dirt. I am really concerned about what is happening."

A security firm with links to Nyanda was apparently given a R19-million contract by Gama. It is alleged that he did not follow procedure. He is also being probed for a tender to buy 50 locomotives.

Gama received a notice of suspension last Monday, two days before the cabinet was due to endorse his appointment. That was despite allegations received by the Public Service Commission as far back as November 2007.

Ramos has also been accused of scuppering his appointment, as she raised the allegations at her last board meeting in February, at which the appointment of a CEO was on the agenda.

Gama's appointment has been endorsed by the ANC's national working committee, on which Nyanda serves.

Transnet is undertaking an R30-billion capital expenditure programme which has been beset by allegations of tender rigging, corruption and wasteful expenditure.

NB

BV

"F13"

Generally corrupt

It was the ANC kindergarten's Wee Julius who said that if the Karaoke King was corrupt then "give us a corrupt president". We all know who is singing for his supper in Tuynhuys now, so perhaps we should take note when ANCYL second-in-command Vuyiswa Tulelo says disciplinary charges will not keep Siyabonga Gama out of the Transnet penthouse. "Comrade Gama will become the CEO by hook or crook," she said.

B/P

Just a ploy to remove him

I STRONGLY believe that Siyabonga Gama is being pushed so that the interests of a certain clique can be realised. The clique's interests are not confined to Transnet, but straddle much of the government's economic cluster.

The sidelining of Gama is part of a well-orchestrated strategy designed to ensure that certain cronies exercise power over the economic organs of state, now and beyond their lifetimes.

— Kenneth Fitoyi

ANNEXURE "G"

-----Original Message-----

From: James Styan [mailto:james.styan@sake24.com]

Sent: 02 September 2009 03:33 PM

To: John Dlodlu Corporate JHB

Subject: FW: Suspension of Transnet Freight Rail CEO, Siyabonga Gama

Satawu has become aware of the suspension of Gama effected on 1 September 2009. Satawu is convinced that the suspension is informed by a dirty tricks campaign to discredit him publically and rule him out as the most suitable candidate as we have already questioned the timing of the charges. Secondly, the suspension occurring after charges have been issued is also unusual in that suspension is usually subject to investigation or at the very least takes place in the context of very serious charges.

Satawu is reliably informed that the Carlton Centre cabal led by the acting GCEO, Chris Wells with a direct link to former GCEO, Maria Ramos is hell bent on ensuring that Gama does not get the job. We are further reliably informed that a certain Sipho Maseko from British Petroleum who is a protégé of the former Board chairperson, Fred Phaswana is being positioned for the job by the Board. All of this is more than indicative of the fact that there is deliberate strategy at play by this grouping who wishes to perpetuate the status quo by getting in a so called African candidate who will be a controlled puppet by the current white executives in place.

Satawu wishes to strongly caution the current Board and Exco not to create instability in the business by attempting to circumvent decisions that are to be taken by the Cabinet (Executive) in appointing the CEO of Transnet. Satawu understands that both the appointments of Saki Macozoma and Maria Ramos were made by the Executive through the Minister of Public Enterprises, why should it be any different now.

Satawu will ensure that no puppet appointment takes place until the disciplinary process of Gama is completed even though at the cost of

keeping
 the untransformed cabal in place a little longer. Satawu is in the
 process of
 engaging internally with a view to launch an intensified
 transformation
 campaign using the Employment Equity Act to clean up the lily white
 Transnet
 Capital Projects and ensure an investigation into a company called
 Hatch which
 have been given all the major projects.

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Editorial of C. Press

Meddling with Transnet matters

THIS level of political interference at Transnet does not bode well for the effective management of parastatals.

At last count the Presidency, ANC headquarters, Justice Minister Jeff Radebe, the ANC Youth League and trade union federations Cosatu had all insisted that the Transnet board appoint suspended executive **Sibusiso Gama as chief executive.**

It is an unprecedented level of political pressure exercised on what is supposed to be a board appointed by government but which operates with autonomy and respect for its professional and expertise.

What's at stake here? A race imbroglio or an important and apostolic court case?

Transnet is being sued by Gwladys Zungu, who sought to buy the parastatal's stake in MTN in 2005. The deal was cancelled by former chief executive Maria Ramane and Zungu sued Transnet. The case goes to court next week.

Ramane was minister in 2005. Zungu is an ally and reported ANC member.

In court next week Zungu will demand R618 million from Transnet in damages. Could this possibly be one of the reasons the ANC is going out on a limb? Is it hoping that a politically appointed chief executive will quickly settle this case?

After a **flimsy selection process** the board had put forward **Pravin Gordhan as a candidate** but he became finance minister nominee.

The next preferred candidate was **Sibusiso Gama**, the ex chief

who this week pulled out of the race. **Who can blame him?** The political heat would have wilted any candidate but Gama.

Even for him the politicians have turned this vital job into a poisoned chalice because if he gets the job it will mean as if he is only there by the grace of the ANC.

By all accounts Gama is a popular and talented rail executive. He runs Transnet's most complex and important rail freight unit and he was part of the team that brought stability to the troubled rail parastatal.

But the board and management felt he had mismanaged the tender process by not being rigorous enough in his oversight thereof.

Gama tells his side of the story in this week's City Press and he is fighting his reputation in the courts.

The question of who is right or wrong is really not for the ANC to determine. Neither is it terribly good practice to level the race card at the board and the executive team at Transnet.

The board is diverse and its non-executive directors include Christine Ramona, Ndlovu Zangigile and Peter Moyo.

Their reputations are being sullied and it will be a real surprise if they walk in the next fortnight.

Also in a tight spot is Public Enterprises Minister Barbara Maseko, who has to make the nomination of Transnet chief executives to cabinet. Caught between her party and the board, she is damned if she does and damned if she doesn't.

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accusations levelled against him by Mr Gama in relation to an aspect of one of the transactions in issue in the disciplinary proceedings. The applicant, however, disavows any reliance on an unfair labour practice under of the Labour Relations Act, No. 66 of 1995 (the LRA) for reasons that ought to be clear when dealing with jurisdiction. What they do concern, according to what is set out in the applicant's heads of argument, are "... issues of public law, administrative justice, corporate governance and legality, as well as fairness in corporate actions." During argument Mr Nixon on behalf of the applicant explained that all these issues are confined to the legality of the delegation of authority to Mr Maharaj by Mr Wells. Nonetheless they appeared to also enter the realm of fairness of corporation decision-making functions and its impact on the applicant's constitutional rights.

- [5] The factual basis underpinning the legal challenge is that Mr Wells was precluded from delegating the decision-making power to bring disciplinary proceedings against Mr Gama or to suspend him by reason of Mr Gama's own accusations against

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Mr Wells, and that Mr Wells' alleged involvement in the process continued to have an influence over the Board and did assert itself over one of the Board's appointed sub-committees. In short Mr Wells' involvement in the process, however, tangential, rendered the entire process tainted.

- [6] The nub of the complaint is the perceived bias of Mr Wells. This is evident from the following extract of Mr Gama's replying affidavit:

"It was specifically in relation to the authority of Mr Maharaj to take a decision to institute disciplinary action (or suspension), what was stated by my attorney, Mr Langa, was that if the Board had delegated authority directly to Mr Maharaj, there might not have been an objection. However, the objection arose because Mr Maharaj was purportedly sub-delegated this authority by Mr Wells. Mr Wells should have had no involvement at all in the matter and he should not have sub-delegated such authority to Mr Maharaj in circumstances where Mr Wells was not objective or independent. Clearly Mr Maharaj has acted on the instructions and at the behest of Mr Wells."

- [7] The allegations that Mr Wells' continued involvement in making reports to the full Board after Mr Gama had accused

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and to suspend him on full pay until either the disciplinary process was finalised or until the suspension was lifted.

- [3] Mr Maharaj's decisions are challenged in proceedings brought by way of application before this Court they are challenged on the grounds that the current Acting Group Chief Executive (GCE) of Transnet, Mr Wells, could not delegate his admitted authority in such matters to Mr Maharaj. The applicant contends that only the *full* Board of Transnet could take the decisions to bring disciplinary proceedings against him or to authorise his suspension.

THE ISSUES

- [4] At the outset, I admit to sharing the difficulties expressed by the respondents in appreciating the basis of the challenge. The heads of argument presented on behalf of the applicant contends that the process followed of bringing disciplinary proceedings and of suspending Mr Gama were not lawful or fair in that Mr Wells could not delegate his powers to Mr Maharaj. The reason advanced is that Mr Wells, was tainted by

ANNEXURE 'I'

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 09./38956

In the matter between:

GAMA, SIYABONGA

Applicant

and

TRANSNET LIMITED
AND 12 OTHERS

First to Thirteenth Respondents

JUDGMENT

SPILG J.

THE ALLEGATIONS

[1] Mr Gama is the Chief Executive Officer of Transnet Freight Rail (TFR), previously known as Spoornet. TFR is one of apparently four operating divisions of Transnet Limited.

[2] On 1 September 2009 Mr Maharaj, who is the Group Executive: Human Resources of Transnet Limited (Transnet) took the decision to institute disciplinary proceedings against Mr Gama



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Mr Wells of shifting the blame onto him in respect of a locomotive contract to which one of the disciplinary charges against Mr Gama related. It is apparent that the thrust of the applicant's complaint against the decisions taken by Mr Maharaj, and their support by a sub-committee appointed by the Transnet Board as well as the subsequent endorsement or ratification by the full Board itself, concerns the influence that Mr Wells is said to have exerted over Mr Maharaj and the Board. It is also contended that Mr Maharaj was too junior to take the decisions. Although that position appeared to have been abandoned in the cited extract from Mr Gama's replying affidavit, I shall nonetheless deal with it.

- [8] In order to put in perspective the issue of perceived bias on the part of Mr Wells and its alleged impact on the legality of the decisions taken by Mr Maharaj, their endorsement or ratification by the Board's sub-committee and the subsequent full Board in perspective, it is necessary to set out the basic complaints that are the subject matter of the disciplinary enquiry against Mr Gama. It is also necessary to set out Mr

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Gama's allegations as to why Mr Wells is biased against him and why this has tainted the entire disciplinary process launched against him.

- [9] The sequence of events from initial investigation to an internal forensic audit conducted by Ernst & Young as well as subsequent investigations prior to Mr Maharaj taking the challenged decisions concern, if proven, serious allegations regarding the maladministration in respect of two separate contract awards. The first related to the impropriety of a tender process regarding what has been termed the "50 like-new locomotives" and which I will refer to as "the locomotive contract". The second disciplinary charge relates to the procurement of security services from General Nyanda Security Risk Advisory Services (Pty) Limited (GNS).
- [10] The disciplinary charge in respect of the locomotive contract is that Mr Gama concluded the agreement in disregard of an express condition laid down by Transnet's Board that Transnet Rail Engineering should carry out all engineering on the assembly and maintenance of the locomotives. It is alleged



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that the failure to adhere to this Board stipulation resulted in serious financial consequences for Transnet.

[11] Among the averments in relation to the GNS contract is that Mr Gama concluded this agreement without following an open tender process and without having authority to do so. The applicant's authority regarding a contract of this nature is said to be limited to a value of R10 million, whereas the total estimated value of the GNS contract was just under R19 million and that to date some R55 million has been spent.

[12] In his formal response of 20 July 2009 Mr Gama for the first time contended that Mr Wells was attempting to shift the blame for the overspend on the locomotive contract and that in fact it was Mr Wells who had adversely affected Transnet financially by intervening in the locomotive contract and "*unwinding the transaction*". It is this complaint against Mr Wells together with averments that Mr Wells and certain others are conspiring to destroy Mr Gama's chances of becoming CEO of Transnet that form the foundation of perceived bias. The applicant alleges that this bias has

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tainted the process and explains why disciplinary steps are being taken against him only at a stage when the appointment of a new GCE by Government is imminent.

[13] Mr Gama originally relied on Mr Wells being a co-contender for the Transnet GCE position. However, the facts reveal that Mr Wells withdrew his candidature at an early stage. Nonetheless, Mr Gama persisted with the allegations that Mr Wells' involvement directly taints the process and that Mr Wells is also involved in a conspiracy to prevent Mr Gama from becoming the next CEO of Transnet.

[14] In regard to the legal consequences raised by Mr Gama's allegations of taint and bias in the delegation process and why only the full Board could consider the issues, the applicant has relied on a failure of administrative justice, a breach of his constitutionally protected rights and an entitlement to challenge the legality of the process adopted by reference to what can best be described as either a common law power of review arising from the contractual relationship between the parties or arising out of fair corporate governance principles.

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[15] The application was brought as one of urgency. It was contended that Cabinet was about to consider appointing the new GCE for Transnet. It was also contended that the very act of taking disciplinary proceedings against him and particularly of suspending him is seriously damaging to Mr Gama's reputation. When it was revealed that Cabinet was not due to meet during the week when the application was set down for hearing, the applicant sought to contend that the matter was no longer urgent. However, the respondent's position was that a delay in the resolution of the issues raised was prejudicial to the entire disciplinary process. A delay would frustrate an expeditious resolution of the disciplinary proceedings and the suspension issue. A delay would also have a debilitating effect on Transnet and possibly the appointment of a new GCE. I also believe that important public interest matters arise concerning accountability and their expeditious resolution having regard to the circumstances of this case and its impact on possibly the largest State-owned and taxpayer funded enterprise.

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[16] I was satisfied that the matter was sufficiently urgent to be dealt with on an accelerated basis. At that stage all that remained outstanding was the applicant's replying affidavit which he had undertaken but failed to file prior to the set down date. The replying affidavit was subsequently filed and the matter was heard on Friday, 25 September 2009.

[17] A further issue that was raised, by me, concerns Mr Gama's contract of employment. On analysis it appeared that the applicant still relied on a common law review based on fairness which was to be implied from the contractual relationship. On Wednesday, 30 September, I heard argument on whether or not the contract should be furnished. My concern was that a further application might be brought to the High Court based on the terms of the contract and that it might be contended that issues relating to the actual terms of the contract, or those to be inferred from it, were not before me. I was concerned that a process of launching one High Court proceeding after another, whether by the one party or the other, would effectively undermine the proper

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administration of justice and frustrate the desirability of finality in litigation.

- [18] I was assured by the applicant that there would be no further proceedings before the High Court in relation to the issues raised before me or in relation to any challenge or claim arising out of the employment contract itself. I was assured by all the parties that the contract was not relevant to a determination of any of the matters that had been identified, including the possibility of a common law review to be discerned from the contractual relationship. I am, in any event, bound by the SCA and constitutional authorities that require a court to confine itself to the record of evidence placed before it (e.g. *Director of Hospital Services v Ministry* 1979 (1) SA 626 (A)).
- [19] A subsidiary issue raised was whether or not the joining of all the remaining members of the Transnet Board was competent.
- [20] This left one other issue of concern to me. Although all the parties contended that I enjoyed jurisdiction for one or other

reason, it remained necessary to be satisfied that the High Court enjoyed jurisdiction outside the consent of the parties.

JURISDICTION

[21] All the parties have effectively consented to the jurisdiction of this court. However, the parties cannot clothe the High Court with jurisdiction if it is excluded by statute.

[22] I must therefore consider whether the provisions of section 157(1) of the LRA precludes the High Court from dealing with the matter on the ground that the issues before me can only be determined under the exclusive jurisdiction accorded to the Labour Court. See *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para 113.

[23] Fortunately it is unnecessary in the present case to deal with the tension between section 157(1) on the one hand and the concurrent jurisdiction of the High Court as dealt with in section 157(2) of the LRA and the inherent original jurisdiction of a High Court as entrenched in the Constitution on the other. Accordingly, the case of *Makhanya v University of*



Zululand [2008] 8 BLLR 721 (SCA) which binds me on what portion of the *Chirwa* judgment (which also binds me) constitutes its decision need not be considered in any detail.

- [24] I am satisfied that the way in which the applicant has pleaded his claim (see *Makhanya* at paras [30] and [34]) and the substance of the claim (see *Chirwa* at paras [124] and [125]) falls squarely within the concurrent jurisdiction of the High Court. This is because they both are concerned with a constitutional challenge based on rights of administrative review (see *Chirwa*, para [54]; *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA) at para [16] and *Makhanya* at paras [18] and [26]) and also with the enforcement of common law contractual rights or rights under corporate law in relation to the exercise of delegated powers. (Compare *Kriel v Legal Aid Board* [2009] 9 BLLR 854 (SCA) at para [16] which appears distinguishable because reliance was still placed on the unreasonableness of the dismissal). The question of whether the applicant has embarked on 'forum shopping' and therefore may be precluded as a matter of policy from pursuing his



claim in the High Court does not arise since he has not approached another Court to enforce the claims that arise in this matter. (See *Makhanya* at para [61])

- [25] Furthermore, the resolution of the issues in this matter are also concerned with the legality of steps taken to initiate disciplinary proceedings against a person whom it is alleged is guilty of maladministration and that Transnet considers itself obliged to pursue the disciplinary proceedings since the investigations allegedly reveal a breach of the Public Finance Management Act, No. 1 of 1999 ("the PFMA"), a concern supported by independent legal advice from two different law firms.
- [26] It is pre-eminently the concern of a High Court exercising original jurisdiction to consider issues of this nature, if the underlying substance of the issues play a role as indicated in *Chirwa*. They involve rights issues, which it is apparent from the stance taken by Transnet, ought not to be the subject matter of conciliation and negotiation by reason of the

obligations they were advised they have to initiate disciplinary proceedings by reason of an alleged transgression of the PFMA.

- [27] It should be sufficient for present purposes to refer to *South African Association of Personal Injury Lawyers v Heath and others 2001 (1) BCLR 77 (CC)* at para [4] where the Court said that:

"... and maladministration are inconsistent with the rule of law and the fundamental values of our the Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

- [28] Although this was said in the context of the Special Investigating Units and Special Tribunals Act, it is clear that the purpose of the PFMA Act is similarly to hold accountable both the Board and officers (such as Executive Management) of State-owned corporations and other government controlled entities. I also refer to sections 195(1) and (2)(b) of the Constitution which requires public administration to be

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accountable and to meet high standards of professional ethics. If the application of these constitutional provisions and statutes such as the PFMA are to develop and be applied with reference to public accountability within State-owned corporations then it is pre-eminently the domain of the original jurisdiction exercised by the High Court (with the added advantage of its diverse composition) and ought not to be confined to a specialised court concerned exclusively with labour relations matters.

- [29] Accordingly, I am satisfied that this court enjoys jurisdiction under any of the authorities by which I am bound and which I understand are likely to be considered further in the matter of *Gcaba v Minister of Safety and Security and others* (CCT 64/08) that was argued before the Constitutional Court on 7 May 2009.

STATUS OF TRANSNET

- [30] It is necessary to establish the status of Transnet in order to determine whether its Board and management function

principally within a commercial corporate environment subject to principles application to those areas of law or whether their actions are to be treated as simply the exercise of a state or administrative power.

[31] Transnet Limited was incorporated as a public company pursuant to the provisions of the Legal Succession to the South African Transport Services Act, Act 9 of 1989 (the Legal Succession Act).

[32] In terms of this Act, Transnet became the successor to the South African Transport Services and took transfer of all its assets (save those relating to certain rail commuter services).

See section 3.

[33] In terms of the Legal Succession Act, and despite the provisions of section 32 of the Companies Act, 1973 the Registrar of Companies incorporated Transnet Limited as a public company with the State as its only member and shareholder. Moreover, the provisions of section 2(6) of the Legal Succession Act excluded only sections 66, 190 and 344(d)

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of the Companies Act from applying and then only while the State remains the sole beneficial member and shareholder.

[34] Accordingly, Transnet is essentially subject to all the provisions of the Companies Act.

[35] It is clear that Transnet is intended to operate as a commercial enterprise under the ordinary provisions of the Companies Act and is subject to the common law principles governing corporations including those relating to corporate governance which render its Board and management subject to fiduciary obligations. Its formation as a public company was directed at transforming it from a government agency (see section 3 of the Legal Succession Act) and at allowing it to operate on profitable commercial lines with the potential of attracting investor shareholders (see the wording in section

Transnet to discontinue any activity that is contrary to the strategic or economic interests of the country (see section 17). In principle this is no different from the actions of a majority shareholder who dictates the course a company is to take. It does not affect the Board's or management duties to have regard to the best interests of the company and to comply with all the common law rules relating to corporate governance.

[37] Transnet was not burdened with an unprofitable operating division. Hence the separation of those rail commuter operations which required subsidisation. These were hived off to a separate entity, namely the SA Rail Commuter Corporation Limited under the responsibility of a different Minister. (See Chapter V of the Legal Succession Act)

Memorandum and Articles of Association under the Companies Act. Hence the Transnet Board and its executive officers are clearly intended to be subject to the provisions of the Companies Act and the common law, such as that relating to corporate governance, that has developed in relation to corporations. (See Coetzee DJP's explanation in the Full Bench decision of Ex parte NBSA Centre Ltd 1987 (2) SA 783 (T))

[39] The fact that the Transnet Board and its officers are subject to the express provisions of sections 50 and 51 of the PFMA in regard to their fiduciary duties and their accountability does not denigrate from their actions remaining subject to corporate laws. The PFMA amplifies these duties and obligations, which are of special application to all State-owned entities, whatever from they take.

[41] In short, whilst Transnet is a State-owned enterprise its structure and objectives are those of a public listed company and its board and officers execute their functions within the laws relating to corporations with, where applicable, the heightened duties and responsibilities imposed by the PFMA.

WHETHER THE DECISIONS TO INSTITUTE DISCIPLINARY PROCEEDINGS OR TO SUSPEND THE APPLICANT CONSTITUTED ADMINISTRATIVE ACTION SUBJECT TO THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000 ("PAJA")

[42] Transnet is specifically identified as a major public entity under Schedule 2 of the Legal Succession Act. It is also a statutory body, fulfilling a public function and is obliged to act in a manner consistent with the strategic and economic interests of the country. See Section 17 of the Legal Succession Act.

[44] *Chirwa, Transman and Makhanya* have confirmed that a Transnet employee or a person in a similar position, even though a public servant of an organ of State, is precluded from challenging his dismissal by relying on the rights of review provided for under PAJA. This is because the decision does not constitute "administrative action" for the purposes of triggering the application of that Act but is based on the exercise of a contractual power (*Chirwa* at paras 142, 143 and 148; *Kriel v Legal Aid Board* [2009] 9 BLR 854 (SCA) at paras 13 and 14 and the cases cited at para 15).

[45] It is therefore evident that the decision to delegate the authority to decide whether or not to discipline Mr Gama is not justiciable under PAJA. In any event, the decision in my view is similar to a decision taken to prosecute which does not necessitate administrative action and is not subject to review.

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Although it may be contended that the suspension of one of the highest-ranking executives within Transnet, responsible for one of its most important operating divisions, impacts on the operations of an organ of State, it nonetheless constitutes the exercise of a power conferred under corporate law in discharge of a corporate function involving both corporate and commercial considerations.

COMMON LAW AND CONSTITUTIONAL RIGHTS TO CHALLENGE

[47] A company can only perform acts through its duly authorised directors, managers and employees. This requires the appropriate delegation of powers, generally with appropriate limitations. The source of these powers generally reside in the Board which in turn delegates to individual directors or executive management with further powers of sub-delegation conferred by appropriate Board resolutions.

[48] The respondents argued that the Board has the power to delegate management functions in general and disciplinary powers in particular under section 24(5) of the Legal

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Succession Act. In my view this is incorrect. Section 24(5) falls within the provisions of Chapter V which deals with a different legal entity, namely the South African Rail Commuter Corporation. I have already dealt with their separate legal existence from Transnet, how it arose and why the governance of Transnet is to be founded under corporate law principles.

- [49] Mr Pretorius, on behalf of the first to third respondents, also relied on Article 81 of the Articles of Association of Transnet which provides that, subject to certain limitations that are not relevant, the management of the business and the control of Transnet vests in the directors who *"... in addition to and without limitation of the powers expressly conferred upon them by the Companies Act or these Articles may exercise or delegate to any one or more persons (including without limitation a committee) all such powers and delegate to anyone or more persons (including a committee) the doing of all such acts (including the right to sub-delegate) as may be exercised or done by the Company and are not in terms of the*

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Companies Act or by these Articles expressly directed or required to be exercised or done by a general meeting, subject, nevertheless, to that management not being inconsistent with any resolution passed by a General Meeting."

[50] Furthermore, under Article 82, the directors are accorded the power to appoint such sub-committees with such functions and powers as the Board may consider necessary for the effective exercise of its functions.

[51] The applicant does not challenge resolution 2004/P4 of 2004 which delegated functions including disciplinary powers to the Group Chief Executive of Transnet. The applicant also accepts that in terms of that resolution the Group Chief Executive was entitled to sub-delegate his or her powers. Although the legality of the sub-delegation by Mr Wells in his capacity as Acting GCE is challenged, the applicant accepts that Mr Wells sub-delegated his disciplinary powers to Mr Maharaj. Indeed, Mr Gama had previously been brought a

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disciplinary body pursuant to the exercise of these delegated powers.

[52] For reasons that appear in the previous section, there can be no administrative justice challenge under PAJA to the delegation and sub-delegation of the powers conferred on Mr Maharaj to consider whether or not to bring disciplinary charges against Mr Gama.

[53] The question of whether the delegation of the authority to consider bringing disciplinary charges against Mr Gama or to suspend him involved a breach of a constitutional requirement or of a common law right under contract or corporate governance needs to be considered both by reference to the facts and the existence of the legal right contended for in the circumstances of the case. It is accordingly necessary to set out the facts in some detail.

THE FACTS

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[54] The key facts are not in dispute. Accordingly it is unnecessary to invoke *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), bearing in mind that the applicant effectively seeks final relief.

[55] On 31 January 2008 the then Minister of Public Enterprises addressed a letter to Transnet's then chairperson, Mr Fred Phaswana. Mr Phaswana was informed that the Department of Public Enterprises had received information concerning allegations of "... corruption and procurement irregularities in Transnet, relating in particular, to the awarding of the locomotive tender." The Minister conveyed the Department's concern that it was necessary to investigate and assess the alleged irregularities. The irregularities related to what has been previously referred to also as the "50 Like-New Contract".

[56] Investigations then commenced during the first half of March 2008 and focussed principally on irregularities in the tender process. During May 2008, disciplinary action was instituted against the then General Manager: Engineering in TFR who was

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considered at the time to have been primarily responsible for the procurement process, namely the.

- [57] During the course of the investigation, it appeared that Mr Gama had concluded the locomotive agreement on the strength of a specific Board resolution but that he had not complied with the condition to which the Board approval was subject, namely "*.. that Transwerk would carry out all engineering on assembly and maintenance*".
- [58] During September 2008, Transnet's then Group Chief Executive (GCE), Marla Ramos, received an anonymous letter alleging irregularities in TFR's Security Department. This included the award of a security contract to GNS.
- [59] In both October and November 2008 a number of further anonymous communications were received, including by the GCE, all relating to alleged misconduct and irregularities in the TFR Security Department.

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- [60] At a meeting held with Transnet's group forensic manager, and Mr Oates of Ernst & Young who are Transnet's internal auditors, Mr Gama was informed of the anonymous communications. He was advised that the internal audit department would be conducting investigations.
- [61] On 12 February 2009 Mr Oates forwarded a draft status report to Ms Ramos at her request relating to both investigations, i.e. in respect of the locomotive acquisitions and the GNS contract.
- [62] On 13 February 2009 Ms Ramos, at her last Transnet board meeting as GCE, briefed it on the status of both investigations. Ernst & Young's draft status report identified concerns about Mr Gama's role and conduct in relation to each of the investigations. Ms Ramos then handed over the issues raised in the investigations to the Board.
- [63] Earlier on the same day, the Board, during the course of a closed session which excluded the executive directors, debated its preferred candidate to replace Ms Ramos' as GCE.

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Prior to the meeting, the Corporate Governance and Nominations Committee (CGM Committee) of the Transnet Board had decided on a short-list of five candidates pursuant to a process that had commenced in the last quarter of 2008, after Ms Ramos' intended resignation became known. Although Mr Wells had made himself available on 9 December 2008, he withdrew his candidacy three days later. This occurred before the first meeting of the CGM Committee was convened to consider candidates and before interviews were conducted on 9 and 10 February.

- [64] The shortlist of five candidates included Mr Gama. During its closed session the Board recommended Mr Pravin Gordhan as its preferred candidate to the Minister. The other candidates were not ranked. However, the Board's recommendation that was conveyed on 13 February 2009 through its then Chair, Mr Phaswana, was that Mr Gama was not suitable for appointment as GCE. The Minister was advised that *"Mr Siyabonga Gama, was thoroughly considered but there are important gaps, relative to the requirements for this*

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position. He currently requires greater cognitive development to handle the complexity of this position."

- [65] After Mr Pravin Gordhan had withdrawn as a candidate, the Minister requested profiles in a detailed report on all the other candidates. On 9 March 2009 Mr Phaswana responded. Mr Phaswana's letter again indicated concerns regarding Mr Gama and added that since the previous letter of 13 February 2009 to the Minister, the Board had received documentation and reports including the internal auditors' report, that contained serious allegations of misconduct on the part of Mr Gama, and which required the company to conduct investigations. Mr Phaswana indicated that it was necessary to commence a new appointment process *"... as none of the other shortlisted candidates are at the level required."*

- [66] After the Board meeting Mr Phaswana then dealt with the report together with the chairpersons of the Board Committees, namely the Risk Committee, the Remuneration Committee and the Audit Committee. At that time Mr Everingham was the chairperson of the Audit Committee.

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They then discussed the Ernst & Young report on 19 February 2009. Subsequently a meeting was held with attorneys appointed by the Board for the purpose of apprising them of the report and to obtain advice. On 26 March 2009 the attorneys advised that the PFMA "... obliges Transnet's Board to take disciplinary steps against the TFR CE [Mr Gama]".

- [67] On 23 April 2009 Transnet's head of internal audit, together with the attorney who provided the advice, reported on the forensic investigation to a closed session of the Board Committee Chairpersons. The Board decided to hand the investigation regarding both contracts over to the Executive. It was also decided that Mr Wells would review the advice given and, in his capacity as acting GCE, would take appropriate steps on behalf of Transnet.
- [68] Mr Wells then also sought legal advice from a different firm of attorneys. Its purpose was to establish Transnet's legal obligations in dealing with a matter of this nature and to advise on the appropriate process that should be followed.

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- [69] On 11 May 2009 Mr Wells held a meeting with Mr Gama and informed him of the legal opinion that Wells was considering following with regard to certain allegations made against Mr Gama. This is confirmed in a letter addressed by Mr Gama to Mr Wells on 18 May 2009.
- [70] In the letter of 18 May 2009 Mr Gama confirmed that during their discussion on 11 May 2009, he had referred to enquiries previously directed to him by Ernst & Young and contended that Ernst & Young's investigation was still on-going. Mr Gama expressed concern that his reputation could be prejudiced as a result of untested allegations. The letter concluded with Mr Gama urging that appropriate safeguards be taken to ensure that there would be no damage to his career or reputation as a result of any possible perceptions created or leaks as a result of Mr Wells' investigations.
- [71] At a special meeting of the Board held on 2 June 2009 Mr Wells updated the Board on the investigations and at a subsequent Board meeting on 18 June 2009, Mr Phaswana informed the Board that the forensic investigation had been

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handed over to Mr Wells for execution and finalisation. The Board was also advised that a report would be furnished once the investigations had been finalised.

[72] On 18 June 2009 Mr Wells addressed a letter to Mr Gama which confirmed the receipt of legal advice that had been obtained by the Board relating to the seriousness of the issues. This required that the matter be dealt with at an executive level and the letter informed Mr Gama that the Board had instructed him to deal with the matter.

[73] The letter of 18 June 2009 afforded Mr Gama an opportunity to respond formally to both the issues regarding the locomotive contract and also to the GNS issue. The letter was comprehensive and set out details of the complaints. In regard to the latter, one of the issues was that the contract approved by Mr Gama was for an estimated total value of R18,9 million whereas he only had authority to conclude a contract up to R10 million and also indicated that the process of appointing GNS *"was flawed and there is a strong indication that it was manipulated"*.



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- [74] On 19 June 2009 Mr Gama requested time to address the issues raised. He also requested the legal opinion obtained by the Board, and access to documentation at Transnet Rail Engineering (TRE) and Ernst & Young.
- [75] On 13 July 2009, Mr Gama then addressed a letter to the Chairperson, Mr Phaswana, referring to Mr Wells' refusal to provide a copy of the legal opinion. Mr Gama contended that this "... *vitiates the process of administrative justice and fairness*". The letter concluded with Mr Gama expressing concern that the tenure of the Board was nearing an end and it should not determine such an important or major decision "... *days or hours before the end of its tenure*" as it would infringe the duty of care required at a time when they would have what Mr Gama termed "*a diminished responsibility towards the company*".
- [76] On 17 July 2009 Mr Phaswana replied to Mr Gama. He stated that Mr Gama had no right to a copy of the legal opinion, nor was it necessary for Mr Gama to have the document in order to respond. Mr Phaswana also recorded that the initial

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investigations into both the locomotive contract and the security services contract had been conducted by the Transnet internal auditors before the Board took legal advice. He also rejected the suggestion that the outgoing directors of the Board had diminished responsibility and asserted that they remained subject to their fiduciary duties until their tenure on the Board ended.

- [77] On 20 July 2009 Mr Gama addressed a comprehensive response to Mr Wells, who was now the Acting GCE , to the allegations regarding both the locomotive contract and the security services contract. Mr Gama contended that when Mr Wells proceeded to unwind the locomotive transaction he had in fact incurred significant and unwarranted expense for Transnet and that Mr Wells was now attempting to shift the blame onto Mr Gama. Mr Gama contended that this was disingenuous and that in fact Mr Wells was now attempting to reinstate the original contract. Mr Gama claimed that Mr Wells' had adversely affected Transnet by wrongly intervening

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as he had done. Mr Wells was not implicated whether directly or indirectly in the security services contract.

- [78] A special meeting of the Board was held on 28 July 2009 at which Mr Wells updated the Board on the investigation. he did not advise the Board of Mr Gama's accusations against him. After Mr Wells left the meeting, a concern was raised about a perception that the Board had conflated the succession process with the forensic investigations. The Board emphasised that the February 2009 decision not to recommend Mr Gama for appointment as GCO on the grounds that unsuitability for the position had been raised before the Board who became aware of the forensic investigations. However, in view of the sensitivity surrounding the forensic investigations, and alive to a media report that there was a succession battle between Mr Wells and Mr Gama, the Board decided to appoint a sub-committee to assist Mr Wells in finalising the investigation and to notify the Board of its recommendations.

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[79] A sub-committee of the Board was then appointed. It consisted of the Chairperson of the Board, Mr Peter Joubert and Mr Everingham (who since 11 August has been serving as Acting Chairperson of the Board). This is recorded in the minute of the closed session meeting of 28 July 2009.

[80] The sub-committee met and came to the view that Mr Wells in his capacity as acting CGE should proceed with disciplinary proceedings against Mr Gama. The sub-committee considered further legal advice from Transnet's attorneys on 13 August 2009 that *"... there were grounds for concluding that Mr Gama had breached the provisions of the PFMA and that Transnet was obliged to take such disciplinary steps against him"*.

[81] Accordingly, both the then chairperson and his successor (Acting) as well as Mr Joubert had considered Mr Gama's letter of 20 July 2009 including the allegations made regarding Mr Wells and the conclusion sought to be drawn that the investigation had been motivated by Mr Wells' attempt to cover up his own mistakes.

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[82] The sub-committee then reported to the full Board at a special meeting held on 24 August 2009. At that stage Mr Gama's response of 20 July 2009 had still not been circulated to the full Board. Based on the sub-committee's recommendations, which considered Mr Gama's response, the full Board noted that the sub-committee had discharged its obligations in assisting Mr Wells to finalise the forensic investigation matters and in the circumstances (including a consideration of the legal advice taken) the full Board "**RESOLVED** unanimously that the acting Group Chief Executive should give effect to necessary disciplinary action."

[83] Subsequent to the meeting, and on 24 August 2009, Mr Maharaj in his capacity as Group Executive : Human Resources addressed a notice to Mr Gama which was received by Mr Gama on the same day.

[84] The document is headed "*Notice to attend a disciplinary hearing*". This notice informed Mr Gama that a pre-dismissal arbitration would be held into allegations of misconduct or incapacity on the grounds set out in the body of the notice.

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The grounds related both to the locomotive contract and the security services contract. It further informed Mr Gama that a pre-hearing meeting would be held at the offices of Bowman Gilfillan Attorneys on 27 August 2009 for the purpose of dealing with the conduct of the hearing, to resolve any preliminary issues that were capable of resolution and to ensure that the hearing would run smoothly.

- [85] The notice to attend a disciplinary hearing recorded that investigations into the security services contract had not been finalised and that Transnet reserved the right to deal with further matters that may be revealed.
- [86] The notice then dealt with the issue of suspension. I quote the relevant paragraph in full:

"Because of the seriousness of these allegations and the fact that, if proven, they may demonstrate that you cannot be trusted to execute your responsibilities in your present position and may result in your dismissal, and since, in these circumstances, your continued presence in the workplace may be prejudicial to the conduct of the enquiry itself Transnet is contemplating suspending you from your

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employment pending completion of the disciplinary process. You are invited to make written representations on the question whether it would be appropriate to suspend you pending completion of the disciplinary process and what other measures, if any, Transnet should consider to protect its interests during that period. You should address any such representations to Pradeep Maharaj by 12h00 on Wednesday, 26 August 2009."

- [87] On 26 August 2009 Mr Gama's attorneys addressed a letter to Mr Maharaj. The letter was copied to Prof. Everingham (now Acting Chairperson of Transnet, to Mr Wells as Acting GCE, the Minister of Public Enterprise and the Deputy Minister of Public Enterprise. The letter recorded that Mr Gama objected to the validity and fairness of the steps being taken against him both in relation to the proposed disciplinary hearing and the proposed suspension. It was contended that these steps were taken and timed with a view to prejudice Mr Gama's prospects of filling the vacancy for the Group CEO position of Transnet *"... for which our client is deemed to be a favourite / front-runner to be appointed in this position"*. This was in view of the fact that Cabinet was due to take a decision on the suitable candidate on or shortly after 26 August.

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[88] The letter of 26 August also stated that the actions were deliberate, devoid of good faith and motivated by an ulterior purpose. The letter then proceeded to challenge Mr Maharaj's authority to issue the notice of 24 August. Furthermore, it was also contended that Mr Wells and Maharaj had already predetermined to suspend Mr Gama before allowing him an opportunity to make representations.

[89] The letter of 26 August 2009 contended that the process was not bona fide, had been manoeuvred to create unnecessary urgency with the intention of prejudicing Mr Gama. The letter required proof of the authority upon which Mr Maharaj was entitled to issue the notice of 24 August, required additional time to submit representations in respect of his proposed suspension and required to be notified of the person responsible for considering whether or not to suspend Mr Gama and the basis of such authority.

[90] In this regard, Mr Gama's contended that only the full Board of directors should fairly and legally decide on his possible suspension. This was by reason of Mr Gama's seniority in

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Transnet and the allegations made against Wells which precluded him from taking such a decision. In the letter, confirmation was sought that the Board would take the decision regarding suspension. Mr Gama also requested an opportunity to personally address the Board *"... in order to share other or further information that would indicate a conspiracy against him so as to place the Board in a better position to determine whether to suspend him or not."*

[91] Mr Gama was afforded an opportunity until noon on 28 August 2009 to make representations in regard to his possible suspension. The letter expanded on the concerns that gave rise to considering Mr Gama's suspension and include that the allegations, if proven, may result in a finding that Mr Gama is unfit to hold office which would result in serious risks to the business if he continued to hold office.

[92] Furthermore, in the letter it was contended that the disciplinary process itself may have a very serious impact on Mr Gama's ability to run his division and to work effectively within the executive team under the leadership of the current

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Acting GCE. It was claimed that the situation was exacerbated by reasons of Mr Gama's allegations of a conspiracy in relation to both the substance and the timing of the process. The letter also indicated that management of the TFR executive team was likely to become very difficult during the period of the disciplinary process and that there was a real possibility that Mr Gama would not be able to devote the necessary time and attention to TFR business while dealing with the serious disciplinary allegations. Mr Maharaj indicated that he would be taking the decision on suspension in his capacity as Group Executive : Human Resources *"under authority delegated to me by the acting group CE (and in consultation where necessary with the acting group CE)"*. The letter claimed that all steps had been taken with the full knowledge and support of the Board.

- [93] On 27 August 2009 Mr Gama's response of 20 July 2009 was circulated to the full Board. Accordingly the full Board became aware of the allegations that Mr Gama had made against Mr Wells and his motives.

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[94] On 31 August 2009 Mr Gama's attorneys addressed another comprehensive letter to Mr Maharaj dealing with the issue of Mr Gama's proposed suspension. Prior to that Mr Gama's attorneys had also indicated that the disciplinary hearing could only be chaired by an independent, senior and suitably experienced legal practitioner who has no connection with either of the parties.

[95] On 31 August Prof Everingham's attorneys responded to the letter of 26 August. The letter dealt with matters covered elsewhere in this judgment.

[96] On 1 September 2009 Mr Maharaj addressed a letter to Mr Gama stating that he had given careful consideration to the representations made in relation to the question of his possible suspension. Mr Maharaj advised Mr Gama that on the basis of a legal opinion provided to him, he was satisfied that he had the necessary authority to take the decision in relation to the question of suspension. Mr Maharaj stated that after balancing the representations made against the interests of Transnet "... during this difficult period" he decided to

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suspend Mr Gama from his duties with immediate effect and that the suspension would continue until disciplinary process was finalised or until the suspension was lifted. Mr Gama was requested to advise whether he required written reasons for the decision.

- [97] On 2 September 2009 Mr Wells issued a statement advising of Mr Gama's suspension and that disciplinary process enjoyed the Board's unanimous support. It also confirmed that disciplinary hearing would be adjudicated by an independent and external arbitrator.
- [98] At a subsequent meeting on 10 September 2009, the full Board unanimously confirmed its resolutions of 24 August 2009 and of 28 July 2009.
- [99] In my view the undisputed facts reveal the following:
- (a) The allegations of misconduct are serious and there is no objective indication that they have been trumped up. The reason is that they have been the subject

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matter of on-going investigations initiated well before any suggestion of Mr Wells' involvement in attempting to influence the outcome. The investigations and the decisions to institute disciplinary proceedings, including those against Mr Gama, have been subject to independent professional scrutiny by Ernst & Young, who are Transnet's internal auditor, (i.e. an independent auditor engaged as one of two independent auditors in order to satisfy good corporate governance principles) and also two sets of reputable firms of attorneys.

- (b) The advice given by the independent firms of attorneys was that the investigations revealed a breach of the fiduciary duties and responsibilities owed under the PFMA. They advised that Transnet had an obligation to take disciplinary steps against those who were considered on the evidence then available to be held accountable.

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- (c) Both the Transnet Board and its Executive had been concerned about their obligations to properly investigate the issues. There is no evidence to suggest that the investigations were ever put to bed and only resurrected because of Mr Wells' attempt to discredit Mr Gama or because of an attempt to prevent Mr Gama from being appointed as GCE of Transnet. On the contrary, the investigations were expressly passed on by Ms. Ramos in her capacity as out-going GCE of Transnet to the Board and the Board then proceeded to place the responsibility for further investigations in the hands of its Executive.
- (d) There can be no quarrel with the Board's delegation of its authority to investigate, consider initiating disciplinary proceedings or consider the possible suspension of Mr Gama to Mr Wells prior to 20 July 2009 when Mr Gama for the first time claimed that Mr Wells had an ulterior motive for proceeding against him. This is because the Board and Mr Wells had been

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acting in terms of the long existing delegated authority contained in a 2004 board resolution. Moreover, the authority of Mr Wells to sub-delegate these powers to another was on the face of it, pursuant to the same 2004 board resolution.

- (e) Both a sub- committee of the Board as well as the full Board have supported the decisions taken to proceed with disciplinary charges and to suspend the applicant.

[100] I proceed to consider whether the facts support the applicant's challenge to the delegation of authority to Mr Maharaj on constitutional or common law grounds (arising either out of principles of corporate governance or contract).

CONSTITUTIONAL CHALLENGE

[101] Mr Nixon on behalf of the applicant contends that the delegation of authority by a person who is tainted itself taints any steps taken by the delegated functionary. As I understand it the constitutional challenge goes to a

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perception of bias based on an interpretation of the constitutional principles governing public administration set out in sections 195(1) and (2)(b) of the Constitution. The contention that Mr Wells has exerted undue influence over the Board itself or a sub-committee of the Board extends the perception of bias to the decisions hitherto made by them as well. It, however, does not extend to the point that the full Board cannot now disabuse its mind and reconsider the entire matter since this is effectively the order sought by the applicant.

- [102] The SCA in *Zuma supra* at paras [36] - [38] confirmed three principles. Firstly, that a failure to comply with a constitutional or statutory requirement remains justiciable under the principle of legality, irrespective of whether or not PAJA applies. Secondly, actions in the realms of initiating charges against a person are not wrongful merely because it is brought for an improper purpose. Finally, in order to offend the requirement of legality there must, in addition to an

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improper purpose, be a lack of reasonable and probable grounds to support the decision taken.

[103] I have set out the facts in considerable detail. In my view reasonable and probable grounds exist for supporting the decision to institute disciplinary proceedings and to suspend Mr Gama.

[104] It should also be borne in mind that the disciplinary proceedings are to be conducted before an independent professional, and suitable skilled person.

[105] I wish to make it clear that my decision does not in any way suggest that Mr Gama may be found to have been properly charged. He is clearly innocent until proven guilty and he has set out comprehensive reasons as to why the charges are without merit. Nonetheless, as with any competent decision to initiate charges, it remains based on reasonable grounds. The requirements of accountable governance requires a proper and expeditious ventilation of the issues.

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[106] It was also contended that the decisions taken breached Mr Gama's constitutional right to dignity under section 10 of the Constitution. In my view, the fact that a person faces disciplinary charges of misconduct inevitably affects his or her dignity. The applicant accepts that such an infringement is the inevitable consequence of any competently brought charge. It, however, appears that the applicant's contention goes to the timing of the decisions taken, bearing in mind that he is a contender for the most senior position in possibly the largest State-owned corporation. Again, provided the requirements of legality in the process of bringing disciplinary charges and in suspending Mr Gama are met, the invasion of dignity is a necessary, reasonable and accepted consequence and a constitutionally sound limitation under section 36 of the Constitution. Moreover, the constitutional value of accountability addressed in the *SA Association of Personal Injury Lawyers* case *supra*, should not be overlooked in balancing competing constitutional interests.

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[107] There is also no case made out of perceived bias that can affect the legality of the process. Much less that of institutional bias. See *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) at paras [45] and [48]; *Sager v Smith* 2001 (3) SA 1004 (SCA) at paras [16] and [17] *Council of Review, South African Defence Force and others Mönnig and others* 1992 (3) SA 482 (A); *Swartz NO and Others v Wallach and Another* (WLD Case no. 15422/97, Judgment on 4 February 2002). I also refer to this aspect later.

[108] Accordingly, a case has not been made out for a valid constitutional challenge to the legality of the decision to delegate or any other element of the process upon which the applicant has sought to rely, even tangentially.

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CORPORATE GOVERNANCE AND OTHER COMMON LAW GROUNDS

[109] In my view Mr Gauntlett and Mr Pretorius, on behalf of the various respondents, are correct in their respective submissions that such a case has not been properly made out on the founding papers. There is no evidence of an implied term nor has a case been made out of some infraction of a corporate governance principle either in relation to delegation of power or in the competence of the person who has been delegated.

[110] The furthest the applicant has gone is to content that Mr Maharaj is under the influence of Mr Wells, that there is a perception of bias that taints the entire process (i.e. a form of institutional bias) or that Mr Maharaj is too junior to take the decisions.

[111] For the same reasons expressed earlier, I am satisfied that Mr Maharaj had the necessary authority. Furthermore, the mere fact that Mr Wells delegated his powers to Mr Maharaj cannot, without more, taint the decision taken by Mr Maharaj. There is no evidence placed before me to suggest that Mr Maharaj

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exercised anything other than an independent decision-making power notwithstanding the allegations, that are really conclusions without adequate foundation, made to the contrary and which I mentioned earlier.

[112] I am fortified by the decision relied upon by Mr Pretorius of *Bulla v Akhawarray: MEC Finance, Northern Cape Government* [2004] 3 All SA 693 (NC) at paras 4,5 and 23. I respectfully adopt and apply the position stated by Olivier J in that case.


[113] I have had some difficulty insofar as Mr Maharaj took the decision to suspend Mr Gama. Although Mr Maharaj and Mr Gama are at the same level of seniority (according to the respondents) the question of Mr Maharaj's competence to take a decision that is intrinsically concerned with the operational requirements of Transnet and its continued ability to function properly may have raised concerns. However, the applicant did not suggest that Mr Maharaj lacked the ability to make an informed decision and accordingly no factual basis has been laid to suggest this. Moreover, both a sub-committee of the Board and the Board itself had endorsed Mr Maharaj's decision

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to suspend Mr Gama. In the case of the Full Board, this was by way of a recorded Board resolution. The terms of the suspension make it clear that if the Board is so resolved it may at any stage reconsider the suspension.

[114] I have assumed that there are competent grounds for challenging under common law review or by an application of corporate governance considerations or contractual considerations the issues raised by the applicant. I would not wish this decision to be taken as an acceptance of any of the legal rights contended for.

[115] In view of the facts presented in this case, it is unnecessary to consider the legal arguments raised. I would, however, respectfully refer to the decision of Hodes AJ in *Pennington v Friedgood and Others* [2001] JOL 8973 (C) and his rejection of much of the argument raised by Mr Kennedy on behalf of the applicant.



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MISJOINDER

[116] In my view the applicant improperly joined the fifth to thirteenth respondents. The tenth and eleventh respondents did not oppose the application. All the other members of the Board in their capacity as Board members did so. The costs will form part of the main costs order.

[117] In my view it would be setting an undesirable precedent if a Board decision was challenged by requiring each and every member of the Board to either admit or deny allegations concerning decisions taken by the Board. A Board operates on principles of majority rule. In many cases these decisions are taken in closed session. Whilst there may exist exceptional circumstances where such a course ought to be left open to a litigant, I am satisfied that in the present case no such grounds have been disclosed.

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CONCLUSION

[118] The applicant has not made out a case for challenging the legality of the delegation of authority whether from the Board or by Mr Wells to Mr Maharaj nor can the decisions taken by Mr Maharaj be considered to be either tainted or raise adequate grounds for perception of bias.

[119] I also find that there has been an impermissible joinder of the fifth to thirteenth respondents. Since the tenth and eleventh respondents have not opposed the application, it is unnecessary to deal with any cost issue in relation to them.

[120] The decision I make clearly has no impact on any challenges that are open to the applicant under the LRA. In my view, there are no valid challenges to the decisions taken that arise within the jurisdiction of the High Court and which have been raised.

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[121] I accordingly make the following order:

The application is dismissed with costs, including the costs of the first to third respondents and of the fourth to thirteenth respondents (excluding the tenth and eleventh respondents), such costs to include the costs of two counsel.

SPIEG J

HEARINGS: 22, 25 and 30 September 2009

JUDGMENT: 7 October 2009

Applic; Adv P Kennedy SC

LANGA ATTORNEYS

1st-3rd Resp; Adv PJ Pretorius SC , Adv H Shozi

BOWMAN GILFILLAN ATTORNEYS

4th-9th & 12-13; Adv JJ Gauntlett SC,

Adv L Nokosi-Thomas, Adv H Maenetje, Adv M Blumberg

EVERSHEDS

ANNEXURE "J"

IN THE DISCIPLINARY MATTER BETWEEN:

TRANSNET LIMITED

The Employee r

and

S GAMA

The Employee

FINDINGS IN DISCIPLINARY HEARING

INTRODUCTION

- 1 Hearings in this matter were held between 13 January and 25 February 2010 during which period there was some 14 days of hearing. Mr. Gama, the employee was represented by advocate G. Pretorius SC assisted by V. Ngalwane and instructed by attorney Mr. T. Langa of Langa Attorneys. Transnet the employer was represented by advocate P. Pretorius SC instructed by attorneys C. Todd and K. Savage of Bowman Gilfillan Attorneys. The parties agreed to waive the strict requirements of the Disciplinary Code and Procedure set out in paragraph 6.3 of the Transnet Code.
- 2 To understand the charges one needs to appreciate that although Transnet is a single company of which the government is the shareholder, it operates through various divisions including Transnet Freight Rail ("TFR") formally

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known as Spoornet and Transnet Rail Engineering ("TRE") formally known as Transwerk. The governance structure of Transnet is that it has Board which has four sub-committees including an Audit Committee and a Group Executive Committee. The main divisions of Transnet ordinarily replicate that governance structure. At group level there is a Group Chief Executive Officer, Chief Financial Officer and Chief Operating Officer as well as the Executive Responsible for Human Capital and the Executive Responsible for the Office of the Chief Executive. There are a number of sub-committees of the Group Board including the Capital Investment Committee.

THE CHARGES

- 3 Gama is the Chief Executive Officer of Transnet Freight Rail. He was suspended on 1 September 2009 pending the finalisation of the disciplinary process initiated by the delivery of the original charges on 24 August 2009 which notified him to attend a disciplinary hearing. It is apposite to set these charges out in detail. They are as follows:

"1. You authorised the conclusion of a contract for the provision of security services by General Nyanda Security Advisory Services (Pty) Ltd (GNS) on confinement in excess of your delegated authority. This constituted a wilful or alternatively, negligent failure to carry out your duties in the manner expected of you, and has resulted in breaches of the PFMA that included but are not limited to, sections 50, 51, and 57 of the PFMA. This constitutes misconduct contemplated in section 51(1)(e) of the PFMA.

1.1. The procurement process for the award of the contract was irregular.

1.2. When the irregularities in the process were brought to your attention you failed to take appropriate steps either to investigate the irregularities, to terminate the contract, or to implement any other appropriate measure to deal with the situation.

1.3. In your explanation for these failures you have refused to acknowledge that you exceeded your delegated authority, and failed to demonstrate an appropriate level of concern

at the apparent manipulation of the procurement process, or to acknowledge the seriousness of the irregularities in that process, and you failed to accept responsibility for a decision for which you are accountable.

- 1.4. Your conduct in approving the contract with GNS falls far short of any standard that may reasonably be expected of a person in your position.*
- 2. You failed to comply with the terms of the Board resolution of 26 April 2007 which approved the acquisition of 50 "like new" locomotives and which authorised you to conclude, sign and execute the contract. Specifically you failed to conclude the contract or to execute the contract in compliance with the condition established by the Board that Transwerk (now Transnet Rail Engineering) would carry out all engineering on assembly and maintenance. This constituted a wilful or alternatively, negligent failure to carry out your duties in the manner expected of you, and has resulted in breaches of the Public Finance Management Act (PFMA), that included but are not limited to, sections 50, 51, and 57 of the PFMA. This constitutes misconduct contemplated in section 51(1)(e) of the PFMA.*
 - 2.1. When the failure to comply with the terms of the Board resolution was brought to your attention you failed to take appropriate steps to rectify the situation.*
 - 2.2. In your explanation for these failures you have refused to acknowledge that you did not comply with the terms of the Board resolution, and have failed to demonstrate an acceptable appreciation of your responsibility for the execution of a project of that size and significance.*
 - 2.3. In addition you have sought to redirect all responsibility for shortcomings in the project away from yourself and in the direction of your colleagues and subordinates. This demonstrates an unacceptable failure to accept responsibility for matters for which you are accountable.*
 - 2.4. Your conduct in relation to the conclusion and execution of the 50 like-new contract falls far short of the standard that may reasonably be expected of a person in your position.*

- 4 Charge 3,¹ while not abandoned, was not persisted in during closing argument for Transnet and is not considered in detail in these findings. Charge 3 is in the alternative to charges 1 and 2, it being alleged in charge 3 that Gama's conduct in relation to the GNS contract and the 50 like new contract both constitute breaches of the Transnet Code of Ethics.
- 5 Subsequently the charges were amended by the addition of a further charge to which I shall refer as charge 4. This charge reads as follows:

"4. In dealing with the allegations which are the subject of the complaints set out in paragraphs 1 and 2, you have made statements, directly or through your attorneys, and in affidavits filed in the course of the high court proceedings instituted by you, concerning the motives, conduct, and integrity of senior executives of the Transnet and/or members of the Board of Transnet;

4.1. which were calculated or likely to cause harm to those persons and/or to Transnet: and/or

4.2. which were not justified or reasonable for you to make in the circumstances: and/or

4.3. which are indicative of an irretrievable breakdown in the trust relationship between you and Transnet.

4.4. Specifically you made statements to the effect that:

4.4.1 The acting Group Chief Executive (GCE) has deliberately sought to tarnish your image and to embarrass you, and has conducted himself in relation to the subject matter of the complaints set

¹ Charge 3 reads: *In the alternative, your conduct in relation to each of the matters dealt with in 1 and 2 constitutes a breach of the Transnet Code of Ethics. More specifically, the Transnet Code of Ethics requires that employees ensure that their actions comply with applicable laws and regulations, internal controls, policies and procedures and that they are accountable for their actions and the safe maintenance of assets under their control. This is unacceptable performance for a person with your degree of responsibility within the organisation, and demonstrates an inability to perform to the standard reasonably expected of a person in your position."*

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out in paragraphs 1 and 2 for an improper purpose or for an ulterior motive;

- 4.4.2 The acting GCE has fabricated allegations with an ulterior motive and in pursuit of his own personal interests;*
- 4.4.3 The acting GCE, other senior executives and one or more members of the Board have acted in a sinister and mala fide attempt to subvert your candidacy for the GCE position;*
- 4.4.4 The acting GCE and/or members of the Board and/or Transnet may have committed a criminal offence by instituting or endorsing the disciplinary proceedings instituted against you;*
- 4.4.5 The information relevant to one or more of the allegations of misconduct against you was obtained in the course of "malicious skulduggery" against you;*
- 4.4.6 The disciplinary proceedings were instituted in bad faith and for an ulterior motive;*
- 4.4.7 The complaints form part of a "witch hunt" by the acting GCE and "his Cabal" against you;*
- 4.4.8 The acting GCE and another senior executive conspired to "scuttle" or to prejudice your chances of being considered to the position of GCE;*
- 4.4.9 The acting GCE concealed information from the Board.*
- 4.5. You stated that you were not interviewed in the course of the investigation of the allegations that are the subject of the complaints, when this is not true.*
- 4.6. Your conduct in making some or all of these statements has caused irreparable harm to the relationship of trust between you and Transnet and to the working relationships that are necessary to sustain your employment and/or has resulted in a situation of incompatibility between you and Transnet and/or its leadership."*

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Understanding the Charges

- 6 Charge 1 relates in broad terms to the conclusion of a contract between Transnet and General Nyanda Security (Pty) Limited ("GNS")² allegedly in excess of Mr. Gama's delegated authority. For convenience I shall refer to this as "the GNS contract". In simple terms this charge alleges that Gama authorised the conclusion of a contract on confinement and did so in excess of his delegated authority. An examination of this charge immediately reveals the clauses 1.1 to 1.4 of this charge allege poor performance by Gama in that broadly he failed to take appropriate measures to investigate the irregularities associated with the awarding of this contract or to regularise the situation.
- 7 The second charge relates to a different aspect namely the signing of a contract for the acquisition of 50 reconstructed locomotives. During the hearing this was referred to as the "50 like new contract". The essence of this charge is that although Gama as CEO of Transnet Freight Rail was authorised to conclude the contract to procure these refurbished locomotives, such authorisation was subject to a clear written condition laid down by the Transnet board ("the board"). The allegation of misconduct is that Gama failed to execute and conclude this contract in compliance with the board's condition. As with the previous charge, paragraphs 2.1 to 2.4 of charge 2 then allege poor performance on Gama's part by virtue of his failure to take appropriate steps to rectify the situation when the failure to comply with the condition stipulated by the board was brought to his attention. It is Transnet's case that Gama refused to accept responsibility for the shortcomings of this project for matters for which he was accountable.

² See below discussion about the company name and identity



- 8 Charge 4 is essentially a complaint that Gama has directly or through his attorneys during the course of various High Court proceedings and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. This Transnet says is misconduct. It is also contended that these statements indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet.

PRELIMINARY POINTS

- 9 On 20 November 2009, Gama delivered to the company a written response to the disciplinary charges. This written response³ raised three preliminary points. I shall deal first with two of those three points. It is convenient to deal with the third preliminary point later in these findings.

First Preliminary point: Alleged dismissal of the charges by Ms Ramos the Transnet CEO

- 10 As I understood Gama's counsel this point was ultimately not persisted in during closing argument. I shall accordingly deal with it only very briefly.
- 11 During one of the usual periodic meetings between Ms Ramos the CEO of Transnet and Gama at which key issues of TFR were discussed, Gama mentioned to Ramos that he had received an anonymous letter which implicated him in irregularities pertaining to the GNS contract. Ramos said she had received a similar letter which, upon inspection, proved to be identical to the letter which Gama had received. At that one-on-one meeting Ramos then said words to the effect that this was "rubbish" and that Gama should not bother himself with it. Gama subsequently contended in his

³ Bundle A1 pages 17-25

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written response that on the basis of this statement by Ramos to him Transnet considered the matter of his alleged misconduct in relation to the GNS contract closed and is now precluded from proceeding against him with the charges in relation to the GNS contract.

- 12 Gama's contention is that he reasonably understood that Ramos had, by way of this remark, dealt with and dismissed all allegations of wrongdoing on his part in relation to the GNS contract. I agree with the submission in argument that this contention reflects very poorly on Mr Gama. It is a rather startling suggestion. The evidence shows that Ramos, to whom the letter was addressed sent it on to Mr Chris Wells, then Chief Financial Officer (and later from March 2009 Acting Group Chief Executive Officer) and Mr Vuyo Kahl, Group Executive Legal with a note requesting that the matter be looked into "*as per normal processes*". Ramos not only called for the allegations to be investigated but she also followed up on the progress of the investigation both with Wells and Mr. Oates of Transnet Internal Audit (who oversaw the investigation) on a regular basis. This is clearly inconsistent with Ramos having waived or dismissed the charges as contended for by Gama. The evidence established that this complaint started a long process of investigation by Transnet Internal Audit ("TIA"). Moreover, in any event, it is not conceivable that at that stage, when Ramos was unaware of the full facts of the alleged misconduct on Gama's part (which had then not yet been investigated), that she could have excused him. The evidence of Oates of TIA was that the anonymous tip-off system received a 10 page letter concerning very various irregularities within TFR. Although the tip-off letter did refer to a suspicion that the GNS contract may have been secured in an under hand manner, the particular charge in relation to the GNS contract, namely that Gama had concluded the GNS contract in an amount beyond the level of his delegated authority, is *not* one of the alleged irregularities contained in the tip-off letter. Consequently, in fact, that charge could not have been waived by Ramos. Gama could

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simply not reasonably have understood that Ramos had excused him of all misconduct in relation to the GNS contract. Indeed when he was cross-examined on this issue, Gama was evasive and driven to seek to transform his complaint in this regard into one about his not having been informed until May 2009 of that there was in fact an investigation against him. Gama accepted under cross-examination that Ramos had not dismissed as rubbish any charge in relation to his signing a confinement beyond his authority.⁴ There is no merit in this first preliminary point.

The second preliminary point: Delay in preferring the disciplinary charges

- 13 In paragraph 4.2 of Gama's response to the disciplinary charges,⁵ he contends that bringing the charges belatedly was unfair and materially prejudicial to him. This argument was persisted in during the disciplinary hearing. Gama argues that the relevant facts were known to Transnet in 2007 and 2008 and that the inordinate delay in bringing the charges against him is unfair.
- 14 This preliminary objection requires fuller investigation and consideration and it is convenient to revert to this aspect later in these findings.

Third preliminary objection: Vagueness of the charges

- 15 Although in his written response to the charges Gama raised the vagueness of the charges as an issue and set out various grounds on which both the first and second charges were allegedly too vague and not sufficiently specific, the point was not persisted in at the outset of the disciplinary enquiry. In my view, while certain of the charges were wide of the mark, particularly viewed with hindsight, they were not so vague as to render the employee prejudiced in any way. There is no merit in this objection.

⁴ Gama, page 65

⁵ Bundle A1, page 20

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Background

- 16 Mr. Wells has been the Acting Chief Executive Officer for Transnet since March 2009 when he succeeded the former CEO Ms Ramos. Prior to that he was the Chief Financial Officer. He set out the structure of the organisation with its various divisions and governance structures with the Board and its various Committees. Transnet Internal Audit reports directly to the Audit Committee which is the Sub-Committee of the Board. For day-to-day operations Transnet Internal Audit (TIA) reports directly to the Chief Financial Officer's Department.
- 17 Gama joined Transnet in 1994, as the Business Development and Planning Manager for the Port of Durban. Previously he obtained a B.Com degree and studied towards an MBA. Having worked in Portnet for eleven years he then in 2005 was appointed as the Chief Executive Officer of Spoornet, now known as TFR. In that position he headed up a team of fifteen general managers involved in the various operations with four or five general managers beneath him dealing with the day-to-day running of the operational activities of TFR. The General Manager responsible for Safety and Security for part of the time relevant to the present matter was Mr. John Beattie. The CEO of Transnet Rail Engineering ("TRE") was Mr. Richard Vallihu. TFR employs approximately twenty five thousand employees.

Charge 1: EXCEEDING OF DELEGATED AUTHORITY IN APPROVING THE GNS CONTRACT

- 18 In relation to charge 1 Mr. Gama denies that he exceeded his delegated authority.⁶ He denies further that he was aware of any irregularities in the procurement process of the award before the contract was concluded. He

⁶ Bundle A1, page 23

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also denies that he failed to take appropriate steps to investigate the alleged irregularities once they were brought to his attention.


The Policy Framework

- 19 The Detailed Procurement Procedures ("DPP") policy of Transnet is relevant to this charge. This policy was in place at all relevant times and provides that the Transnet Board has delegated its powers for the day-to-day running of the business to the Group CEO who in turn has delegated certain powers to the CEO's of the relevant Transnet entities, of which TFR would be one such entity.
- 20 The DPP policy sets out the open tendering process (also referred to as the Request For Proposal or "RFP" process) in Transnet.⁷ The policy states that: *"The tendering system is regarded as the procurement mechanism which best ensures open and fair competition. Tenders are invited publically and any individual or enterprise is granted equal opportunity to tender for Transnet's business."*⁸ This general approach is however subject to an exception dealing with the circumstances in which the open public tender process is not adopted and where confined enquiries for quotations may be invited. This is the exceptional procurement process referred to as "on confinement", the idea being that the business will be confined to only one or a few tenderers rather than going on open tender. The policy states that the confinement mechanism *"... is ideally suited for circumstances where due to urgency, or restrictive market, etc, it will not be possible, practical or economically viable to invite open tenders."*⁹
- 21 The conditions for the application of the exceptional circumstances under which the confinement process may be adopted are set out in the DPP

⁷ Clause 2.2 of the Policy

⁸ Clause 2.2.1.6 of the DPP Policy

⁹ Clause 2.5



policy. The following sub-clauses of clause 2.5 are relevant for present purposes:-

- "2.5.1.1 *If the purchase, sale, hiring of movable goods or service which must be rendered, or the offer received, exceeds R2 million in value and is of such a nature that it cannot be dealt with in terms of any of the prescribed procurement/disposal mechanisms, the matter must be fully motivated in writing to the CEO, or his/her duly authorized delegate in the Procurement Function, depending on the value of the proposed confinement, who will, if he/she agrees with the reasons advanced for the proposed confinement, authorise the confinement of business to one or more contenders only.*"
- "2.5.1.2 *Important to note that the CEO or his duly authorised delegate in the Procurement Function, **who has been granted such specific powers in terms of hi/her Special Delegation of Authority**, may grant prior written authority to invite quotations or to consider an offer, provided that in his/her opinion it is in the best interest of Transnet.*"
- "2.5.2.3 **NB:** *It is accepted that in certain instances such as derailments, washaways or failure of critical equipment (such as an electric substation failure), or instances where any delay will result in the loss of lives, or loss of revenue, etc., it might be absolutely impossible to obtain the necessary prior authority to confine. In such an instance the emergency work is performed, and a full motivation only submitted afterwards, in the normal manner, to obtain the necessary "retrospective authority for confinement". The words "in exceptional circumstances" shall be applied judiciously and restrictively. Misuse of this concession as an excuse for bad planning will be regarded as a serious contravention and will be dealt with severely.*"

It is clear from these provisions that the confinement process is exceptional in nature and is used where the particular nature of the circumstances under which the services or goods are required to be procured are such that it is not possible to follow the open tender process. The policy does make provision for retrospective authority for a confinement procedure, but makes

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it very clear that this retrospective authority is to be applied judiciously and restrictively.

- 22 A CEO, such as Gama, can act comfortably within his delegation of authority so long as the programme for which he is authorising expenditure has been approved in terms of the budget which is part of the corporate plan.¹⁰ Where expenditure falls outside of the corporate plan or has not been budgeted for then the Capital Investment Committee ("CIC") has to review the potential spend and, depending on the amount involved, the authorisation may need to go to the Board for approval.
- 23 It was contended for Transnet that whenever authority is required to exercise the procedures on confinement under clause 2.5 the person adopting the confinement procedure must apply his/her mind properly to the situation and is required to form an opinion on the basis of reasons given for why the exceptional confinement procedure needs to be adopted. This is indeed the case as appears from clause 2.5.1.1 of the DPP policy which requires that matters on confinement be fully motivated in writing by the CEO if he agrees with the proposed confinement. I did not understand Gama to contend that he was not required to exercise his mind and form his own independent view before authorising a contract on confinement.
- 24 In relation to contract acceptance the DPP policy provides that a manager may only communicate acceptance of a tender and conclude a contract if certain provisos have been adhered to, including that *"the value of the business awarded is within the level of his powers to contract in terms of his Special Delegation of Authority"*.¹¹ The alternative, where the value of the business exceeds the level of a manager's delegated authority, the policy requires that *"he shall obtain a mandate from higher authority to conclude*

¹⁰ Oates page 42

¹¹ Clause 6.2.1.2

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and administer the contract.”¹² The DPP policy also provides that each division or business unit, such as TFR, will have its own Divisional Acquisitional Council (“DAC”) which will consider and approve all expenditure contracts falling within its jurisdiction and within the CEO’s delegated powers. Those transactions which exceed the CEO’s delegated powers will likewise be considered by the DAC, and if the DAC concurs with the recommendation, it will refer the matter to the relevant person in the hierarchy with the appropriate delegated powers for the particular Rand value of the transaction.¹³

The Transnet Delegation of Authority Framework¹⁴ is also relevant. It provides for the delegation of power in detail. For present purposes what is relevant are the provisions which deal with procurement¹⁵ and which provides that four steps must be followed namely: (i) Financial approval to spend the funds in terms of OPEX/CAPEX budget; (ii) Approach the market for quotes/tenders from potential suppliers; (iii) Evaluate quotes/tenders from potential suppliers and recommend award of business; and (iv) Conclude the contract with the successful supplier. In particular applicable to the present case is Note 5 of the Framework which reads as follows:

*“All confinement of tenders are subject to prior approval by the relevant official – see 5.4.2 below. Confinement of tenders above R2 million should involve the obtaining of 3 quotes from suppliers, failing which it must be fully justified. Also refer to section 8.1 and 8.2 of the Detailed Procurement Procedures (DPP).”*¹⁶ (my emphasis).

A further note provides that it is permitted to increase an existing contract value by up to 10% subject to certain procedures. Any increased amount exceeding 10% of the original contract value requires to be approved by the

¹² Clause 6.2.1.3

¹³ Clause 8.1 of the DPP policy

¹⁴ Edition approved on 30 October 2007

¹⁵ Clause 5.4

¹⁶ At page 19 of the Delegation of Authority Framework

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relevant Acquisition Council.¹⁷ Although the policy documents referred to an "Acquisition Council" this was frequently referred to in the hearing as the "tender board". Both terms are used interchangeably in these findings.

- 25 Where procurement for goods and services to the value of greater than R2 million is required the system requires that such procurement be referred to the Head Office Acquisition Council ("HOAC") which is a group of senior managers which meets weekly or fortnightly and deals with day to day procurement activities. Larger procurement projects above R15 million are referred to the Divisional Acquisition Council ("DAC") which meets on a monthly basis. Gama himself was not a member of either of those structures. He on one occasion chaired the DAC when it dealt with a very large acquisition of 212 locomotives where the procurement was worth some R6 billion.
- 26 Mr. Gama is the CEO of the operating unit TFR. The delegation document provides that he is authorised in relation to confinement tenders to approve an expenditure of up to but not exceeding R10 million.¹⁸ This authorisation is subject to a note that *"Exco Members have no authority to sub-delegate to Supporting Business CEO's on this transaction. The limits are per transaction/confinement."* The limit of Gama's authority in relation to the GNS security contract was therefore R10 million. This was confirmed by Oates¹⁹ and was not disputed by Gama.
- 27 The document which Gama signed a proving the GNS contract is a TFR Divisional Acquisition Council Agenda Item document headed "GNS confinement". It is a seven page typed document which reflects the "Title of Submission" on the first page as being *"Confinement (Provision of a total specialised security package)"*. The document deals with the GNS

¹⁷ Note 6 on page 19 of the Delegation of Authority Framework

¹⁸ Clause 5.4.2 on page 20 of the Delegation of Authority Framework

¹⁹ Oates pages 93 - 94

confinement process where GNS is the sole service provider referred to in the proposal for which the contract value/ tender price (excluding VAT) is reflected as R 18,9 million made up by R1,57 million per month over a contract period of 12 months.²⁰ The budgeted amount is reflected as R13 million.²¹ Nothing turns on the discrepancy between the tendered contract price and the budget amount as both exceed R10 million. The document uses the word "*confinement*" in some fifteen places including in the heading and in the title of the submission. The document concludes with the signature of Mr. Gama on 5 December 2007 in his capacity as CEO of TFR. I shall refer in these findings to this document as the "GNS confinement document".

- 28 Transnet's case is that the GNS confinement document is a representation of a confinement process having been authorised by Gama on 5 December 2007 in respect of a twelve month contract period which commenced on 1 November 2007 until 31 October 2008 for a value of R18.9 million which exceeds Gama's delegated authority limit on confinement of R10 million.
- 29 Transnet did not content itself with a consideration of the GNS confinement document and the immediate circumstances of the signature thereof by Gama but led a considerable amount of background evidence of what occurred prior to the signing of the GNS confinement document and the circumstances of the investigation and Gama's alleged lack of action once irregularities in the GNS contract and the process of securing that contract came to light. I turn now to consider in some detail evidence relating to the GNS contract.

²⁰ Bundle B1, page 115, paragraphs 11 and 4

²¹ Bundle B1, page 114, paragraph 3a

Evidence in relation to the GNS contract

- 30 The evidence for Transnet in relation to this charge was primarily that of Mr Oates and Mr Madhav. There was also the evidence of Mr Wells on this aspect. Mr. Oates is a partner at Ernest and Young. The Internal Audit at Transnet has been out sourced to Ernest and Young since 1 August 2005 and Oates has been involved in the Transnet Internal Audit ("TIA") since that time. Mr Madhav was the main investigator on this charge while Oates who was his superior, oversaw the investigation. Madhav is an Associate Director at Ernst and Young responsible for forensic investigation at TIA where he has been employed since October 2008. At the request of Oates he investigated the allegations relating to the TFR security department and in particular the GNS contract.
- 31 Madhav prepared report a into the security department dated 12 February 2009 (to which I shall refer as the "*Madhav report*").²² He submitted this report to Oates who in turn gave it to Ms. Ramos. Madhav testified about the content of his report at the disciplinary hearing. The report concluded that the value of the GNS contract amounts to R18 933 120.00 and that there was no written document confirming that the proposed confinement was escalated to the Group Chief Operating Officer. The report concluded that the GNS confinement was approved by Gama as CEO of TFR in contravention of section 5.4.2 of the Authority Framework document.²³ Oates confirmed that as at the date of the disciplinary enquiry no such document escalating the matter to the Group COO had been produced.
- 32 Oates testified that the GNS confinement contract is clearly for a period of 12 months and that there is no basis for saying that it was for only a 5

²² Bundle D, page 33, Madhav pages 58-59

²³ Bundle D1, pages 55 - 55

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month period as Gama contended in his written response to the charges.²⁴ He testified that had the GNS contract been concluded on an open tender process it would typically have not required any involvement of the CEO as other persons were empowered (within their delegated authorities) to award the contract provided it was pursuant to an open tender. Oates accepted that as a matter of courtesy a contract on open tender may however have gone to Gama despite there being no requirement that it had to.

- 33 As far as the Oates was aware, Gama's only involvement in any irregular process in the TFR security department was the signing of the GNS contract on 5 December when Mr Beattie presented the document to Gama and asked him to sign it.²⁵ Mr Beattie, as appears more fully below has left Transnet and lives in Australia.
- 34 Oates did not accept that it was in order for Gama, if he was approached and told that the GNS contract had been through the tender board process and needed his approval, to simply approve the contract without more. He said that Gama needed to apply his own mind to the issues and could not simply rely on his staff where the plain evidence in the document in front of him showed that it was not an open tender process but rather a confinement process. Oates did however accept that had the GNS proposal in fact been through an open tender process there would be nothing irregular about Gama's signing the GNS confinement document.
- 35 The crux of the issue on this charge is whether Gama was entitled, as he did, to simply accept that an open tender process had been followed when so advised by Beattie. Transnet's case was that when the document was presented to Gama it very clearly reflected that the contract was on confinement. The GNS confinement document referred to a company, GNS,

²⁴ Oates page 89

²⁵ At page 129

which Gama knew involved a friend of his.²⁶ Oates testified that in those circumstances the CEO should have been very careful to ensure that it was an open tender process and to ensure that he was acting within his level authority. Oates conceded that if Gama had looked only at the last page of the GNS confinement document presented to him that there is no reference to a confinement and nothing to indicate that the contract concerned a confinement. This is the page which contains the signatures of the persons who requested, recommended and supported the proposed GNS contract.²⁷ In fact this concession by Oates is mistaken because in the fine print at the bottom of each page of the document, including the final page, is a reference to confinement.²⁸

- 36 The GNS contract was recommended by the Head Office Acquisition Council TFR ("the tender board") when it was outside their level of authority to so approve it. Oates said that that of Mr L. Tobias, the Chairman of HOAC was on the list of persons with whom the TIA still needed to further discuss this matter. Other responsible persons involved may therefore still be disciplined for their involvement. Mr John Beattie the former General Manager : safety and Security TFR left the organisation in December 2007 as is more fully discussed elsewhere in these findings.
- 37 Oates testified that when Gama had reviewed the renewal of the previous service provider CPI he had made a written comment on one of the document calling for the contract to go on open tender and that the process must be advertised. Oates therefore accepted that Gama's approach was that security contracts had to go on open tender.
- 38 Mr Dingaan Senamela was employed by Mr. Gama as Senior Manager Security: TFR in which position he was required to oversee the entire

²⁶ A.t pages 131-2

²⁷ B 1 page 120

²⁸ This is clear from Bundle B, page 120H

security function for TFR as head of security.²⁹ Oates accepted that it was Senamela who had to explain why the extra R13 million extension was approved in respect of the GNS contract. Disciplinary steps have been implemented against the Senamela in relation to an irregular extension of the GNS tender. Oates also accepted that Mr. Fredricks was responsible for the letter written to GNS on 6 December 2007 informing that company that it had been appointed. These aspects of the GNS security contract were not matters for which Gama was responsible.

- 39 Oates testified that at the breakfast meeting of 10 December 2008 he informed Gama of the fact that the GNS contract was the subject of an investigation.³⁰ When he testified later Gama denied that he had been so informed by Oates at that meeting³¹ but this fact was not put in issue with Oates when he was cross-examined. It must therefore be accepted that Gama was informed as early as 10 December 2008 that there was an investigation into a complaint about the appointment of GNS. As Gama had himself authorised the appointment of GNS clearly this investigation of which he was told could possibly have related to Gama himself.
- 40 Oates said that in the meeting of 10 December 2008 between Gama and himself he asked Gama whether or not he knew General Nyanda. Gama responded by saying that he knows many people. Oates then asked him whether Nyanda was a friend of his to which Gama answered "*I have many friends*".³² It was put to Oates in cross-examination that at that meeting Gama did not say that General Nyanda was one of his many friends but said that he knew General Nyanda "*as you would know him as a public*

²⁹ Page 108

³⁰ Oates, page 81


³¹ Gama, page 59-60

³² Oates page 52

figure" or words to the effect. Oates denied this.³³ Oates said that his exact words were "*I have many friends*".

- 41 Mr. Karthi Naicker is the Transnet Group Forensic Manager. He also testified about the events of the breakfast meeting of 10 December 2008 which he attended with Oates and Gama. There was no transcript of this meeting which was an informal meeting. Naicker had never met Gama before the meeting. According to Naicker the nature of the discussion at the meeting was that Oates informed Gama that various call reports had made anonymous tip offs. The reports referred to a rape allegation and a recruitment irregularity in relation to security personnel at TFR. Gama indicated that he was aware of these issues. Oates then proceeded to tell Gama that there was also an issue around the appointment of GNS and he asked Gama whether he was happy with the performance of GNS. Gama responded that he was indeed happy with its performance. Oates had in general indicated that there was a need to investigate all these allegations and Gama was supportive indicating that he would provide cooperation and assistance in the investigation. Mr. Senamela was mentioned in the discussion and Gama indicated that he had employed Senamela with whose performance he said he was happy. General Nyanda was also mentioned. Oates asked Gama if he was friends with General Nyanda and Gama responded by saying that he knew a lot of people and had a lot of friends. According to Naicker the discussion concluded with Oates indicating to Gama that TIA would conduct an investigation into and verify the merits of the various allegations. Gama again said that he would provide the necessary assistance and support. It was also put to Naicker in cross-examination that Gama's recollection of this discussion was that when he was asked whether he knew General Nyanda he replied along the lines that he knew General Nyanda like you would know him because he is

³³ Oates page 12



a public figure. Naicker said did not recall this response by Gama at the meeting.

- 42 Madhav received the report sent to Ramos on 18 September 2008 together with the Anonymous Tip-Off's letter dated 21 October 2008 containing the allegations regarding irregularities at TFR Security. He also confirmed the second Anonymous Tip-Off's letter. Madhav was mandated to look into the contents of these documents to see whether there was any merit in the allegations and to authenticate them if possible. In order to do so he started an initial verification process as a result of which he concluded that there was some substance to the reports which needed further investigation. The allegations regarding irregular appointments of staff and the rape allegation took precedence, the former because at the time there was some 80 officials that had been interviewed in relation to employment in various security roles and a number of those candidates were apparently not suitable for the positions to which they were about to be appointed. This required urgent attention.
- 43 The investigation into the situation which preceded the GNS contract revealed that a company called CPI was appointed during November 2005 to conduct certain specialised security services relating to the apprehension and prosecution of persons responsible for cable theft in the Gauteng region. The value of this contract was R520 000 per month for two teams of investigators. CPI was appointed on confinement as it was the only known company to offer this service. The initial contract was for 6 months and was thereafter extended for a further 6 months.³⁴ At this stage Gama entered against his signature approving the contract a note which read: *"Enter into a 6 month contract and reassess"*³⁵

³⁴ Madhav page 73; Bundle B1, 8B

³⁵ Bundle 1, page 8B

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- 44 There were two further 6 month extensions to the CPI contract.³⁶ The second extension therefore expired at the end of December 2006. On 3 March 2007 Gama signed a further extension of the contract until the end of June 2007 with a note that CPI's services be reviewed in the interim to see whether they are required and instructing that the work go out on a public tender process for the contract with effect from 1 July 2007.³⁷ The extension of the CPI contract for the period December 2007 to March 2007 was therefore a retrospective approval by Gama.
- 45 The memorandum of agreement for the provision of security services between Transnet and CPI records that Transnet "...requires the services of an experienced security and investigative company with the... expertise and extensive knowledge of the scrap metal industry... so as to enable Spoornet to obtain its desired results of eliminating conductor/cable theft and theft of goods in transit as well as removing the leaders of the conductor/cable theft syndicates from society through arrest and prosecution."³⁸ The contract further records that CPI warrants "that it is a security and private investigative company with the necessary skill, knowledge and expertise, possesses the required security personnel and equipment, is fully conversant with Spoornet's problem and operations, and is willing to tender the services required so as to enable Spoornet to achieve its desired results."
- 46 Madhav testified that he could find no evidence to confirm that GNS met these requirements when it later contracted with Transnet.³⁹ The scope of services and performance assessment criteria were set out in the CPI contract and the geographical area of the contract applied to the Central region which Madhav explained extended from Gauteng to Ermelo, and

³⁶ Madhav, page 71

³⁷ Bundle B1, page 8H(i) replacement

³⁸ Bundle B, page 8L

³⁹ Madhav page 76

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Standerton and as far north as Musina. In this regard Transnet has Western, Central and Eastern regions. The principal region is the Central region in which most activity takes place. It is also the area which predominates from a crime point of view.

- 47 Madhav testified about the attempt to obtain a complete security package for 2 years across various regions under tender number 103098739.⁴⁰ This tender was issued on 17 July 2007 with a closing date of 7 August 2007 and a compulsory briefing on 27 July 2007. The final extension of the CPI contract expired on 30 June 2007, but a month-on-month extension was granted to CPI for July and August 2007. This was required because the aim of going out on public tender and obtaining a contract before 1 July 2007 had not been achieved. Madhav testified that by the end of August, when the month-on-month extensions to CPI expired, the tender process for the new contract had not yet been completed.⁴¹ Nevertheless the CPI contract was not extended any further. The investigation could not obtain any explanation for why there was no further extension, particularly as there was no apparent dissatisfaction with the services provided by CPI. In fact the evaluation report on the tender in question⁴² records that when assessing the previous business conducted *"the current contractor CPI are delivering great results with regards to cable theft etc"*.
- 48 The investigation showed that an open tender was issued and eleven tenders were received.⁴³ The tender description was to provide a complete security package service for a two year period across the Central as well as the Eastern regions. The services required included the prevention of cable theft, visible policing, securing rapid response to crime incidents,

⁴⁰ Bundle B, page 9

⁴¹ Madhav page 81

⁴² Bundle B, page 28

⁴³ Madhav page 83, Bundle B, page 20

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investigations, arrests, prosecution and conviction of perpetrators.⁴⁴ Included among the eleven bidders were the following three companies: G4 Security Services, Vimba Group Holding and CPI. GNS was not one of the bidders in this process.

- 49 A short listing process resulted in four bidders being short listed namely G4 Security, Vimba Group Holding, Fidelity Security Services and CPI which had been the previous service provider.⁴⁵ As at 29 August the open tender process was ongoing and the four short listed firms were invited to attend a meeting on 31 August 2007 at which there would be a presentation and questions. The evaluation report of the Head Office Acquisition Council in relation to this tender reflects the same four bidders.⁴⁶ It is this document which contains the assessment of the previous business conducted from Spoornet which is referred to above and which recorded that CPI was delivering great results.
- 50 Madhav testified that various e-mail correspondences within Transnet reflected that as at 2 October 2007 the matter was ready to go to the relevant acquisition council for approval. Madhav testified that at a meeting held by Transnet at group level G4S was appointed to perform a group wide audit of all security services being provided to Transnet. For this reason it became inappropriate for G4S to continue to participate in the bidding process to provide services when it also had to audit those services.
- 51 On 15 October 2007 Khanye of TFR send an e-mail to Douglas Martin, the Supply Chain Manager at TFR, and others indicating that the open tender process should be put on hold because of this situation. There was a response the same day on the e-mail from Mr Nayager of TFR to Khanye (and others) rectifying the message in the previous e-mail and stating that

⁴⁴ Bundle page 18

⁴⁵ Madhav page 85, Bundle B, page 24

⁴⁶ Bundle page 29

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"it is an INSTRUCTION from Transnet to place this process on hold".⁴⁷

There was however no indication from whom this instruction had emanated.

52 A series of the e-mails were in the file Madhav obtained from Khanye.⁴⁸

These documents revealed that on 5 November Martin e-mailed Khanye asking him to send out an advice to the bidding firms that the process had been cancelled in its entirety.⁴⁹ The concern expressed by the investigators, and Transnet in the hearing, was that in a process where there were four short listed bidders that could potentially provide the security service and one bidder had to be excluded because a situation of conflict of interest arose, there was no reason why the process of short listing should not continue with the three remaining service providers. The cancellation of the open tender process and the substitution thereof with the confinement process was therefore extraordinary and unexplained.⁵⁰ This was particularly the case because the open tender process was already at an advanced stage in November 2007 when the process was cancelled. The four bidding firms had already been short listed and had made their presentations and had submitted their BEE requirements to the Acquisition Council, which indicated that the process was already at an advanced stage. The investigators could find no evidence of a reason for why the open tender process had been cancelled in its entirety. Explanations were obtained from the security managers concerned, namely Khanye and Nayager but they were not satisfactory. One explanation was that they did not want any repercussions and another explanation was that there were no other suitable bidders from the remaining three in the bidding process once G4S had dropped out. Neither of these explanations was satisfactory, particularly because CPI had previously rendered security services to TFR successfully. The investigators also investigated whether or not Transnet

⁴⁷ Bundle B, page 32B, Madhav page 92

⁴⁸ Bundle B1 pages 32A- 32C

⁴⁹ Madhav page 92, Bundle B, 32A

⁵⁰ Madhav page 93

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Limited had in fact issued an instruction at group level to cancel the open tender process. Ms. Dunswa, who would have been responsible for such an instruction, denied that she ever issued an instruction to stop the process.⁵¹ Their investigators were unable pinpoint precisely from where the instruction allegedly came, but it appeared to have emanated from the TFR security department.

- 53 Madhav testified that both Senamela the Senior Manager: Security TFR and Khanye Manager Security: TFR were both charged with misconduct in relation to irregularities in relation to the GNS contract.
- 54 Madhav testified that the DPP policy stipulates that on cancellation of an open tender process the relevant Acquisition Council (in this case HOAC) has to be notified of the cancellation of the tender process. There was no evidence that HOAC was ever notified of the cancellation in the present case.⁵²
- 55 The GNS confinement document signed by Gama on 5 December 2007 records that the service provider is "*General Nyanda Security (Pty) Limited registration number 1998/0122/0507.*" On the face of it the formal contract between TFR and GNS was later concluded with an entity styled "*General Nyanda Security (Pty) Limited*". That is the name of the company reflected immediately below the signature of the signatory who signed on behalf of GNS⁵³ and is similarly the name of the contractor as defined in the body of formal written contract.⁵⁴ The cover sheet to the GNS contract however reflects a different company name, namely "*General Nyanda Security Advisory Services (Pty) Limited*",⁵⁵ but with the same company registration number. The investigation showed that only a company by the name of

⁵¹ Madhav page 95

⁵² Madhav page 96

⁵³ Bundle B1, page 127 read with page 164

⁵⁴ Bundle B1, page 142 para 1.1.17

⁵⁵ Bundle B1, page 138

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"General Nyanda Security Advisory Services (Pty) Limited" existed and it has the company registration number 1988/12205/07. This latter company was registered with the Private Security Industry Regulatory Authority in terms of section 21 of Act, 56 of 2001 on 9 June 2008. A copy of the certificate of registration was produced in evidence.⁵⁶ A security service provider needs to be registered with the Private Security Industry Regulatory Authority ("PSIRA") and its employees need to be accredited. A statement from Mr. A. Malesa, the Registrations Manager of PSIRA was produced which showed that the company General Nyanda Security Advisory Services (Pty) Limited applied for registration with PSIRA on 5 June 2008 and was registered on 9 June 2008. At the time that Gama signed the confinement contract with GNS it was therefore not registered with the PSIRA. Neither was it registered at the time that the full written contract was concluded on 4 June 2008. Indeed GNS only applied for registration the following day.

- 56 Under cross-examination Madhav accepted that when referring to "GNS" one had to distinguish General Nyanda Security Risk Advisory Services (Pty) Limited from the close corporation associated with GNS. He accepted that whilst the company was not registered with PSIRA the CC was so registered. The members of the CC were Messrs. General Nyanda and Mr. Sylvester Sithole, who were also directors and shareholders of the GNS company. Madhav stated that when they investigated the financial affairs of GNS it was the financial affairs of the company and not the CC which they investigated.⁵⁷ The fact remains however that the company General Nyanda Security Advisory Services (Pty) Limited was not registered with PSIRA on 4 June 2008.⁵⁸

⁵⁶ Bundle B1, page 36

⁵⁷ Madhav page 117

⁵⁸ Madhav page 118

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- 57 It should be noted that the terms of section 20 of the Private Security Industry Regulations Act, 56 of 2001 no person may render a security service for remuneration or reward unless that person is registered as a security service provider in terms of the Act.⁵⁹ Moreover a security business may only be registered as a security service provider if all the persons performing executive or managing functions in respect of that business are registered as security service providers.⁶⁰ Any contract concluded which is inconsistent with these provisions is invalid to the extent of such inconsistency.⁶¹ On the face of it therefore the GNS contract when it was signed on 4 June 2008, being the last date of signature, was not valid. It is not necessary for purposes of this hearing to make a definitive finding in that regard. What the evidence in this regard does show is that GNS was established at the last moment before concluding the GNS contract – in fact too late. This contradicts the contention that GNS had any kind of prior record of providing services in the security industry as is suggested in the GNS motivation for confinement document which was prepared within TFR as is more fully canvassed below.
- 58 The date on which the open tender process was put on hold was 15 October 2007 and it finally cancelled on 5 November 2007 according to Madhav. The written proposal by GNS to TFR was contained in an unsigned document dated 4 October 2007⁶² which was *before* the open tender process had been stopped and indeed preceded the date upon which the tender process was put on hold. In addition on 3 October 2007 Mr. Khanye of TFR received an e-mail which contained a profile of GNS (Advisory Services).⁶³ Madhav confirmed that this proposal was received

⁵⁹ Section 20(1)(a)

⁶⁰ Section 20(2)(a) & (b)

⁶¹ Section 20(3) of Act 56 of 2001

⁶² Bundle B, page 52

⁶³ Bundle B, page 61

prior to the cancellation of the existing open tender process.⁶⁴ Madhav testified that given that the open tender process had already reached the stage of short listing and TFR was almost ready to make an award of the contract, it was highly irregular to be receiving profiles and proposals from an additional competing service provider which had not taken any part in the open tender process.⁶⁵ This was not challenged.

- 59 Madhav pointed out that the content of the GNS proposal was unimpressive and contained anomalies. It referred for example to past experience of the company GNS in "*exposing jury tampering, "bogus expert witnesses, counterfeit venues and conspiracies*".⁶⁶ Madhav testified that there was no evidence to confirm that GNS had any previous experience in these areas. Although the proposal claimed that "*GNS provides the finest business intelligence available in the world today*",⁶⁷ Madhav testified that their investigation could find no evidence of GNS's previous performance or track record. Their investigation showed that as at 27 February 2007 the annual turnover for that year for GNS was approximately R3 million. The TIA investigation in this regard remains ongoing. Madhav's investigation revealed that GNS did have various motor vehicles reflected on its financial statements as its assets but had no other assets or security equipment.⁶⁸
- 60 The GNS profile reflected that GNS operated from what it termed a platform or consortium which comprised of "*Revert Risk Management Solutions*", a company with which it was in alliance as well as "*Nayle Outsourcing*" and "*Sithole Human Capital*" all of which contracted their services to GNS. There was no evidence from the GNS financial statements that it employed any staff or that it paid salaries and wages. An examination of the GNS tax

⁶⁴ Madhav pages 102-103

⁶⁵ Madhav page 103

⁶⁶ Bundle B, page 70

⁶⁷ Bundle B, page 71

⁶⁸ Page 105

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clearance certificated showed that it was not registered for UIF, PAYE or the Skills Development Levy which indicates that this company entity operated without employees. Madhav stated that their investigation showed that GNS was really a shell company which outsourced its services to other companies to perform all the work.⁶⁹ His evidence in this regard was not challenged.

61 Madhav testified that the GNS proposal to TFR was not contained in the confinement file. Subsequent investigation however found these documents in the office of Senamela the Senior Manager: Security TFR. These documents were not offered to the investigators by Mr. Senamela on request and were only found following a search of his office by the investigators. Senamela is presently subject to disciplinary proceedings.

62 Madhav referred to a proposal made by GNS to TFR dated 12 October 2007 which was signed as having been received on 15 October 2007 by Messrs. Nayager, Senamela and Khanye of the TFR security department.⁷⁰ The document was therefore produced shortly before the open tender process was halted and was received on same date that the tender process was halted. Madhav testified that their investigation could not find any evidence that the open tender process was in fact cancelled and stopped in an authorised fashion,⁷¹ or formally cancelled as required in terms of the DPP policy requirements. The GNS proposal of 12 October 2007 reflected as its purpose a project to address cable theft and theft of goods from TFR as paragraph 1.2 of the proposal reflects.⁷² The GNS proposal when describing the project background in paragraph 1.1 thereof reflects that GNS had information as to the operations of and operational requirements of TFR and the problems relating to high levels of cable theft and theft of

⁶⁹ Pages 106-107

⁷⁰ Bundle B, page 83, Madhav pages 108 and 112

⁷¹ Page 109

⁷² Page 109, Bundle B, 88

goods. This information, as far as Madhav could ascertain, had been furnished to GNS in earlier correspondence on 3 and 4 October 2007 in e-mails from TFR. This led the investigators to conclude that the GNS proposal was prepared with the assistance of someone from within TFR. This was not challenged by Gama. This assistance to GNS would have been provided probably at some time between 3 and 12 October 2007. The GNS proposal details the project approach⁷³ to include "Investigations and Analysis", "Monitoring and Evaluation", the development of an action plan as well as the gathering of intelligence. At clause 2.3 of the GNS proposal project cost estimations are provided. Madhav testified that the proposed costs for the services of GNS were significantly higher when compared with the costs of the services which had up until then been supplied by CPI and reflect a total pre-VAT costs of R2.2 million per month compared with the R520 000.00 per month then being charged by CPI. In other words the cost was approximately four times as high.⁷⁴

- 63 According to Madhav the investigation revealed that there was a second proposal received from GNS, similarly dated 12 October 2007. This was identical to the first proposal save that the cost estimates in clause 2.3 thereof were reduced from an overall pre-VAT cost of R2.2 million to approximately R1.5 million per month. The second proposal therefore revised the costing downwards. On investigation as to how this had occurred Mr. Nayager, Manager Security: TFR informed Madhav that following receipt of the initial proposal TFR security management engaged in negotiations with GNS in order to reduce their costing on prices and that this would have occurred around about 15 October 2007, almost 2 months prior to the signing of the confinement by Gama on 5 December 2007. Madhav said that the revised costing remained excessive when compared

⁷³ Paragraph 2.2

⁷⁴ Bundle page 94, Madhav pages 112-113

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with the charges by CPI for broadly the same service provision and was approximately three times as high.

- 64 The impact of this evidence as to the excessive cost of the GNS was significantly modified under cross-examination when Madhav conceded that a proper cost comparison was very difficult to make. In his report Madhav stated when dealing with financial considerations in paragraph 5 that "*It could not be determined whether the amounts paid to GNS were reasonable when compared to payments made to CPI, as we are unable to isolate common services performed by both companies*".⁷⁵ Madhav stood by this statement at the enquiry. When asked to explain how he could then assert that GNS was so much more expensive than CPI if he was unable to make the comparison, his explanation was that they had only been able to perform a comparison of the invoices at face value and because the descriptions in the invoices of the two companies may have been very different for what were in reality the identical services, it was not possible to isolate precisely what services had been performed by CPI when compared with GNS.⁷⁶
- 65 Madhav said that even if one assumed that the GNS contract was for a wider geographical region including not only the Central Region but also the Eastern Region, that the contract price still remained excessive because by far the greater services of Transnet occurred in the Central Region. The investigation therefore showed that prior to 15 October 2007 when the open tender process was put on hold, proposals had been received from GNS concerning its service and negotiations were taking place around GNS's proposed costing.⁷⁷

⁷⁵ Bundle D1, page 44

⁷⁶ Madhav pages 119- 120

⁷⁷ Page 117



The GNS Confinement Motivation

66 Madhav found a GNS confinement motivation document on Khanye's computer which was reflected as have been created on 29 October 2007. It set out the general problem Transnet faced of the rise in theft of copper and aluminium cable; stated that research done on the PSIRA website identified three companies that had never worked for Transnet before; commented on the profile of each these three companies and thereby excluded two the three leaving only GNS as a company which could offer the comprehensive specialised security package sought by Transnet. This motivation document concluded with the recommendation that GNS be afforded the opportunity to provide a solution to the cable theft problem. The document was prepared for signing by Senamela Senior Manager: Security TFR. The final paragraph of the document deals with "*Way Forward*" and suggests that TFR go out on open tender early in 2008 before April to secure a complete specialised security package. This suggestion is however contradicted by the recordal in the motivation itself which suggests that as the festive season approaches an alarming increase in copper theft has been shown and is to be anticipated unless a specialist security service is in place. Madhav's investigation did not reveal any further documentation in the form of either an open tender process having been adopted or in the form of any confinement authorisation or motivation having been prepared. Importantly no documents were found to show that GNS was ever involved in any form of open tender process.⁷⁸ The GNS motivation document was initially found on Khanye's computer and was not supplied to the investigators by the employees in the TFR security department on investigation. It was only traced when Khanye's computer was imaged. Madhav testified that it appeared that the document was authored by Khanye together with Senamela as a signed version of the GNS

⁷⁸ Pages 118 and 122



confinement motivation was later obtained which bore the signatures of both Senamela and Khanye. The date on which this document was signed is unclear.

- 67 On 23 October 2007 one Bella Maja of TFR sent an e-mail to GNS and copied it to a number of people at TFR, including both Khanye and Senamela. In that e-mail Maja indicated that as per Khanye's request of 23 October 2007 GNS should complete and provide the information required in the attached pro forma Supply Declaration Form (SDF) for vendor creation.⁷⁹ Madhav explained that this was forwarded to GNS in order for it to complete the documentation so that it could be registered as a vendor on the SAP system so that payments could be affected by Transnet to GNS in the future. Although there was nothing irregular about creating a vendor on the system, the timing thereof is significant if one has regard to the fact that the open tender process for short listed bidders had been put on hold on 15 October but had not yet been stopped. It was therefore extraordinary that GNS was already being forwarded documentation to be created at a vendor on the Transnet system.⁸⁰ In addition also on 23 October, a letter was written by Mr Brian Fredricks, the Chief Procurement Officer: Spoornet Supply Chain Services to the Managing Director of GNS requesting that it supply Transnet with its BEE accreditation credentials. The letter indicates that the furnishing of a rating certificate regarding such credentials is a requirement for any future tender issued by Transnet.
- 68 The GNS confinement motivation document under the heading "*Current status quo*" states that "*Unfortunately CPI contract number ... expired on 31 August 2007*". Madhav testified that he failed to understand what was unfortunate. The expiry of the CPI contract had been extended month-on-month up to 31 August and could simply have been extended for a further

⁷⁹ Bundle B, page 111 A

⁸⁰ Page 121

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few months until an open tender process had been completed. No explanation was supplied by any of the players in the TFR security department as to why the services of CPI had been terminated at that stage.⁸¹

- 69 The GNS confinement motivation then refers to the (open tender) having been stopped *"on the instruction from Group Executive Virginia Dunjwa (the Group Chief Risk Officer) after it was realised that one of the companies we short listed (G4S) was awarded business by Transnet Strategic Sourcing (TSS) to audit private securities companies in use by Transnet."* Madhav's investigation revealed that the reference to G4S being awarded a contract to audit private security companies in use by Transnet was accurate but that the investigation revealed that no instruction was given by Dunjwa to halt the open tender process. He testified that it was unacceptable that the open tender process had come to a standstill and there was no reasonable basis on which that tender process was halted. The motivation document then refers to *"Since the expiry of the CPI contract in August 2007 and the mishap of not being able to finalise the RFP process, the copper theft syndicates gained momentum and as we approach the festive season our stats show an alarming increase in copper theft resulting in train delays and only the worst could be anticipated without specialised security in place."*⁸²
- 70 Madhav testified that the termination of the open tender process was no a *"mishap"*. Moreover, the accuracy of the statement regarding there being an increase in copper theft was tested during the investigation and it was found that whilst cable theft had increased in about July it had began to decrease in August and that from September to December 2007 it had continued to decrease so the statement made in October regarding an

⁸¹ Page 124

⁸² Bundle B, page 112

alarming increase was therefore simply inaccurate.⁸³ The motivation document then states that *"To counteract the above the Freight Rail Security Corporate Office comprising of the Senior Manager, Technical Security Manager and Contracts Manager were compelled by their KPA's to come up with a solution quickly enough to reduce the copper cable theft."* KPA's refers to the "key performance areas" of the various managers that were tasked with coming up with a solution. What the motivation documents says in effect is that those responsible had to put a solution in place fairly quickly. This was against the background of the fact that the option of simply extending and renewing the existing CPI contract on a month-to-month basis was not utilised. That of course was a simple and readily available solution and one which was already in place.

- 71 Asked to about the statistics on cable theft Madhav accepted that in July and August 2007, being the last 2 months that CPI was contracted, cable theft incidence numbered 179 and 178 respectively. The following month there was a significant reduction to 113. Madhav said they tried to investigate this significant drop in theft once CPI left but could not get a satisfactory answer as there was a whole host of factors that could have contributed towards this. Madhav did however point out that looked at in the longer term the base as from April 2007 was a fairly low base that this was coming off and the months of July and August seemed to be at odds with the general trend. Madhav referred to various graphs that had been prepared from the statistics recorded of cable theft. For the period August to December 2007 being the period during which the GNS motivation alleged a sharp increase in incidents, there was in fact in the 2007 year a consistent decline in incidents of cable theft. Similarly from July to December 2007 there was a consistent decrease.

⁸³ Page 126

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- 72 The GNS motivation document then refers to research having been done on the PSIRA website to identify companies which do not currently render services to Transnet. Madhav testified that there was no requirement that providers of security services that had previously worked for Transnet could not again render services. In any event, Madhav's investigation revealed that at the time when this research would have been done in October 2007 GNS was not registered with PSIRA and could not for that reason have appeared on its website. In addition, no details of GNS existed on the PSIRA website. The research referred to in the motivation as having been conducted was therefore highly suspect. Madhav's investigation and analysis did reveal that of the other two companies identified one was inappropriate in providing the required security services although the second company could have provided the pro-active approach of investigations and limited intelligence required by Transnet.⁸⁴
- 73 Madhav enquired into what communications had taken place between TFR and the two other companies identified as potential service providers. Circle 7 provided TFR with a company profile on 26 September 2007. Madhav's investigation revealed however that this company was requested by a manager from TFR security to provide a profile and assessment of security services on the Richards Bay Coal Line and *not* in relation to anything else for TFR security. The Circle 7 proposal was therefore limited and simply did not address a comprehensive security package.⁸⁵ The other identified service provider, Analytical Risk Management ("ARM"), was also approached. Madhav was informed by that company's senior managers that on around 29 September 2007 they received an urgent call from TFR security saying that there was a major issue in the Richards Bay coal line and asking that they provide a site assessment in the Richards Bay area. ARM accordingly submitted a response thereto and was never

⁸⁴ Page 129

⁸⁵ Page 130

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asked to submit a proposal regarding a comprehensive specialised security service. The investigation revealed that ARM had provided its company profile with a generic costing and that it was asked to do so around 22 September 2007 and to supply the proposal on 29 September 2007. This was the proposal which the investigators found attached to the GNS confinement document. The ARM manager Mr. Verner Steinhoble said that the TFR manager concerned Mr. Nayager had mentioned that an open tender process was underway. Steinhoble said he queried whether it was not premature for ARM to present its credentials given the fact of such a tender process. Nayager responded that Transnet had a prerogative not to award the open tender.⁸⁶ While this evidence is hearsay, there was no evidence to gainsay it. It does tend to show that there was not only no open tender process but that the limited enquiries on confinement were entirely inappropriate as regards the supply of a comprehensive security service by ARM or Circle 7. This would necessarily leave as a certain outcome the fact that GNS would reflect as the only realistic bidder for comprehensive security services.

- 74 Madhav testified that there was no explanation and certainly no satisfactory explanation given for why the confinement motivation failed to include the three bidders which had already submitted their bids in the open tender process.
- 75 The confinement motivation document then referred to the fact that GNS was unique because it boasted experienced former SANDF and SAPS employees with years experience in their field of work. This he said was inaccurate because their investigation revealed that that GNS had no employees.⁸⁷

⁸⁶ Page 132

⁸⁷ Page 134

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- 76 The GNS proposal submitted to TFR contains the following statement under the heading "A world of experience"⁸⁸: *"GNS has a variety of specialists with experience in corporate and criminal law, finance, due diligence, forensic audits, intelligence, law enforcement, management consulting, military, regulation, research and security. The GNS team comprises of individuals of vast experience and are renowned subject matter experts in their areas of specialisation."* Madhav investigated this statement and found that none of it was true. The investigation could find no evidence to confirm any of these assertions. There was moreover no evidence that any due diligence had been performed by TFR on GNS.⁸⁹
- 77 Madhav testified that Beattie signed a termination agreement with Transnet on 5 December 2007, being the very day that Gama signed the GNS confinement document. The termination agreement meant that Beattie's last day at work was 7 December 2007 and he was paid 15 months salary, but the termination document revealed no reason for his termination. He had been employed with Transnet for some 13 months prior to his leaving and received 15 months severance pay. It was put to Madhav in cross examination that Gama would say he signed Beattie's separation agreement on 5 December, that Beattie signed it on 6 December and that Beattie actually left Transnet's employ on or about 10 December 2007. Madhav stated that the termination agreement itself stated document stated 7 December 2007 as the last working day. Wells understood that Beattie was on a normal employment contract for an indefinite period, had worked for TRE for 13 months and was paid a severance package of approximately 15 months salary. This Wells said was shocking⁹⁰ as it was far too high and he said that an investigation was taking place into this issue.

⁸⁸ At page 66 and 97 of Bundle B

⁸⁹ Madhav page 3

⁹⁰ Page 29

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- 78 Madhav also testified about the overall course of the implementation of the GNS contract. The monthly payment approved in the initial confinement was some R1.5 million per month (excluding VAT). The GNS agreement was later extended for a further period with a similar monthly payment being made to GNS. This extension was approved by Senamela the Senior Manager: Security TFR who approved the extension on 31 March 2008. Madhav said that the approval of the extension was not in accordance with Transnet's policies and procedures.⁹¹ There was a second further extension for a further 3 months from March to May 2008 with a monthly payment of R856 000.00 (ex-VAT). Again according to Madhav this was an extension obtained outside of the policies and procedures of Transnet. As far as Madhav was aware the GNS agreement was extended on a month-to-month basis until the end of January 2010 whereupon the GNS contract was terminated following non-cooperation by GNS in regard to its furnishing information which Transnet had asked be presented to it.⁹² No open tender process was ever conducted involving GNS either in relation to the original agreement or the two extensions thereof.
- 79 Madhav said that while they could not find any evidence to confirm GNS's alleged track record⁹³ by comparison CPI had a well documented track work record having performed work not only previously for Transnet itself but also having performed similar work for Eskom, City Power and Telkom.⁹⁴
- 80 In terms of the GNS contract GNS was prohibited from sub-contracting any of their services without Transnet knowing of this fact.⁹⁵ Madhav said that in fact GNS did so contract as they had no personnel employed in any

⁹¹ Page 7

⁹² Page 8

⁹³ Page 10

⁹⁴ Page 10

⁹⁵ Page 11

capacity as security personnel. Moreover GNS failed to comply with the reporting responsibilities contained in the GNS contract.

- 81 Madhav testified that including the extensions approximately 60 or 70 people needed to be employed for purpose of executing the required services required under the GNS contract. As previously mentioned the investigation could find no evidence of any employment by GNS which in fact sub-contracted the work. There was also no evidence to show that either Senamela or Khanye the two managers responsible for security in TFR ever took any steps to monitor and oversee the implementation of the GNS contract.

The GNS confinement document

- 82 Before the GNS confinement document was approved and signed by Gama, it went through a process. The proposal that GNS perform the work as contained in the GNS confinement document was initially referred by Senamela Senior Manager: Security TFR to the tender board (HOAC) for approval. HOAC approved the document subject to final approval for the CEO (i.e. Mr Gama). This appears from a copy of the minutes of the HOAC meeting of 7 November 2007.⁹⁶ The GNS confinement document itself makes no reference to an open tender process and the approval by the HOAC clearly refers to the approval of a confinement. Indeed the word "confinement" is referred to three times in the relevant six line portion of the minutes of the HOAC meeting.
- 83 The GNS confinement document makes no reference to a "consortium" of which GNS would be part. Neither does the GNS motivation document refer to a consortium of any type. Similarly, neither document refers to GNS having the right to sub-contract its obligations. Madhav confirmed the

⁹⁶ Bundle B, pages 121, 121a at 121d, Madhav page 23

signatories who signed off on the GNS confinement document as follows. Senamela: Senior Manager Security TFR who "requested" the confinement signed on 8 November 2007. The document was "recommended" by Beattie the General Manager: Safety and Compliance Freight Rail who signed on 14 November 2007 and was "supported" by Lloyd, Tobias Chairman of HOAC who signed on 23 November 2007. The document was thereafter approved by Gama as Chief Executive TFR who signed on 5 December 2007.⁹⁷

84 Madhav testified that absent any specific delegation of authority of which there was no evidence, no person other than Gama had authority to approve this confinement.⁹⁸

85 Madhav said that the investigation revealed an e-mail from one Relibile Mofokeng from GNS to recipients Jaco van Wyk and Khanye, the latter of TFR, which had as an attachment a letter to Transnet from GNS.⁹⁹ Under the heading "*Our Engagement*" the letter states:

"We refer to the above matter, in particular the telephonic conversation between your Mr. Siphon Khanye (Transnet Freight Rail) and our Mr. Relibile Mofokeng (GNS) on 22 November 2007. We confirm that following:

- *GNS has been appointed to render services to Transnet Freight Rail based on the agreed costs as per our quotation dated 12 October 2007."*

86 The letter goes on to confirm that GNS will receive the appointment letter in due course and it confirms their instruction to liaise with Mr. Dingaan Senamela as a matter of urgency with regard to the above allocation of resources. This e-mail was sent on 23 November 2007 approximately two weeks *before* the confinement was signed and approved by Gama. Madhav

⁹⁷ Bundle B, pages 120 and 120H

⁹⁸ Page 25

⁹⁹ Bundle B, pages 122-3

34

said that when he asked Khanye about this letter where he told Mofokeng that GNS had been appointed, he simply got no response from Khanye.¹⁰⁰ In addition, Mr. Jaco van Wyk is from Nayle Security Services or Nayle Consulting. The fact that he was copied on the e-mail indicates that Nayle was probably sub-contracted to GNS to perform services which is not permitted in terms of the DPP policy procedures.

- 87 By letter dated 6 December 2007 Mr. Brian Fredricks the Chief Procurement Officer, TFR wrote to GNS regarding the GNS confinement contract. That letter referred to the confinement as *"a comprehensive total security package to be supplied nationally for a one year period"* and confirmed the acceptance of the quotation and proposal and revised quote after negotiations undertaken dated 12 October 2007. This letter therefore indicates that the negotiations between TFR and GNS regarding the confinement contract pre-dated by 3 days the e-mail which placed the open tender process on hold.¹⁰¹ The content of that letter of 6 December 2007 is generally similar to the GNS proposal document dated 12 October 2007 as subsequently revised, both as to the content and the format of the document.¹⁰² This letter confirming the acceptance of the quote referred to various reporting requirements which Madhav testified were not complied with. Neither were the performance criteria met being a 25% reduction in cable theft after five months and a 50% reduction during the remaining contract period. The contract period was recorded as from 1 December 2007 to 31 December 2008 being a 13 month period.¹⁰³ At a later stage on 4 June 2008 a formal contract was concluded between General Nyanda Security (Pty) Ltd¹⁰⁴ and Transnet Limited which was signed by Mr. Peter

¹⁰⁰ Madhav page 133

¹⁰¹ Bundle B, page 127, Madhav page 29

¹⁰² Compare Bundle page 83 and following

¹⁰³ Bundle B, page 137

¹⁰⁴ referred to on the cover sheet as "General Nyanda Security Risk Advisory Services"

Fernhead the Chief Operating Officer for TFR and Mr. Relibile Mofokeng as Project Manager for GNS.¹⁰⁵

- 88 The formal contract provided in clause 19.1 that GNS afford access to Transnet's representatives to all data and information in its possession reasonably necessary to allow the verification of the content of the service provider's invoices submitted represent charges that had properly been incurred. Moreover the agreement provided in clause 20 that except with the written approval of Transnet, GNS would not in whole or in part assign, transfer or otherwise, dispose of its rights or obligations under the agreement or sub-contract any responsibility for the performance of its services. The investigation revealed that GNS used sub-contractors but there was no evidence that GNS ever notified Transnet that it was utilising sub-contractors. The formal contract recorded in clause 24.1 that the period of the agreement was from 1 December 2007 until 30 November 2008 being a 12 month period.¹⁰⁶ It also allowed in clause 24.2 for the termination of the contract by Transnet on one month's written notice.
- 89 The investigation revealed an e-mail sent from GNS to Jacques Seaward – apparently the Managing Director of Revert Risk Management Solutions – referring to an appointment letter wherein GNS appointed Revert to provide services to TFR for a period of one year.¹⁰⁷ That letter confirmed that payments would be made by GNS to Revert of R500 000.00 (including VAT) per month. The investigation also found a telefax from GNS to “Jacques” dated 21 January 2008 which referred to “our consortium”¹⁰⁸ and

¹⁰⁵ Bundle B, page 164

¹⁰⁶ Bundle B, page 158

¹⁰⁷ Bundle B127A(a), Madhav page 36

¹⁰⁸ Madhav accepted that the GNS proposal document reflected on its cover sheet the logos of “Revert” and “Nayle Outsourcing” which indicated that there was a consortium, although as he pointed out that it was merely the two logos which suggested this and the content of the contract document does not explicitly state that there is any such consortium of these three

confirmed that "*Revert and Nayle outsourcing together approached Transnet Rail with regards to the provision of a comprehensive security package to TFR*". The letter confirms that the revised quotation of 12 October 2007 had been accepted and that the contract had been awarded for a period of one year and then set out the scope of the contract.¹⁰⁹

- 90 The investigation further revealed that on average payments made to CPI the previous service provider had been paid 62 days after invoice whereas payments to GNS were paid 20 days after invoice.¹¹⁰
- 91 As mentioned above the GNS contract was first extended on 31 March 2008 by Senamela despite the fact that he was not authorised to conclude such an extension to the agreement. The circumstances of this extension were that the services of a security service provider Singobile Equestrian Security Services (SESS) was terminated on 24 January 2008 and that firm was providing security at City Deep, Kaserne and Kavzon and GNS were contracted to temporarily secure these facilities until another service provider could be found. The investigation also found a motivation for this extension to the GNS contract.¹¹¹ The effect of the extension was to double the monthly amount paid to GNS to an amount of approximately R3.5 million per month. Madhav pointed out that the scope of the extension referred in identical terms to the project scope already contained in the existing GNS contract.¹¹² The motivation contained a handwritten note by Senamela the essence of which is that it required that GNS conduct an investigation into an incident at Kaserne. In fact this investigation was not performed by GNS but was performed internally at TFR by Mr. Pillay a

parties. The contract was awarded to GNS alone and not to a consortium or partnership. To my mind this is extremely flimsy evidence of a consortium.

¹⁰⁹ Bundle B127Ba

¹¹⁰ Madhav page 37

¹¹¹ Bundle B2, page 336

¹¹² Bundle B2, page 337

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security manager and his team of investigators.¹¹³ The effect of this extension was that the monthly payment following the first extension of the GNS contract was increased to a monthly payment to well above the originally quoted amount.

- 92 In respect of the first extension HOAC retrospectively condoned the approval of the extension subject to the condition that the extension was only valid until November 2008 and subject to a report on the Kaserne incident being produced by 30 November 2008. In regard to the required authority to extend the scope of an original contract this can only be done to a value of less than 10% difference from that of the original contract which can then be approved by the relevant manager or person who approved the original contract. This is in terms of the DPP policy procedures. Increases of the nature of these two extensions of the GNS contract required that a tender process be followed which did not occur in either instance.
- 93 The GNS confinement document itself contained the word "*confinement*" not only in the heading and title of submission, but a further thirteen times in the body of the document. The contract period is stipulated as being from 1 November 2007 to 31 October 2008.¹¹⁴ Paragraph 2 dealing with "*Recommendation: reasons for issuing a confined tender*" refers to the open tender process having been stopped on instruction of Group Executive Dunjwa, and later records that an open tender process is to be followed after the confinement contract period expires.¹¹⁵ It refers in paragraph 14 to a monthly savings of some R692 000 which Madhav said was inexplicable as the CPI contract was for the lower amount of R520 000 per month. Paragraph 14 of the document refers to the commercial evaluation and to GNS being a company with a proven track record of providing security services. As set out above, Madhav testified there was no evidence of this.

¹¹³ Page 41

¹¹⁴ Bundle B, page 115

¹¹⁵ Bundle B, page 114, paragraph 2

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The investigator's interview with Gama

- 94 Madhav interviewed Gama on 8 April 2009 which was some 17 months after he signed the GNS confinement. That interview was recorded and transcribed. Madhav confirmed the accuracy of the transcript.¹¹⁶ The purpose of the interview was not for Madhav to decide on Gama's guilt or innocence but was to obtain clarity on documents and the process which had been adopted.
- 95 Madhav testified that during the interview Gama said that he could not recall that it was a confinement, that there was no need for any security service provider to go out on confinement and that an open tender process should be followed. In relation to the GNS confinement documents which he had signed Gama initially denied that it was a confinement and said that it was actually an open tender process by which GNS had been appointed. Madhav confirmed Gama's statement reflected in the transcript that Beattie, the General Manager: Safety and Security came to his office and said that we need to sign this document as it was urgent. Gama said asked Beattie why it was urgent and what the pertinent issues were. Beattie's reply was that they were putting new people on site, that the process had taken longer than they thought but they had three companies that had tendered and that they had chosen the best company and that they needed to start immediately because of issues around cable theft. Asked in the interview what documents had Beattie presented to him, Gama responded that it was the motivation. The only motivation which Madhav found was GNS motivation document prepared by Senamela and Khanye. That motivation document refers to a confinement process rather than to an open tender process.

¹¹⁶ Madhav pages 59-60

- 96 In relation to whether Gama had applied his own mind or relied on the views of others Madhav said that Gama stated that he relied heavily on the tender board doing its job which was to ensure that they had looked at the BEE requirements and whether the process was done properly in terms of Transnet procedures. Gama then said that obviously the tender board people had already signed it. He would know they had taken all that into account. He would then make sure that there was the budget for this expenditure, ask about the amount and then approve it. Gama then said that even if it was written "*confinement*" on the document it was not a confinement process because they had gone through a process and had showed him that process.¹¹⁷ Madhav testified that there was no indication of any other process other than the confinement process having been followed in relation to the GNS contract.
- 97 Madhav testified that he asked Gama to confirm that he had read the GNS confinement document when he was presented with it for signature. He did not receive a direct answer, as is reflected on the transcript. However, as part of his answer Gama did say that "*I do not think I would have gone into the detail, into all the details of this*".
- 98 The chairperson during this interview was Mr. Brenton Steenkamp.¹¹⁸ He asked Gama whether Beattie had alluded to the fact that it was a confinement as stipulated on the document and in the heading. To this query Gama responded: "*No, no, you see this thing of a confinement as I say, people sometimes write all kinds of things and say it is a confinement*". Gama then said that Beattie "*showed me three companies in this document to say: these are the three companies that we have interviewed. Here is the one company that we are choosing. These are the reasons. Mine was to say: Okay, have you taken it to the tender board? Yes, it has been taken*

¹¹⁷ Madhav page 54

¹¹⁸ Madhav page 55

to the tender board. This notion of a confinement in this contract is actually untrue. Because a confinement is if I approach you and I say: 'I am going to ask you, you are the only one that can do this...'. 'I have always maintained, and I have said to my people:: security contracts, there is no way that you can say you cannot go out on open tender'. Madhav testified that the reference to the three companies was a reference to the GNS motivation document where three companies are mentioned and which document he showed Gama during the interview.¹¹⁹ The GNS motivation document sets out the process that was followed and how the three companies were chosen and how the recommended service provider GNS was chosen for confinement. The GNS confinement document motivates a confinement and does not make reference to an open tender process save where it refers to the cancellation of the prior open tender process and, as Madhav conceded in cross-examination, where it refers in the final paragraph to the contract going out on open tender *in the future* before April.

- 99 Madhav testified that during the interview Gama asked that he be given all the documents and Madhav replied that there was only one other document that they had in their possession and that was the GNS motivation document which he produced. He said that what Gama was saying in the interview was that he in fact signed the approval of an open tender process and not, as indicated on the document which he signed, the approval of a confinement process.¹²⁰ Gama mentioned in the interview that the document which Beattie showed him reflected that three companies had participated in the process, whatever that process was. Madhav testified

¹¹⁹ At Bundle B1, page 112

¹²⁰ Madhav page 89; Bundle D1, page 87

that there was no other document other than the GNS motivation document that referred to three companies participating in a tender process.¹²¹

- 100 Madhav commented that insofar as Gama was saying that what he had signed was not really a confinement and was the approval of an appointment after an open tender process, then Gama probably never read the document before he signed it¹²² if in his mind it was not a confinement as the document clearly indicates it was. Gama stated in the interview that *"My role in this thing is to say to the GM who come to me: Do you have the funds for this? Have you followed the processes?"*¹²³ Madhav confirmed that was how Gama delineated his role.
- 101 When asked in the interview whether he had looked at the value of this particular contract when signing it off Gama replied *"With all these new contracts, I have an authority of 100 million on these things. This thing was R4.9 million"*. Madhav explained that the R100 million referred to Gama's authority to sign or approve a contract following an open tender process. Madhav explained that the reference to R4.9 million was a reference to the savings as reflected in the GNS confinement document rather than the value of the contract which was R18 million which is apparent from the confinement document.
- 102 Madhav testified that after again insisting in the interview that this was not a confinement, Gama in effect said that the security department personnel were not competent to write whatever was written on the motivation and on the Acquisition Council documents in the way that they were supposed to.¹²⁴ Madhav confirmed that towards the end of the interview Gama again stated that the document was not presented to him as a confinement but

¹²¹ Madhav page 60, Bundle D, page 86-87

¹²² Madhav page 60

¹²³ Bundle D1 page 89

¹²⁴ Madhav page 62

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was presented to him as the product of an open tender process.¹²⁵ Gama then asked Beattie whether he had taken it to the tender board and Beattie said "Yes, they have signed". Gama said: "Okay, that is good" asked "Have you got the money?" and Beattie replied "Yes, I have got it".¹²⁶

103 Madhav testified that when he put to Gama during the interview that what he signed was in fact a confinement and that there was only one tender price appearing thereon Gama responded: "No, but I am saying to you this is not true. Whatever they may have written in here, he (Beattie) has shown me documents. Okay? You know? And this, by the way, this was a five month contract"¹²⁷ Madhav testified that it was in fact a 12 month contract. The correct position, which Gama himself stated shortly thereafter in the interview, was that it was a one year contract with an initial approval period of five months and that there would be an assessment after five months. Madhav then informed Gama in the interview that the acceptance letter which went out was for a period of one year and that the contract value was R18 million made up of R1.5 per month for 12 months. Gama responded that the allegation that his confinement limit was R10 million and he had spent R18 million was not true "... because in my own analysis and in the documents that John (Beattie) gave me, very clearly we were not talking about a confinement".¹²⁸ Madhav testified that this was not correct based on the documentation and that the contract signed by Gama clearly was a confinement.¹²⁹

104 Gama then continued in the interview "And in any event, even if it was a confinement okay, these people are going to work for the first five months and then, and then check how far they have gone. What is the first five

¹²⁵ Bundle D1, page 94

¹²⁶ Bundle D1, page 94

¹²⁷ Bundle D1, page 96

¹²⁸ At D1, page 99

¹²⁹ Madhav page 64

months, at R7.5 million?"¹³⁰ Madhav testified that this referred to the value of the contract over the first five months being the period after which the performance review was to be conducted, but that the contract was in fact a 12 month contract subject to a five month performance review. The value of the contract has clearly to be based on the full 12 month period.

- 105 Madhav confirmed that in the interview Gama stated that he knew what his authority was in terms of confinements and he knew what his authority was in terms of what he was discussing with Beattie. He then said: *"But what I do want to say and to state unequivocally is that some of these discussions that we tend to have here, are really just discussions that are aimed by others to cast aspersions on my integrity and I am not going to allow that."*¹³¹ Madhav denied that he had in the interview said to Gama he was not telling the truth or that he had cast aspersions on Gama's integrity. When Gama made this comment in the interview about unidentified persons casting aspersions on his integrity, he did not explain who the other people were to whom he referred. In his testimony at the disciplinary hearing Madhav sought to go no further than to show that the facts relied upon by Gama are in fact untrue. Madhav did not contend that Gama was being wilfully untruthful or express any view in this regard.
- 106 Madhav said at no stage during the interview did Gama ask for an opportunity to read the documents in order to refresh his memory. On the contrary, he expressed no doubt about what he was saying. Towards the end of the interview Gama did however request that copies of the documents be made available to him. This was done approximately a week later. Gama never reverted and suggested to the investigators that he needed to correct anything he had said to them in the interview.

¹³⁰ Bundle D1, page 99

¹³¹ Bundle D1, page 101

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107 Madhav accepted that during the interview Gama had referred to documents which Beattie showed him in a file but said that they had been unable find a separate file held by Beattie as opposed to the documents to which Beattie would simply have had access.

108 Madhav accepted that when he went to interview Gama he knew according to the documentation which he then had that an open tender process had not been adopted. He also knew that Gama had previously told Oates that as far as he was concerned the GNS contract was the product of an open tender process.¹³² Madhav accepted that he nevertheless did not make the documents which indicated the contrary (i.e. that it was not an open tender process) available to Gama prior to the interview. During the interview Gama was shown documents as the interview proceeded. In the interview Gama maintained (as he had previously in documentation and in a discussion with Oates in March), that he believed the process leading to the GNS contract was an open tender process. In the interview Madhav showed Gama the GNS confinement document and asked him to confirm whether he had signed this document. In addition Madhav handed Gama the GNS confinement motivation document and Gama's response was that while "*confinement*" might be written on the document, as far as he was aware it was an open tender process.

Gama's evidence on the interview

109 Gama was not pre-cognized or shown any documents prior to his being interviewed by Madhav in April 2009. Gama explained that his statement during the interview that as far as he was concerned there was no confinement involved even if it looked like it was a confinement, was because of his previous instruction that security contracts should undergo the open tender process and because Beattie had indicated to him that the

¹³² Madhav page 127

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tender process had been completed.¹³³ Gama said that the GNS confinement document was amongst those presented to him by Beattie during their discussion.¹³⁴ He said that other documents were also presented to him by Beattie in the course of his motivation and to indicate the tender process which had taken place. Gama testified that there was nothing in the documents which he discussed with Beattie that indicated to him that this was a confinement which he was being asked to sign.

- 110 In his evidence Gama said that he was looking at the documents which Beattie had *"from the other side"* by which I understand he was reading the documents upside down and that he *"clearly believed at the time that they had in fact gone out on tender"*.¹³⁵ Gama was clear that at the time when he signed the document he believed it had gone through an open tender process. He confirmed his statement in the interview that he *"would not have gone into all the detail of this"*.
- 111 Gama confirmed his prior instruction that security contracts should be subject to an open tender process. He also confirmed his statement in the interview that he *"would not have read this thing word for word"* referring to the GNS confinement document. Gama testified that during the interview his belief was that an open tender process had been followed and this had been confirmed to him by Beattie at the meeting when he asked Gama to sign.
- 112 Gama testified that the tender board is required to check that the proper process is followed and to ensure that Transnet's requirements are satisfied, so that in essence once the document had been to the tender board reliance could be placed thereon in respect of the *"cleanliness of the process"* as he put it. Gama complained that during the interview the

¹³³ Gama, page 15

¹³⁴ Gama, pages 16-17

¹³⁵ Gama, page 17

documents he was being shown were produced by bit and he was being required to recall what had happened in a discussion some 17 months earlier without the benefit of having considered the documents beforehand. He therefore asked that all the documents be made available to him so that he could familiarise himself with them. This appears to be an entirely reasonable request in the circumstances. However, it must be borne in mind that shortly thereafter Gama obtained all the relevant documents and yet never reverted to the investigators to in any way qualify what he had said during the interview.

- 113 During the interview Gama said that even if he had read the entire GNS document he would still have said to Beattie that this was not a confinement because of what Beattie had orally told him about it being a tender process. Gama confirmed in his testimony at the hearing what he had earlier said during the interview, but went on to add: *"But if I had read the document and it said confinement, then we would have to carefully go through it and say, why do you say it's a tender process if it's a confinement?"*¹³⁶
- 114 Gama testified that he had asked the procurement staff to find Beattie's file and although they produced some documentation no specific comprehensive file was produced.
- 115 There was no dispute about the fact that the process of calling for tenders was guided by the procurement department and that it was common practice was in Transnet that the relevant acquisition council together with the relevant to general manager would deal with the process of procuring services for Transnet.¹³⁷

¹³⁶ Gama, page 26

¹³⁷ Gama, page 54

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- 116 At the stage in July 2009 when Gama prepared his written response¹³⁸ to Wells' concerns arising from the TIA investigations he had realised that the appointment of GNS was not through an open tender process and that the initial open tender process (of which GNS was not part) had not been pursued.
- 117 In his written response Gama denied any involvement in possible manipulation regarding the appointment of GNS and suggested too well that *"if indeed there was any manipulation that you suspect by any party, we would follow up on that matter and carry out an investigation."*¹³⁹ Gama testified that Wells never asked him to carry out any such investigation prior to his suspension.
- 118 Gama was never party to or privy to the open tender process from which G4S withdrew and which was later stopped because, as was usually the case, he did not get involved at that level of the procurement process.
- 119 In his written response Gama recorded¹⁴⁰ that the security department had verified the profile of the three companies GNS, ARM and Circle 7. This information he had obtained from a memorandum from Khanye a manager in the TFR security department dated 10 July 2009.¹⁴¹ He further referred to the minutes of the tender board of 7 November 2007 which recorded HOAC's support for the GNS confinement subject to the CEO's approval. Gama's written response also refers to the confinement being signed *"for a period of five months, 1 December 2007 - 30 April 2008 on a performance review period at R1.5 million (+-R7.8 million)".* This information Gama said was obtained not only from paragraph 4 of the GNS confinement document

¹³⁸ Bundle D2, page 1

¹³⁹ Bundle D2, page 18-19

¹⁴⁰ At paragraph 4.3

¹⁴¹ Bundle D2, page 91

itself¹⁴² but also from members of the tender board. He contended in his written response that this fell within the R 10 million limit of his delegation of authority on confinement as the contract value was R7.8 million.¹⁴³ Gama did not go so far as to repeat this justification in his evidence at the disciplinary enquiry. Instead, he merely pointed out that if the consignment was for a five-month period then it fell within his delegated authority.¹⁴⁴ What Gama failed to point out is that the very next line in paragraph 4 of the GNS confinement document refers to the total contract period being a period of one year. What the written response goes on to say, and this was confirmed and repeated by Gama in his testimony at the enquiry, is that the GNS confinement document was poorly written and that he had instructed the (new) General Manager concerned (Siya Mtetwa) to follow up on the pertinent aspects relating to the poor quality of the documents submitted and that he had been informed that both a training intervention and an enquiry on security submissions in general was underway. He further explained that the Chief Procurement Officer had implemented a procurement management process to ensure that communication on tenders is dispatched to all parties that apply to participate in a tender. The written response then records Gama's general belief which is that security services can be obtained via a public tender process. It goes on to state that it is sometimes impossible not to enter into short-term confinement contracts where operational problems such as cable theft require this, and that it would be similarly negligent not to support efforts to curb that practice.¹⁴⁵ Gama's reliance in his written response on paragraph 4 of the GNS confinement document was selective and is not based upon a proper construction of the full document which in paragraphs 11 and 14 reflect that the contract period was for a full year. On the face of it the fact that Gama was selective in this way in interpreting the document in order to

¹⁴² At paragraph 4, Bundle B, page 120B

¹⁴³ Bundle D2, page 20

¹⁴⁴ Gama, page 41


¹⁴⁵ Bundle D2, page 20 paragraph 5.2; Gama page 42

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seek to persuade Wells that he had authorised a contract within his level of delegated authority was misleading.

- 120 In support of his submission that the GNS confinement document was badly drafted Gama then referred in his written submission to the fact that the 2008 tender audit for TFR scored poorly on tender administration and that remedial action had been instituted with the Chief Financial Officer and the Chief Procurement Officer.¹⁴⁶ Finally, Gama indicated that the new General Manager had been tasked with a full review of the security area to be completed within three months following an incident whereby a security manager had hired another security companies services without obtaining any authority. Gama testified that this review had already begun by the time he was suspended but that he was not able, in consequence of his suspension which occurred about a month later, to indicate what had transpired in regard to that review process. Gama also suggested that any suspicions which TIA had regarding existing contracts could be assessed and dealt with. He pointed out that TIA for their own reasons, had not shared their investigations with him.
- 121 Gama said that that had he known at the time that the document he was signing was a confinement not have approved it because of his belief that security contracts should go out on the open tender.
- 122 As discussed in detail elsewhere in this award Mr Khanye provided the team with a file which contained the signed GNS contract which Mr Fernhead had signed in June 2008, the GNS confinement motivation as well as the GNS confinement document which served before HOAC as well as some e-mails. Madhav testified that the confinement document was obtained from Khanye around early December 2008. The version of the GNS confinement motivation (there being two contained in the exhibits file) was identified as

¹⁴⁶ BundleD2, page 20 paragraph 5.3; Gama page 43



the one handed in at the hearing under bundle B1, page 112 which was signed by both Senamela and Khanye.

- 123 The chairman of HOAC is Mr. Lloyd Tobias. He was the only member of HOAC interviewed by the investigators. The minutes of HOAC reflect that they motivated a 12 month contract. Madhav accepted that HOAC had no authority to approve a confinement for R18 million. When Tobias was asked by investigators why his council had approved the GNS contract in that sum his answer was simply that the council does not *approve* the confinement which is subject to final approval by the CEO, the council only supported it.¹⁴⁷ Madhav testified that he asked Tobias how they could support something which they knew Gama could not approve. He said that Tobias was evasive in answering this question and Madhav conceded that Tobias' answers were not satisfactory. Despite this wholly evasive answer Madhav did not interview any other members of HOAC or officials who were present at the relevant HOAC meeting to explain this apparent anomaly.¹⁴⁸
- 124 Divisional Acquisition Councils are dealt with in paragraph 8.1 of the DPP policy which provides that the DAC will consider and approve all expenditure contracts falling within its jurisdiction within the CEO's delegated powers. Consequently, HOAC's authority on confinement is the same as the CEO's, in this instance R10 million. This was common cause. The provision in clause 8.1 continues: "*Transactions exceeding the CEO's delegated powers will likewise be considered by the DAC, and if it concurs with the recommendation, refer the matter to the relevant person in the hierarchy with the appropriate delegated powers for the particular R – value of the transaction*". Madhav conceded that if this was indeed a confinement of R18 million then HOAC was required to refer the matter to higher authority. It was put to Madhav that either Tobias was untruthful when he

¹⁴⁷ Madhav page 82

¹⁴⁸ Madhav page 84

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said that the contract value was under R10 million or that HOAC was derelict in its duty by not referring the matter to the next level of authority. Madhav stated that it is possible that the council never applied its mind to whether it had to refer to the next level and that this was the subject of ongoing investigation. He accepted that no steps had been taken against any people at HOAC in this regard but said that their investigations revealed that action is probably to be taken against the council.

125 Mr. Fredricks (Head of Supply Chain Services: TFR) signed the appointment letter of 6 December 2007 which accepted the GNS proposal.¹⁴⁹ Madhav could not explain why Fredricks had never been interviewed during the investigation or asked about whether he had complied with the requirement in the DPP policy¹⁵⁰ that a person signing a legal document may only do so with the prior advice of the relevant legal services department. Madhav accepted that he should have pursued this question and that it was possible that someone from that legal department had told Fredricks that he could sign the letter.¹⁵¹ Madhav was not aware that Fredricks was facing any disciplinary steps.

126 The investigators had contacted Beattie, whom I understand now lives in Australia, but he said he could not recall anything. Madhav categorised Beattie's response as uncooperative as he would not give any answers and said he could not recall anything.¹⁵² Madhav accepted that he left in the air his evidence about the timing of Beattie's leaving Transnet.¹⁵³

127 In relation to the file of documents which Gama said Beattie brought him, the investigators were unable to find this file and had requested Gama

¹⁴⁹ Bundle B1, pages 127 - 137

¹⁵⁰ In clause 5.5. Note 1, Bundle A2, page 154

¹⁵¹ Madhav pages 108 - 109

¹⁵² Madhav page 113

¹⁵³ Pages 113 - 114

during his interview to produce the documents he was referring to. Gama said he would go and look for them.¹⁵⁴

- 128 Madhav accepted that the scope extension of the GNS contract from 1 April to 30 November 2008 (a period of 8 months) was subsequently condoned by HOAC on 13 August 2008 with an estimated contract value of some R13 million which, on the face of it, exceeded the authority of that council. The investigators did not discuss with the council members why they condoned the scope extension but Madhav conceded that Gama had nothing to do with the aspect of the extensions of the GNS contract.
- 129 Mr, the Chief Operating Officer: TFR signed the GNS agreement in June 2008. Madhav could not recall whether he had asked Fernhead whether he had referred the contract to the legal department before signing it. Madhav accepted that the investigation did not ascertain from Transnet Group Legal whether they had approved the agreement. Madhav accepted that Fernhead should have run the contract past Group Legal before signing it.
- * 130 Madhav's report recommended that corrective action be considered against Gama in relation to the approval of the confinement contract beyond his authority.¹⁵⁵ He did not recommend any corrective action against Nayager. He said it was only later in the legal opinion from Bowman Gilfillan that Nayager's name came up as somebody else who had transgressed the policy.
- 131 Madhav accepted that for an open tender process a tender would be adjudicated on by a cross functional evaluation team and thereafter by the relevant Acquisition Council (i.e. HOAC) which would decide whether the tender should be accepted or not and would then refer the matter for the

¹⁵⁴ Madhav page 111

¹⁵⁵ Bundle D1, page 58; Madhav page 124

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conclusion of the contract by someone else. None of this however had anything to do with Gama.

- 132 Gama's version as put to Madhav was that whilst the other signatories to the GNS confinement document had all signed on or before by 23 November 2007 Gama had no knowledge that as early as that date GNS had been informed that the contract would be awarded to them. Gama's version is that when he signed the document he believed at the time it was an open tender and only later, upon being shown the documents, did he come to understand that the process was in fact one of confinement.
- 133 The statement in the final two lines of the GNS motivation document that the contract should go out on open tender early in 2008 and before April, is nowhere stated in the GNS confinement document itself. Madhav pointed out under re-examination that if the intention was that the GNS contract would be a five month contract on confinement and thereafter a new contract would be awarded based on an open tender process, that there would have been no need for a *review* of the confinement contract after five months.
- 134 Madhav said that it would normally take anything from two to three months for a security contract to progress through and complete the open tender process. The original tender in this case was issued on 17 July 2007. Four months later in November 2007 the process was not yet complete.
- 135 It was pointed out by Madhav that in terms of the DPP policy and Delegation of Authority Framework policy the obligation to ascertain the relevant levels of authority lies on the person exercising that authority.
- 136 Wells accepted that as far as TIA was concerned up until the time of the hearing the only evidence implicating Gama in relation to the GNS contract

was the fact that he signed the confinement for R18 million when his delegated authority was only R10 million.

137 Wells denied that Gama had clearly said in his written response that he would take action to remedy the irregularities in regard to the GNS contract. Wells said that Gama had however also failed to take any action in regard to the irregularities in the process and no such action was taken by Gama before the time he was suspended.¹⁵⁶

138 In response to the suggestion that Gama was not given the full picture by the TIA Investigators and was only shown "*snippets*" of what they had found, Wells pointed out that he had in writing given full details to Gama in the letter which he wrote on 18 June 2009 raising his concerns and that Gama as the CEO at that stage had full access to all the information he could reasonably have required from TRE.¹⁵⁷ Wells also accepted that as the CEO Gama was entitled where he was not personally involved and where his line management were responsible, to rely on them.¹⁵⁸

Gama's evidence

139 I turn now to consider Gama's evidence on the GNS contract in detail.

Gama's evidence on the security contract

140 Gama's unchallenged evidence was that Beattie was head hunted from the private sector where he was very experienced in safety issues and came from a world-class save the environment. Although Beattie was experienced and able Gama explained that he was somewhat overwhelmed by the enormity and urgency of the security issues faced by Transnet. As a man in his 60's it was felt that he probably lacked the energy levels to

¹⁵⁶ Pages 135 - 136

¹⁵⁷ Page 136

¹⁵⁸ Page 137

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achieve what TFR required of him as the General Manager: Safety and Security TFR. Beattie discussed the situation with Gama and it was agreed that his contract would be terminated. Because Beattie had been head hunted from a stable environment and was nearing the end of his working life, the agreement was that he would receive a 15 month severance package. The unchallenged evidence of Gama was that this package was not out of line with packages paid to other general managers who had recently left Transnet. Accordingly, there is in my view nothing to be made of the fact that at the time that Beattie approached Gama to sign the confinement document Beattie was about to leave Transnet within a few days.

141 Combined Private Investigations ("CPI") was the security company which preceded GNS. Gama signed the confinement document for the appointment of CPI in 2005. The reason for the confinement was that CPI was the only known company that offers the specialised service required. Against his signature at the time of approval of this confinement Gama noted that the contract should be entered into for six months and then reassessed.¹⁵⁹ Gama maintained that security services for Transnet should go out on public tender. In support of this being his attitude historically Gama referred to an evaluation report on tenders which he approved in March 2007 and which bore a handwritten note by him requiring that the security services being evaluated should go on a public tender process to ensure a new contract by 1 July 2007.¹⁶⁰

142 When approving the confinement for CPI in about October 2005 Gama read the confinement document, applied his mind to the issues and directed by way of a handwritten note that the period of the contract be reduced to six

¹⁵⁹ Bundle B, pages 8A at 8B

¹⁶⁰ Gama, page 4, Bundle B 8H

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months and then reassessed.¹⁶¹ On 3 March 2007 when considering the extension to the CPI confinement contract he again read the tender board agenda item document presented to him¹⁶² and appended a fairly lengthy note in which he instructed that the extension be only until the end of June and that in the interim a public tender process be undertaken and concluded by 1 July 2007.¹⁶³ He also considered the service very expensive and pointed to the need for meaningful key performance indicators. All of this required that he consider the contents of the document placed before him in some detail. Gama knew that the award of the security contract to CPI had followed a pilot project involving CPI.¹⁶⁴ Gama accepted that cable theft was an important issue for Transnet and that as CEO he would have regularly discussed this with both subordinates and superiors. The reasons for deviating from the prescribed open tender process with CPI were set out in some detail in the tender board agenda item document.¹⁶⁵ In signing his approval of this confinement Gama said he had regard to and examined those reasons to decide whether a confinement was justified.¹⁶⁶ Gama accepted that when he signed the extension of the CPI confinement on 3 March 2007 he exercised an independent discretion as evidenced by his handwritten note reducing the extension from 12 months to six months and did not simply rely on the representation by the tender board.¹⁶⁷

- 14-3 Gama testified that his involvement in the appointment of GNS began and ended on 5 December 2007 when he was approached by his then General Manager: Safety and Security TFR for his formal approval for the security contract. This occurred during the morning when Gama found Beattie

¹⁶¹ Bundle B8B, Gama page 69

¹⁶² Bundle B, page 8C-H

¹⁶³ Gama, pages 76-7

¹⁶⁴ Gama, page 76

¹⁶⁵ Bundle B, page 8H

¹⁶⁶ Gama page 74

¹⁶⁷ Pages 87-88

BH

waiting outside his office to see him urgently. Beattie had no prior appointment. He invited Beattie into his office. Beattie had with him a bundle of documents which would have filled approximately three quarters of a standard lever arch file. Beattie explained that he needed approval of the security contract and showed Gama an open tender document.¹⁶⁸ Gama asked him questions about the process and whether it had been to the tender board and whether the KPI's were finalised as these were relevant to whether penalties applied to service providers who were not performing. Beattie then produced the GNS confinement document for Gama to sign. From the final page of this document Gama could see that the tender board (HOAC) had considered the contract and signed in support. Gama then signed the GNS confinement document. Beattie also indicated to him that there was an urgency to signing because of operational problems regarding security. Gama stated that his meeting with Beattie lasted about 5 to 10 minutes.

- 144 Gama maintained that Beattie told him that the tender board had approved the contract which had gone through the tender process. He also said that on the document shown to him were reflected three companies that had gone to the second stage of the tender process.¹⁶⁹ Gama identified the copy of the GNS confinement document which was shown to him as the copy without handwritten markings thereon.¹⁷⁰ Gama confirmed his signature approving the appointment on 5 December 2007. He said that at the time he signed he believed the document indicated that a tender process had been gone through. He said he observed the signatures on the document, including that of Beattie, and the chairman of the tender board which indicated that the proper tender process had actually been followed. Gama maintained that it was always his contention that security contracts,

¹⁶⁸ Bundle B, page 9

¹⁶⁹ Gama page 9

¹⁷⁰ Bundle B pages 120A-H

where there were many service providers available, should be secured by way of open tender.

145 Gama testified that after he signed the document he had no further involvement in the appointment of GNS as Transnet's security company. He said that it was only in June 2009 when Oates approached him that he became aware that the document which he had signed was not the approval of an open tender but was in fact a confinement of the tender to GNS. Gama had no involvement in the formal appointment of GNS for a 12 month period by Transnet by way of a letter dated 6 December 2007 signed by Fredricks the Head of Supply Chain Services. The formal agreement between GNS and Transnet was concluded on 2 June 2008. This was signed by the COO of TFR and again Gama had no involvement in this process.

146 Despite the background knowledge on Gama's part about CPI and his instruction that a public tender process for security services be concluded before 1 July 2007 Gama contended that when he was asked on 5 December 2007 to sign the document before him by Mr Beattie, he was not aware of whether any tender process had been followed in the interim.¹⁷¹ Gama denied that this was extraordinary saying that he did not deal with tender processes and was not involved in the "nifty-gritty" of that process and would not have been aware of this unless it was raised at weekly operational meetings. He said he would not have enquired as to the situation unless one of his managers had raised the security contract as a problem. While Gama accepted that the issue of cable theft was one which he as the CEO was required to deal with proactively, he did not accept that contracting was an issue which required his active attention. This was despite his acknowledging that there were problems with procurement at TFR at the time and that there was a 24 month project called "Operation

¹⁷¹ Gama, page 77-8

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Cleanup" which was put in place to improve the TFR procurement systems. Gama maintained that he trusted his senior general managers entirely to deal with the contract issues.

147 Gama knew that he had instructed that the new security contract be concluded pursuant to an open tender process before 1 July 2007. He was also aware that CPI's services were extended on a month to month contract after the end of June 2007 but said that he did not specifically know who was performing security services after June 2007. He also did not know whether any procurement process had been put in place and whether or not a tender had ever been issued. He denied any knowledge of the short listing of four bidders on 23 August 2007 by HOAC.¹⁷² Gama accepted that several of his subordinates would necessarily have known about the open tender process for a security contract and that persons dealing with security contracts at group level also knew, because of the instruction to halt the tender process which apparently came from group level. He also accepted that prior to the open tender process being stopped GNS was on the scene as a prospective supplier of security services but denied knowing this at the time.¹⁷³ Gama accepted that there was nothing to prevent the original tender process from reaching its conclusion despite the fact that G4 Security had to be excluded from the tender process. He agreed that it was strange that the tender process was halted. Gama conceded that there would have been no difficulty in his establishing at any stage what the position was regarding the tender process and the short listing of bidders. He accepted that the tender process was halted shortly after GNS had started communicating with managers at TFR under his jurisdiction.

¹⁷² Gama, pages 85-88

¹⁷³ Gama page 80

BH

148 Gama conceded that when Oates approached him in early 2009 to discuss the appointment of GNS and how it had occurred, he informed Oates that like any other security company it had gone out on an open tender process.

Gama's relationship with General Nyanda

- 149 Gama accepted that there had been a sponsorship of the General Nyanda charity golf day on about 18 August 2007 of which he was aware and which was associated with General Nyanda. Gama conceded that he had instructed his lawyers to put to both Oates and Naiker that he denied their version of the discussion about his relationship with General Nyanda and had said that he knew him only as a public figure. Gama admitted in the hearing that this was not his relationship with General Nyanda whom he admitted was a personal acquaintance of his with whom he had played golf in the past, with whom he had spoken on occasion and with whom he would discuss telephonically bereavements in the family. Nyanda also called him to commiserate when Gama was suspended. He denied however that Nyanda was a friend or close friend. Gama explained that the reason why he had instructed his lawyers to put this version was because he wished to put some distance between himself and General Nyanda because of the implication that there was an improper relationship between them which he denies.¹⁷⁴
- 150 Gama accepted that he had given instruction to his counsel in an attempt to distance himself from General Nyanda the effect of which was that the contention conveyed was not true.¹⁷⁵ He accepted that his interpretation of the evidence of Oates and Naicker, namely that it was being alleged or inferred that there was a "friend" of General Nyanda was wrong. Gama accepted that General Nyanda was a personal acquaintance of his and said

¹⁷⁴ Gama, page 29

¹⁷⁵ Gama, page 95

that he had never denied this. He accepted that the version which had been put to the witnesses, namely that he knew General Nyanda like any other member of the public was incorrect and for that he apologised.¹⁷⁶ Gama's cellphone records showed that he was in telephonic communication with the general on 6 and 15 July, 27 August and 1 December 2007, the last communication being a matter of days before Gama signed the GNS confinement document. The retraction of Gama's version as to his relationship with General Nyanda was only made after telephone records were produced which showed communications between Gama and Nyanda which were inconsistent with Gama only knowing the general as would any other member of the public. Gama however denied that from his actual relationship with Nyanda any inference could be drawn of an untoward relationship.¹⁷⁷ He avoided answering the question of why it was, that if his relationship with General Nyanda was in truth entirely innocent, there would have been no reason for him not to give his lawyers the correct instruction rather than to instruct him as he had done with the version that he knew Nyanda as anyone else would know him, because he was a public figure.¹⁷⁸

151 Senamela was appointed as a manager in TFR on 23 July 2007 and Gama accepted that he was therefore new in the job during the period when the open tender process was taking place. Gama received reports regarding security issues including cable theft but could not recall whether he had discussed cable theft with Senamela, saying this may have been dealt with by Beattie.

152 On 5 December 2007 Gama knew that Beattie's departure was possibly imminent. On the previous day and Gama had proposed to Beattie that his role and responsibility be reduced essentially due to his inability to cope with the full scope of his mandated activities. Indeed, when Beattie

¹⁷⁶ Gama, page 97-9

¹⁷⁷ Gama, page 100

¹⁷⁸ Gama, page 100-106

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approached him that morning Gama anticipated that the discussion would be about his response to whether he would remain at TFR or not which was an issue was due to be discussed with Beattie later that afternoon. The negotiations regarding the terms of separation in fact took place on 5 December and were concluded that same afternoon by the time when the separation agreement was signed by Gama.

153 Under cross-examination Gama said that the final signing page (page 7 of seven) of the GNS confinement document was the only document which he looked at and actually read at the time when he signed it. Although the entire GNS confinement document was with Beattie, Gama said he was only handed the final page thereof which was the only page which he read.¹⁷⁹ He accepted however that at the bottom of that very page, in fine print, is a reference to the GNS contract being a confinement. When it was pointed out that the document had previously been signed nearly a month earlier by Senamela and at least 12 days earlier by the chairman of the tender board, Tobias, and yet Gama was being asked to sign it is a matter of urgency, Gama said that he probably didn't pay much attention to the dates on which others had signed the document. He said Beattie asked him to sign as a matter of urgency and indicated that he (Beattie) had omitted to deal with the matter and that the contractors needed to move onto site. Gama did not query why the matter was so urgent. He did not take time to read the document and said that when he signed it he did so without knowing to whom the contract was being granted.¹⁸⁰ He also said that the actual cost to Transnet was not discussed although he said he did ask whether there was money in the budget.

15-4 Gama said that he saw, in Beattie's possession a document which reflected a tender number, such as the cover sheet for the open tender issued on 17

¹⁷⁹ Gama, page 123-125

¹⁸⁰ Gama, page 121

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July 2007 which was produced in evidence and that he had no reason to believe that what he was signing was something other than an open tender.¹⁸¹

155 Gama accepted that what Beattie did by approaching him and persuading him that what he was signing was an open tender process was a complete and blatant fraud¹⁸² and that had Beattie informed him that it was a confinement his response would have been quite different. He accepted that when the fact that what he had signed was a confinement was brought to his attention (during the interview with Madhav in April 2009 as supplemented by the documents subsequently furnished to him shortly thereafter) that there may have been other persons equally guilty of this fraud which had been perpetrated on him.¹⁸³ Yet in his written response of 20 July 2009 there is no mention by Gama of a fraud having been perpetrated on him by either Beattie or anyone else. Gama's answer to this was that he indicated that he needed a period of three months to thoroughly investigate the matter and that insofar as there was an ongoing investigation into himself, who did not want to intervene and interfere with that investigation.

156 Gama conceded that had he read the GNS confinement document he would have concluded that what he was signing was a confinement for a period of one year with the contract value of some R18 million.¹⁸⁴ He accepted that had he read the document he would also have seen that there was in fact no open tender process because the process which had occurred had been stopped. He would also have seen that one of the beneficiaries of the contract was General Nyanda and, knowing that he was (at its lowest) an

¹⁸¹ Gama, page 134 read with Bundle B, page 9

¹⁸² Gama, page 138

¹⁸³ Gama, page 141

¹⁸⁴ Gama, page 148-149

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acquaintance of Nyanda that there was a potential for this to adversely affect TFR.

- 157 Gama accepted that the provisions in clause 5 of the Delegation of Authority Framework were aimed at preventing potential abuse of the confinement process. He further testified that it was not uncommon in TFR to find that standard documentation was incorrectly used in the procurement process and that, in consequence, as a general proposition this was even more reason to scrutinise very carefully documentation such as that authorising a security contract. In addition, although he was not himself the person responsible for executing the programme, he supported and was aware of the "Operation Cleanup" programme within TFR aimed at remedying problems in the procurement systems. He accepted that a CEO such as himself was expected to lead by example and to exercise his authority in accordance with the laid down Transnet procedures and that in the context of the problems regarding procurement within TFR and having regard to Operation Cleanup it was incumbent on him to execute his duties with due and particular care.
- 158 Gama agreed that when he related during the interview what had occurred on 5 December 2007 when he signed, he was relying on his memory of what had taken place on 5 December and not on any documents which he had obtained in the interim.¹⁸⁵ In the interview in response to the question of what documents Beattie had presented to him Gama told Madhav that it was "their motivation". Gama said at the disciplinary enquiry that this was a reference to the file of supporting documents which Beattie had and not a reference to the specific GNS confinement motivation document.¹⁸⁶ In my view Gama's version of this portion of the interview is to be accepted and one cannot in fairness find that he previously gave an inconsistent version.

¹⁸⁵ Gama, pages 29-30

¹⁸⁶ Gama, pages 30-32

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159 While Gama was clear that Beattie did not show him the documents page for page (there being three quarters of lever arch file of documents in Beattie's possession) he did testify that Beattie showed him *"the relevant documentation"* and in particular he accepted that Beattie showed him the document on which the names of three companies appeared.¹⁸⁷ Later in the interview he repeated that Beattie *"would have shown the names of companies"*¹⁸⁸ and that *"He showed me three companies in this document to say: These are the companies that we have interviewed."*¹⁸⁹ Gama confirmed in his testimony at the disciplinary enquiry that he was shown the names of the companies. He also confirmed that he paid attention when Beattie said to him *"Here is the one company that we are choosing."*¹⁹⁰

160 Under cross-examination Gama accepted that when he referred to the open tender process being stopped because of the participation of G4 Security he was recollecting his understanding of the situation prior to interview and as at 5 December 2007.¹⁹¹ Gama accepted that Beattie told him that one company had been dropped, that there were initially four and later three bidders, but did not mention that the entire tender process had been stopped. The interview then continues with Gama again saying that it was a tender process that somebody decided to call a confinement and he is recorded in the transcript as going on to say: *"There was a tender process, there were three companies that were approached. Okay? In terms of their requests for proposals."*¹⁹² Gama denied at the hearing that he knew as at the time of the interview in or indeed as at 5 December 2007 that three companies were approached after the original tender process had been stopped. He said that by his use of the word *"approached"* in the quoted passage he had meant that there had been an *"adjudication"*

¹⁸⁷ Gama, pages 33-35 and 40

¹⁸⁸ Bundle D1, page 84; Gama, page 46

¹⁸⁹ Bundle D1, page 85; Gama, page 47

¹⁹⁰ Bundle D1, page 85; Gama, page 47-8

¹⁹¹ Gama, page 52

¹⁹² Bundle D1, page 87

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process resulting in the final three companies (and that this was therefore a reference to the open tender process rather than the confinement process). This is however a very strained interpretation of the language which he used in the interview.

161 To my mind the record of the interview reflects that Gama was aware on 5 December 2007 that only three companies were approached. The transcript later records the following, which Gama admitted at the hearing was a reference to his discussion with Beattie: *"We were discussing something where he said: Look we have gone out on tender. I had three companies. He did not say four, so I do not know anything about the fourth one. We had three companies, because they were to process this year, as you say. There was the process where they were ten companies or whatever, I do not know the actual number. But I can find out all that."* The importance of this is that, as appears earlier in these findings, the unchallenged evidence of Madhav was that the only document which refers to three companies was page 2 of the confinement motivation document which he showed to Gama during the interview.¹⁹³ There is no such reference to the three companies in the GNS confinement document itself which merely refers, in paragraph 2 thereof, to *"the motivation attached for a list of all companies interviewed together with GNS..."* It follows therefore that Gama was probably shown the confinement motivation document by Beattie at their 5 December 2007 meeting, as that is the only documentary source from which he could have obtained the understanding that there were three bidders who were approached. That being so, it is clear that Gama was given not only as the GNS confinement document which served before HOAC, and which on his version he said at the time was possibly merely wrongly completed to reflect a confinement when in fact the process was an open tender one, but he was also given that the GNS confinement motivation document.

¹⁹³ Bundle D1, page 87; Gama, page 59-60

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162 There are several references in the transcript where Gama refers to Beattie having shown him documents during their meeting on 5 December 2007. Gama testified that the documents were shown to him across the table by Beattie.¹⁹⁴ Gama made it clear that Beattie was in possession of a number of documents and that whenever he questioned Beattie on any aspect he would point out the relevant page in the documents relative to that question. In the course of his explanation Gama stated that "*we saw the documents, we went through them*" but explained that Beattie remained in possession of the file of documents.¹⁹⁵ It was then put to Gama that if he saw the documents and went through them with Beattie he would have seen the word "confinement" and he accepted that he would have seen the word. However, this answer must be seen in the context of his previous answer, which was to the effect that he would have seen the word "confinement" only if he had actually read the documents.¹⁹⁶

163 Gama accepted that when he referred in the interview to a tender process involving ten companies¹⁹⁷ that this was information which he had in his mind and which had not been imparted to him previously in the interview by Madhav. It follows that the reference to the names shown to him during the interview must be references to the names of the three applicant companies in the confinement process such as it was. In this regard, during the interview Gama stated that Beattie "*..even showed me the names*" and "*He showed me the names and said: These are the people.*"¹⁹⁸ The second page of the GNS motivation document was then shown to Gama in cross-examination and he agreed that it reflected two lists of the same three company names, including that of GNS. It is not entirely clear whether Gama admitted under cross-examination at this point that he was actually

¹⁹⁴ Bundle D1, pages 97 and 99; Gama, pages 77, 83,

¹⁹⁵ Gama, page 84 and 88-89

¹⁹⁶ Page 89

¹⁹⁷ Bundle D1, page 92

¹⁹⁸ Page 90; Bundle D1, at page 94

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shown the name of GNS by Beattie in this way,¹⁹⁹ but in any event on the probabilities this was the list being shown to Gama at the time as there is no other document which lists only three company names.

Gama's response and alleged failure to himself investigate and take disciplinary action if necessary

164 Gama said that once he realised that what he had signed was in fact a confinement and that the tender process had been, contrary to his instruction, stopped and replaced with an unauthorised confinement process, there were a number of people both in the TFR security department and in procurement whose conduct needed to be investigated in order that they be called to account and possibly disciplined. According to Gama these included: firstly Beattie, Khanye, Senamela and Nayager in the security department as well as other persons in the procurement department including the Chief Procurement Officer who had issued the acceptance letter. Gama denied that immediately following the interview on 8 April 2009 when he was briefly shown two or three relevant documents, that he had sufficient information to act against these people. He said that he called for a file of relevant documents from the procurement department and was then going on leave for a period of some three weeks. It was, I think correctly, put to Gama that this was like asking the fox what was happening in the hen house because he was asking the very persons who were implicated to investigate themselves. The implication was that he ought to have elicited the assistance of TIA in this investigation, which he failed to do. In any event, on Gama's version by the end of July 2009 some three and a half months later, his investigations had not progressed beyond his determining that there was something amiss.

¹⁹⁹ Page 90

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165 This does appear to me to be an entirely inadequate response from a CEO who at that stage held the view that he had been misled by his General Manager and possibly also misled by staff in the security and procurement departments. The lack of a more vigorous investigation does tend to show that Gama was less than enthusiastic in pursuing these suspected irregularities, particularly given the implications for his position personally which he can hardly have failed to realise. When Wells informed Gama that he was himself the subject of an investigation in relation to the GNS contract Gama said he adopted the view that he should not be seen to be interfering with the investigation of TIA and should remain aloof rather than himself investigating his subordinates.

166 Gama accepted under cross-examination that Transnet was entitled to investigate allegations concerning the award of the GNS contract and call him, as the CEO, to account in relation to that. However, in addition he contended that Transnet was obliged to inform him that he was formally under investigation.²⁰⁰ I fail to see from where the obligation arises that a person must be informed of any investigation against him. The fact that Gama may previously have been told of investigations in his area of responsibility does not give rise to any obligation on Transnet's part. Be that as it may Gama should have realised on 10 December 2008 when Oates told him there was an investigation into irregularities surrounding the GNS contract that the investigation could have related to him. He was formally ^{10/10} that he was the subject of an investigation in this regard on 11 May 2009 and those concerns were reduced to writing on 18 June 2008.

167 Wells expressly raised Transnet's concerns on 18 June 2009 surrounding the GNS contract. In this regard, in his letter to Gama raising the concerns expressed by TIA Wells specifically invited Gama²⁰¹ to indicate what action

²⁰⁰ Gama, page 67-8

²⁰¹ At paragraph 8, Bundle D1, page 141

he considered appropriate to resolve the concerns and what corrective steps he would recommend be taken from a management point of view to deal with the GNS appointment. In this context, of his having been specifically asked what should be done, Transnet contends that Gama's response contained in his written response of 20 July 2009 was wholly inadequate having regard to what he suggested under cross-examination at the hearing should be done by way of an investigation of the GNS contract irregularities. On this issue Gama's response was that he required all the documentation and that he never received the reports from the internal auditors with their concerns or the documents which they had obtained in relation to the alleged irregularities, which he maintained were related to managers several levels below him in the hierarchy. Gama also attributed his failure to pursue an investigation to the fact that he no longer believed that the approaches to him by Wells were genuine.²⁰² That however in my view is no reason why his responsibility as CEO to call his subordinates to account could and should not have been fulfilled. There was no reason why at the time immediately after the interview Gama as the CEO could not have called his staff to account. He had the authority and the power to secure the relevant documentation himself. Indeed, during the interview, the investigator asked that he furnish all relevant documents. Gama retained the responsibility to perform his own investigation into the persons under his command and control. It is in my view no answer to say that he was unable to perform such an investigation because the internal auditors were performing a similar investigation. In this regard Gama referred to the "practice" in Transnet that the internal auditors would approach him regarding issues and to request documentation. He was clearly suspicious because in this instance it appeared to him that TIA already had certain documentation which was not given to him in the normal way. The unchallenged evidence of Madhav was that towards the end of the interview

Gama asked for documentation which was made available to him about a week later and that Gama never reverted to him to correct anything that he had said during an interview or to respond at all.²⁰³ Gama's response at the hearing to the effect that he had requested the Chief Procurement Officer to obtain the documents, that the latter had indicated that certain of the documents were with the auditors but that he would compile a file and that Gama then went on leave for some three weeks, that on his return he did have two files and was still considering these when he met with Wells on 11 May 2009 when he was first informed that he was himself the subject of investigation. Gama contended that at least in part why he did not pursue such investigations was because he did not want to be accused or suspected of engaging in any form of cover up. He therefore felt that he could not continue with the investigation which he had started.

168 I am doubtful about how determining the extent of the irregularities associated with the GNS contract in the security department and the procurement department could reasonably lead to a conclusion that Gama was attempting to cover up. Moreover, if this was genuinely a concern on Gama's part at the time, one would have expected that this would have been expressly raised in his written response of 20 July 2009, but no such concerns were expressed. All that was expressed in that letter in relation to this is that an investigation is required into the GNS contract and that the new General Manager for security had been asked to investigate and that three months would be required to complete such a review dealing with the suspicions of internal auditors.²⁰⁴

169 In his written response on 20 July Gama stated the following in paragraph 4.1: *"I deny any involvement in any possible manipulation that you may be referring to relating to the GNS appointment. If indeed there was any*

²⁰³ Page 112

²⁰⁴ Bundle D2, at page 21

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manipulation that you suspect by any party, we would follow up on that matter and carry out an investigation." Gama's position at the disciplinary hearing was that he considered he had been misled at least possibly fraudulently by Beattie and possibly others, that there were clearly irregularities which needed to be investigated in the security and procurement departments. He even named some of the individuals whom he said needed to account for their conduct. This position is entirely inconsistent with the statement which he made in his written response as set out above. Neither does the suggestion later in his written response that he has tasked the new General Manager security to investigate the matter and requires three months to complete the review constitute an adequate explanation for this response which refers not to any manipulation or irregularity suspected only of Gama himself, but refers to any irregularity by "any party" which would include the managers and Gama's insubordinates in the security and procurement departments.

170 Also noteworthy is the fact that in his written response Gama completely failed to mention the fraud and misrepresentation committed upon him by Beattie or the possible involvement of others in the irregularities surrounding the GNS contract, which had been listed in detail in Wells' letter where these concerns were raised.²⁰⁵ This would of course have been uppermost in Gama's mind and would have been a simple matter to include in his written response. When this failure was put to him, Gama's response was that he was under time pressure to respond. Even accepting that he had other duties to perform this is to my mind an inadequate response given that he had more than a month in which to reply to Wells' letter. Neither is Gama's contention that he later realised that certain issues which he had raised in draft versions of his written response were somehow omitted in the final version at all convincing. If indeed he later realised that

²⁰⁵ Bundle D1, page 140

certain responses had been omitted one would have expected that he would have simply supplemented his response to Wells. There was no evidence that he did so, and neither did he produce at the disciplinary enquiry the drafts which he alleged contained the omitted material.

- 171 In fact, Gama's explanation in relation to the appointment of GNS in his written response was merely to deny any personal involvement in either any manipulation relating to the appointment of GNS or the original open tender process and to seek to provide reasons for why the appointment of GNS on confinement was justified. The approach of seeking to justify the appointment of GNS on confinement is entirely inconsistent with Gama's approach during the disciplinary enquiry. As was pointed out for Transnet the failure to seek to call anybody to account and the approach adopted by Gama in his written response and the failure to investigate what he by then knew to be serious irregularities and procedural defects, is consistent with Gama knowing about the irregularities and procedural defects but seeking to avoid any investigation into them possibly because anybody called to account would simply point out Gama's own involvement.
- 172 Gama denies that he had sufficient information on 5 December 2007 to alert him that he needed to make further enquiry before authorising the confinement and that his failure to do so was gross negligence on his part. He stated that he trusted that there had been an open tender process followed to the letter involving adjudication committees and a tender board and that he had no reason to suspect anything untoward. Gama denied that he new GNS was being favoured in the appointment by virtue of the confinement process having replaced the earlier open tender process.
- 173 Gama was not able to offer any reason for why Beatty would have wanted to mislead him into signing a confinement for GNS. All he could suggest in this regard was that he did not suspect that Beattie would have willingly

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done so, and that perhaps Beattie was merely repeating what he had been told by others.

Discussion and conclusions on the GNS contract charge

- 174 Gama admitted signing the GNS confinement document. It is common cause that the document which Gama signed was in fact the approval of a confinement contract and was not the product of an open tender process. Gama's version is that when he signed the GNS confinement document he believed at the time it was an open tender and only later, upon being shown the documents, did he come to understand that the process was in fact one of confinement.
- 175 Clearly Gama ought to have known that what he was signing was a confinement. The document which he signed was headed "*GNS confinement*"²⁰⁶ and clearly reflects in no less than 15 places over 7 pages that it is a contract on confinement. Even as the busy CEO of a large organisation Gama was negligent if he failed to observe that what was presented to him was a document for the approval of a contract on confinement. Gama says that he placed reliance on Beattie as a trusted General Manager who informed him at the time that there had been an open tender process. In the circumstances where the document which he was being shown reflected something quite different, namely a confinement process this information from Beattie should have raised warning bells.
- 176 The crucial issue in dispute under this charge is whether Gama knew at the time he signed that what he was signing was the approval of a confinement or whether he believed at that time that he was signing the approval of a contract pursuant to an open tender process.

²⁰⁶ Bundle B1 page 114

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177 If Gama signed knowingly and aware that it was a confinement to GNS beyond his delegated authority then his actions were wilful rather than merely negligent. The investigator Madhav did not contend even at the disciplinary hearing that Gama was knowingly not telling the truth. It was nevertheless argued for Transnet that a finding should be made on the probabilities that Gama's actions in relation to signing the GNS confinement document were wilful. In this regard Transnet led extensive evidence regarding the circumstances leading up to the signing of this document and also led evidence about the circumstances during the implementation of the GNS contract and about the circumstances of Gama's alleged failure to take sufficient steps to investigate the irregularities around the GNS contract. Gama denied knowledge of the circumstances relating to irregularities preceding his signing of the confinement document on 5 December 2007.


Summary of background facts and circumstances which existed prior to Gama's signing of the GNS confinement

178 The investigation found no links between Gama and GNS according to Madhav.²⁰⁷ The only link is the fact that General Nyanda, whilst not a close personal friend, was more than a casual acquaintance of Gama's. This is discussed more fully below.

179 The evidence established that in the normal course Gama would have played no part in and had nothing to do with an open tender process which would be adjudicated on by a cross functional evaluation team and thereafter by the relevant tender board which would decide whether the tender should be accepted or not and would then refer the matter for the conclusion of the contract by an executive official. There was also no direct evidence to link Gama with the previous steps taken in securing and

²⁰⁷ Madhav page 146

motivating GNS as the preferred service provider on confinement. Gama's first involvement with this process of which there is direct evidence was of the one on one meeting on 5 December 2007 in his office when Beattie asked him to sign the GNS confinement document. Only Gama gave evidence of the circumstances of that meeting.

- 180 Some years earlier when Gama signed approval for the appointment of CPI as security services provider he wrote a note that the contract should be entered into for 6 months and then be reassessed. This indicates that he considered that security contract with some care and formed a view that the services provided by CPI should be tested. This approach illustrates that he took care and himself considered, independently of the advice of his more junior staff, whether in the interests of Transnet the CPI confinement contract should be approved. This careful and considered approach by Gama is to be compared with his own version that he took no similar care when he signed the GNS confinement document which was similarly for a security service contract. He said that the reason that he failed to take such care was because he did not read the GNS confinement document in the quiet of his own time while going through his in tray in the normal course. Instead he signed the document without giving it proper considered and independent consideration because he was asked to sign the document in circumstances where Beattie his General Manager approached him asked him to do so saying it was urgent and that an open tender process had been followed. It was not suggested that Gama fabricated the entire incident and that he did not meet Beattie at all or that he did so under wholly different circumstances to those about which he testified.
- 181 Beattie has since emigrated to Australia and was not available to give evidence. He told investigators that he could not assist as he could not recall the events in question. There was accordingly no witness who could directly contradict Gama's version of the events during their meeting.
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- 182 The evidence which tends to contradict Gama's version is therefore all in the nature of indirect evidence from which inferences must be drawn. There is nevertheless much to be said for Transnet's contention that when Gama signed his approval of the GNS contract it was probably in the knowledge that it was a confinement contract with GNS – a company controlled and owned by a high profile acquaintance of his, namely General Nyanda. Although as stated there is no direct evidence of Gama's knowledge in this regard – which would establish the necessary intent on his part to make this conduct wilful rather than negligent, the surrounding circumstances which prevailed undoubtedly lead to a high level of suspicion that Gama in fact concluded the GNS contract with full knowledge that it was a confinement and that it was a contract with GNS. Clearly something was amiss in the TFR security department in relation to the securing of GNS as the service provider for the comprehensive security package required by Transnet. The onus of showing that Gama wilfully approved a confinement process in favour of GNS lies on Transnet on a balance of probabilities.
- 183 The irregularities and untoward aspects associated with the procurement of the services of GNS and which tend to show that Gama had knowledge of the confinement to GNS may be summarised as follows.
- 183.1 No open tender process was followed as required under the DPP policy, and as Gama himself had previously specifically required in relation to security services.
- 183.2 This was not a simple case of a failure to follow the open tender process. In fact an open tender process commenced and reached an advanced stage with four bidders being shortlisted. The tender process was initially put on hold and thereafter cancelled entirely. The cancellation was effected on the basis of an "instruction" from group level, but the person who was responsible for issuing that

instruction denied ever having given the instruction. There was moreover no good reason to halt the open tender process merely because one of the four bidders had become ineligible to continue bidding. The other three bidders remained unaffected by G4S having to withdraw from the process. The cessation of the open tender process is therefore not satisfactorily explained and remains highly suspicious.

- 183.3 Strictly, there was no urgency at the time in relation to securing the relevant services because the work was being undertaken by CPI. Although the end of the contract period with CPI had been reached CPI was evidently performing the work competently and the security contract with CPI was being extended on a monthly basis. Accordingly there was no crisis with there being a security void which needed to be filled. On the contrary – in the area of specific concern - namely cable theft, the statistics of incidents over the relevant period in 2007 showed a steady decline. Nevertheless the contract with CPI was terminated. (There was, correctly, no suggestion that the urgency to which Beattie referred constituted urgency for the purposes of the policy provision which permitted a deviation from the tender process by reason of urgency.)
- 183.4 Even before the open tender process was stopped and the participating bidders notified thereof, TFR staff had approached GNS to seek its proposal for the required security services. The evidence shows that there probably was assistance to GNS from inside TFR in the preparation of its proposal.
- 183.5 A misleading motivation document was produced by Senamela and Nayager of the TFR security department in which GNS was promoted as the sole suitable provider of the services. At the time GNS was not so much as registered with PSIRA.


- 183.6 The fact that there was probably collusion between senior management within TFR security department and GNS. Such collusion is shown at least, as mentioned above, to the extent that GNS was assisted in putting together its proposal to provide the security services and that this was done at a stage when the open tender process was still in place and had not yet been stopped. Secondly the motivation for the confinement of the contract to GNS is, on a proper examination thereof, a set up job designed to ensure that only GNS and neither of the other two so-called competing companies would be viewed as acceptable and able to perform the required work. This too suggested a collusive relationship with GNS.
- 183.7 No proper investigation or due diligence process was conducted into the ability of GNS to perform the required security work or as to its proven track record. In fact GNS employed no staff at all and contracted out all the work which was in breach of the contract with Transnet.
- 183.8 The proposal to engage GNS on confinement had proceeded through the recommendation process to HOAC which was the relevant tender board. HOAC had recommended the appointment of GNS on confinement subject to the approval of the CEO. This recommendation was irregular in that the tender board should have realised that the value of the proposed contract exceeded its level of delegated authority, as it also Gama's level of delegated authority, and the tender board should therefore have referred any recommendation to a level higher than Gama as the CEO.
- 183.9 The improbability of Gama not knowing and bothering to discover to whom the security contract was going, particularly as even on his own version he looked at least cursorily at the GNS confinement document presented to him for signature.

183.10 The fact that had the appointment process adopted been an open tender process there would have been no need for Gama to sign of the GNS confinement at all. It was however possible that as a matter of courtesy it would have been given to the CEO to sign.

183.11 On his own version at the enquiry Gama felt that he had been misled by misrepresentations made to him by his sub-ordinates as to the tender process which had been followed when he was asked to sign the GNS confinement. He knew that irregularities must have occurred, yet despite this knowledge he made the extraordinary statement in his written response on 20 July 2009 that he would follow up and investigate if Wells suspected any "manipulation" by any party. This is entirely inconsistent with Gama's own position as evinced at the disciplinary hearing that he knew there must have been procurement irregularities and that he personally felt misled by the representations which had been made to him at the time of his signing. Gama's failure to investigate his subordinates promptly in these circumstances was not satisfactorily explained and suggests the inference that he failed to immediately conduct an investigation into the conduct of his subordinates for his own reasons, possibly because he knew all along since 5 December 2007 of the situation that GNS had irregularly secured the contract on confinement.

184 On the other hand in evaluating the probabilities of whether Gama had knowledge of what he was signing and intended to confine the contract to GNS there are also a number of factors which tend to show that Gama did not have such knowledge. These are the following:

184.1 Gama as the CEO of the largest division of a very large corporation – while he is ultimately responsible for the whole of TFR – is not directly responsible for the day-to-day operations of the TFR security department or the procurement department. There is no



direct evidence that Gama personally had any involvement in the process preceding his signing of the GNS confinement document.

- 184.2 There is no direct evidence that Gama was in cahoots with the security managers who were apparently improperly engaged in assisting GNS to secure a contract on confinement.
- 184.3 There is no evidence that Gama issued or influenced the instruction to stop the open tender process. Indeed that instruction is recorded in the documents as having emanated from Group level (although the person who is alleged to have issued the instruction denied having done so).
- 184.4 Gama had historically himself consistently expressed the attitude that security contracts should go out on open tender. This attitude was of course contradicted by the fact that Gama had himself signed and approved the original CPI contract on the basis of a confinement, because that company was said to be the only company capable of providing the required services. (No impropriety was suggested in regard to the approval of the CPI contract, but this illustrates that a security company was in fact previously appointed by Gama himself on confinement rather than on open tender.)
- 184.5 Gama had expressly issued an instruction in early March 2007 that an open tender process be conducted and concluded by no later than 1 July 2007. (In this regard it is strange and somewhat improbable that despite frequent discussions with his senior managers, probably on an almost weekly basis, at management meetings regarding what was an acknowledged high priority problem, namely cable theft, and despite Gama's instruction to conduct an open tender process, he nevertheless maintained that he had never kept track of or discussed the progress of that open


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tender process which was designed to secure a competent and comprehensive security service to deal with the cable theft problem. In this regard there is again no direct evidence to contradict Gama's say-so that as a high level executive he was unaware of the details of the situation in regard to the progress of the tender process which he had instructed should occur.)

- 184.6 There is the fact that Gama would have known it could readily be shown having regard to the paper trail of procurement procedures that what he was approving was indeed a confinement, and the inherent improbability of his taking that risk.
- 184.7 There is no evidence of Gama in anyway having benefited personally from the award of the contract to GNS. (I would observe however that by its very nature such evidence may be very difficult for Transnet to obtain even if it indeed existed.)
- 184.8 The fact that there had been an open tender process and that Gama could well have seen in Beattie's possession the front cover of the document which it was common cause was sent out calling for open tenders. Gama could in consequence have understood or wrongly assumed that an open tender process had been properly and procedurally conducted to finality.
- 184.9 The fact that the tender board is required in terms of the DPP policy to refer any proposed contract to the person in the hierarchy with the appropriate delegated powers for the value of the transaction and the tender board in fact referred the proposed GNS confinement contract to Gama as the CEO even though the contract value meant the contract was outside of his delegated authority. The tender board (HOAC) had no authority to approve a confinement for R18 million. Mr Tobias was questioned as to why the tender board, of

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which he was chairman, had approved the GNS contract in that sum. His answer to the effect that it only "supported" and did not finally "approve" the confinement which always remained subject to final approval by the CEO was unsatisfactory in that the tender board supported a contract which it knew the CEO could not approve. HOAC's delegated authority to approve expenditure was the same as the CEO's, namely R 10 million. Insofar as HOAC had approved the GNS contract this therefore virtually amounted to a representation to Gama and certainly suggested to him that the value of the GNS contract was under R 10 million, because if the value of the transaction was for an amount greater than R 10 million HOAC ought to have referred the matter to an authority higher than Gama whom it knew had the authority to approve contracts for more than R10 million. In my view Gama is probably entitled to contend that this misled him as to the value of the GNS contract. On the other hand Gama was required to exercise an independent judgment in considering whether to approve the GNS confinement document – which, had he examined it properly, would have revealed to him that the transaction was for an amount in excess of his delegated authority of R 10 million.

- 184.10 As to the fact that HOAC referred the GNS tender proposal to Gama when it should have referred the matter to the next higher level of authority, four possible options arise. (i) HOAC believed that it was a confinement for less than R10 million and that they were therefore within their rights to refer it to Gama as CEO; (ii) HOAC was in cahoots with Messrs. Khanye and Senamela who put up the GNS motivation document; (iii) HOAC was in cahoots not only with Khanye and Senamela but also it with Gama himself when they referred the GNS motivation document to Gama; (iv) HOAC was derelict in its duty by referring it to Gama when it was outside of his
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jurisdiction. As to option (i) properly considered there is really no basis in the GNS confinement document itself for under R10 million. Options (ii) and (iii) seem inherently improbable given the large number of people who would have needed to be part of some form of conspiracy. That leaves option (iv), namely that HOAC was simply negligent in its duties, as the most likely scenario.


- 185 The immediate circumstances under which Gama was asked on 5 December 2007 to sign the document by Beattie are also relevant to Gama's state of mind at the time and whether he signed the document in the knowledge that it was a confinement. Gama was presented with the GNS confinement document by his General Manager Beattie who asked him to sign it. Gama contends that he is entitled to trust and rely on his senior managers and that Beattie was such a trusted manager whom he had no reason to doubt. This was supported to some extent by Wells who accepted the general proposition that Gama was entitled to rely on his subordinate employees in his department where he was not personally involved in something which had happened.²⁰⁸ Also relevant is the fact that Gama knew at the time that Beattie's departure from Transnet was imminent. In fact Beattie's termination agreement was signed later the same day and his last working day was a few days later.
- 186 It is apparent that Gama failed to read and properly consider the documents placed before him by Beattie. In the interview Gama delineated his role as limited to asking his General Manager whether funds were available and whether the correct procurement process had been followed. At the hearing his evidence in this regard was to much the same effect, namely that he asked Beattie about the process and whether this was budgeted for and then simply signed the final page of the GNS confinement document without first reading the contents thereof. Gama's explanation for his failure

²⁰⁸ Wells, page 137



to properly read the document was that he trusted Beattie's explanation. This may of course be a false explanation in that Gama may well have known at the time that what he was approving was a service contract on confinement, that the value of the contract exceeded his delegated authority and that the contract was being awarded to GNS a company owned and controlled by a person with whom he was personally associated General Nyanda. These are all facts which a careful and non-negligent CEO should have known and could have ensured that he was aware of by the simple precaution of reading the documents placed before him for signature and properly ventilating with Beattie and with regard to the other supporting documents why it was that the documentation clearly reflected the process as one of confinement and not as an open tender.

187 Gama's explanation about what occurred on 5 December 2007 in the meeting with Beattie may be a false explanation. In this regard it is relevant to consider that Gama was not open about his relationship with General Nyanda. He initially down played and denied the fact that he was more than merely an acquaintance of General Nyanda. Gama put up a false contention during the hearing that he knew General Nyanda only as any other member of the public would. He later admitted, after the cellphone records had been produced, that he was more than an acquaintance of Nyanda – though he would not describe him as a friend. I describe this relationship as more than an acquaintance in that their relationship was such that they had played golf together, they clearly had each other's cellphone numbers and Nyanda called Gama to express his condolences when a member of Gama's family died and to commiserate when Gama was suspended. Those are acts which one would not expect of a mere acquaintance and are to my mind the acts of a person one would probably describe as a friend, though not necessarily a close friend. Gama explained that the reason why he gave his lawyers a misleading version was because he wanted to gainsay the inference which he felt was being drawn, namely



that he was a close friend of Nyanda's, even though that was not what the witnesses had in fact said. My impression is that Gama was evasive in this area of his testimony. While he explained why he had wanted to mislead the enquiry, the fact is he was prepared to do so and could well have similarly been prepared to present incorrect facts on other aspects of the enquiry, particularly as Beattie was not available to testify in order to gainsay anything Gama said about the events of their meeting on 5 December 2007.

188 Gama's version as to what was discussed at the December breakfast meeting was in my view inconsistent with his earlier version thereof during his interview. He testified at the hearing that at the breakfast meeting with Oates the issue of the GNS contract was not discussed. According to him the only mention of GNS was when he was asked whether he was aware that a company called GNS was being used, to which he answered that he had become aware of that because of reports from his managers Fernhead and Senamela that GNS had assisted in securing a lot of prosecutions regarding cable theft.²⁰⁹ This was then followed up at the breakfast meeting with a question as to whether he knew that General Nyanda owned GNS, to which he replied that he did know this. The transcript of the interview, as confirmed by Madhav shows that during the interview Gama gave a different version. During the interview when the topic of discussion was Gama's understanding of security contracts at the end of 2007 and in particular whether the contract was one of confinement with GNS, he said that at the meeting with Naicker²¹⁰ (which was the breakfast meeting) *"We discussed this thing...., and as far as I am aware and as far as I am concerned, there was never any confinement on this particular matter, even if somebody may have, for some reason, then returned it in a manner and*

²⁰⁹ Gama, pages 24-25

²¹⁰ That transcript refers incorrectly to "Michael", that there was no dispute about the fact that this was the meeting at which Gama was briefed by Oates and Naicker.

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*the way that it then looked like it was a confinement.*²¹¹ There is little doubt in the context that Gama was there referring specifically to the GNS contract as having been discussed at a breakfast meeting. Moreover, Gama's explanation at the disciplinary enquiry that this was a observation referring in general terms to the issue of personnel wrongly completing standard forms, is quite simply not a satisfactory answer as the passage of the transcript in question is not capable of that interpretation, as Gama himself then conceded when the next passage in the transcript was brought to his attention.²¹²

189 Gama's reference during the interview to the contract value only being R4.9 million (when it was in fact over R 18 million) may have been a genuine misreading of the GNS confinement document which he quickly looked at during the interview, or it may have been an attempt to mislead the investigators as to what he had signed or an attempt by Gama to convince the investigators that he believed at the time was that he was signing approval for an amount within his level of delegated authority. The same situation prevails in relation to Gama's further reference in the interview to the five month review period being the basis of the valuation of the GNS contract at R7.5 million.

190 While Gama was clear that Beattie did not show him all the documents, page for page (there being three quarters of lever arch file of documents in Beattie's possession) he did testify that Beattie showed him *"the relevant documentation"*. In particular he accepted that Beattie showed him the document on which the names of three companies appeared.²¹³ Later in the interview he repeated that Beattie *"would have shown the names of companies"*²¹⁴ and that *"He showed me three companies in this document*

²¹¹ Bundle D1, page 78; Gama page 24-28

²¹² Gama, page 28

²¹³ Gama, pages 33-35 and 40

²¹⁴ Bundle D1, page 84; Gama, page 46

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to say: *These are the companies that we have interviewed.*²¹⁵ Gama confirmed in his testimony at the disciplinary enquiry that he was shown the names of the companies. He also confirmed that he paid attention when Beattie said to him *"Here is the one company that we are choosing."*²¹⁶ In the light of this testimony of Gama it is hard to accept, though it is possible, that if he was shown the names of three companies he remained unaware that the contract he was approving was an agreement with GNS which was one of those three companies.

191 In assessing Gama's credibility it must be said that he was cross-examined extensively about events that occurred some time ago and some of which were not necessarily within his personal area of operation within Transnet. He cannot in fairness be described as a generally poor or unreliable witness but there were, as set out above certainly unsatisfactory aspects of his evidence apart from his lack of candour about Nyanda for which he apologised.

192 Madhav's testimony was in my view fairly balanced and credible. As the investigator he could well be tempted to defend the results of his investigation and to guild the lily in his evidence in order to do so. It is however so that in one instance Madhav conceded under cross examination that he had been mistaken. Madhav was challenged over his testimony about the circumstances of and timing when which Beattie left Transnet. Madhav accepted that he left in the air his evidence about the timing of Beattie's leaving Transnet. In this regard Madhav's evidence was rather unsatisfactory in that he seemed to leave the impression that the fact that Beattie was leaving very much at the time when he asked Gama to sign the GNS confinement document was somehow suspicious, particularly as Beattie was paid a 15 months severance payment having only worked for

²¹⁵ Bundle D1, page 85; Gama, page 47

²¹⁶ Bundle D1, page 85; Gama, page 47-8

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Transnet for a period of 13 months. Madhav had not however examined Beattie's contract of employment, did not know whether he was on a fixed term contract or what the precise terms of his severance agreement were. I am not persuaded that Madhav intentionally gave misleading evidence on this aspect. He simply answered the questions which were put to him. Madhav generally made concessions where he should have – for example that the responses by Tobias of HOAC and by Senamela and Khanye to queries put to them by the investigators were not satisfactory. There is no reason to doubt Madhav's veracity.

193 There is similarly no reason why the evidence of Oates, Naicker and Wells should be called into question.

194 On Gama's own version he did nothing by way of reference to the GNS confinement document (or any other document) to satisfy himself, as opposed to relying merely on Beattie, as to the content of the document which he was signing. He accepted that he was aware of the stipulation in the DPP policy that he was required to satisfy himself whenever he signed in terms of the delegated authority. He said that he was satisfied by virtue of the answers which Beattie gave to his questions which were around process. Gama accepted that he and Beattie never discussed the fact that the previous signatories had all approved the GNS proposal on condition that the CEO also approved it. It is noteworthy that the only questions which he asked Beattie related to the process which had been undertaken and whether the cost was budgeted for. As mentioned he said he never looked carefully at the documentation²¹⁷ though he accepted that he "perused" the documents²¹⁸ which Beattie was showing him while he was simultaneously talking to Beattie. He failed to ask Beattie who the other contracting party was and signed the document without ever knowing this

²¹⁷ Gama, page 126

²¹⁸ Gama, page 69

important fact. He failed to determine in any detail what the cost of the contract was, and he failed to read the document which was in terms which made it abundantly clear that he was in fact dealing with the confinement. Gama didn't know for what period the contract was. He was content to accept Beattie's indication that there would be a trial period. In fact, had this been a tender process, Gama's signature would not have been required at all. This fact together with the fact that his signature was being sought should have alerted him to conduct a closer investigation. In addition, Gama's evidence it seems to me does disclose that he read other documents at least in part, including one which informed him that there had been three companies considered in the tender process. That information does not appear from the final page of the GNS confinement document. Gama's evidence under cross-examination that this was the *only* document which he read therefore contradicts his earlier evidence from which it is clear that he read the cover page of the document which called for open tenders. It also contradicts his version during the interview from which it appears that he also read – even if fleetingly – that part of the GNS motivation document which contained the list of the three companies considered for the confinement tender.

- 195 It was contended for Transnet that it was improbable that Gama as the CEO had simply signed a document which consisted of a page of signatures after a five to ten minute discussion in circumstances where he knew that there were problems with procurement procedures in TFR. There is considerable force in of this submission. Gama was the last person in the chain of authority that approved the contract. Placing reliance on the fact that the proper process had been followed without ensuring and satisfying himself that this was so and then simply signing a page of signatures which was presented to him does seem somewhat inexplicable and therefore improbable. Gama's explanation to the effect that both he and Beattie were in a hurry; that he relied on the fact that the tender board had looked at the

issues and signed its recommendation; the fact that Beattie his trusted General Manager had signed the document; and the fact that he posed process questions to Beattie who answered to his satisfaction is not a satisfactory explanation for his failure to properly execute his duties as CEO. In his own words his signature was "*an oversight*" and he "*probably just absentmindedly signed it*".²¹⁹ On his own version he didn't even satisfy himself that what he was signing was in fact of the GNS confinement document which preceded the page of signatures which he did look at. Gama conceded that with hindsight he failed to perform his duties as he ought to have done.²²⁰ He later agreed that even the one final page which he was handed and read he "*glossed over*" as he had discussed in detail with Beattie the process that had been followed.²²¹

196 As has been recorded above Gama conceded that had he read the GNS confinement document he would have concluded that what he was signing was a confinement for a period of one year with the contract value of some R18 million.²²² He accepted that had he read the document he would also have seen that there was in fact no open tender process because the process which had occurred had been stopped. He would also have seen that one of the beneficiaries of the contract was General Nyanda and, knowing that he was (at its lowest) a personal acquaintance of Nyanda he would have known that there was a potential for this to adversely affect TFR. All this shows clear and serious negligence on Gama's part.

197 For Transnet it was contended, correctly in my view, that Gama's exposition of his role in the procurement process - namely to enquire of his General Manager whether there were sufficient funds and whether the process had been followed - was wholly inadequate. As the senior executive authorising

²¹⁹ Gama, pages 133 and 130

²²⁰ Gama, page 134

²²¹ Gama, page 43

²²² Gama, page 148-149

the transaction he does not constitute a check-point in any sense in the procurement process if he relies entirely on the say-so of others. He is required at least to check the documents which he is approving in order to satisfy himself that the procurement process and transaction that he is being asked to authorise are what they purport to be, are correct, that the contract is cost-effective, and that the correct procurement process has been followed before he authorises the transaction. It is no answer to say, as Gama does, that the questions which he asked of Beattie concerning the process followed were sufficient, when clearly they were not. The document which he was signing reflected something different and on his own version he was being misled. Gama said that he trusted all his General Managers to do the right thing, but in this instance that trust was misplaced. In short, it was his duty to check more carefully what he was signing and his failure to do so was negligent. Indeed, Gama himself agreed this was an oversight on his part and it was not sufficient where the requirement was that he satisfy himself as one of the various check points in the procurement process, for him merely to check whether one of the earlier stages in the procurement hierarchy was satisfied and therefore himself adopt the same position.²²³

- 198 Gama admitted under cross-examination that he had an opportunity during his interview to *peruse* the GNS confine document. He also said that he did not have the opportunity to *study* the document and that they were merely *glossing over* it. Nevertheless, he accepted that he had the opportunity of looking at the document.²²⁴ It is clear from the transcript and Madhav's evidence that on several occasions during the interview Gama referred to facts contained in the GNS confinement document, and indeed I understood Gama to concede this at one stage under cross-examination, although elsewhere he seemed not to accept this. I find it improbable that a man of his seniority, confidence ability could not, had he wanted to, simply have

²²³ Gama, pages 64-65

²²⁴ Page 69

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insisted on having the opportunity to read the GNS confinement document during the interview. In my view he was probably free to examine the full text of the GNS confinement document during the interview and the full text of the GNS motivation document had he asked to do so.

- 199 Transnet's case is further that Gama's failure to complain about the fact that he had been misled coupled with his failure to take action to investigate and hold responsible the persons who misled him is significant, and a pointer to his true state of mind. To my mind the evidence does establish that there was failure on Gama's part to point out that he had been the victim of a misrepresentation. It is clear however that by that stage Gama's attitude was that he was being singled out and that in his view Transnet had failed to provide him with documentation and failed to alert him that he was the subject of an investigation, which he contended was the normal procedure. It is clear that his suspicions in this regard had been heightened by his having been informed by Mr Dube about the discussion aimed at preventing him becoming the group CEO. As he put it, his "*antenna was up*". Whilst Dube's evidence was not credible it cannot I think be said that he did not ever approach Gama and convey to him what he said he overheard about ensuring that Gama should be prevented from becoming the group CEO. The fact remains however that Gama did not respond, as one would normally anticipate he should have, by saying that he was himself a victim of a serious misrepresentation. He also did not vigorously pursue investigating who may have been responsible for the irregularities within the security and procurement departments. His explanation for why he was tardy in that respect and that he did not want to be seen to be interfering with an investigation which was looking into his own conduct is only partially convincing.
- 200 Gama accepted, as appears in the interview transcript, that Madhav told him that the acceptance letter which was sent out confirmed a contract for a period of one year valued at R18 million or R1.5 million per month. On

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Gama's version what he authorised was a five-month trial period contract, yet he did not raise the fact that the conclusion of a 12 month contract pursuant to what he had authorised was in any way irregular. The fact that Gama never raised this irregularity was never properly answered by Gama and tends to show that his version of what he authorised should not be accepted because his reaction when he learned of the 12 month contract is not consistent with what he contends was his understanding of what he authorised.

- 201 The company bears the onus to establish that Gama signed with knowledge that he was signing the approval of a confinement. The company has shown that the document Gama signed was a confinement beyond his delegated authority. It has further shown that objectively on the probabilities there were serious irregularities in the TFR security department and irregularities in the procurement process and in the conduct of the tender board. However the evidence of Gama's knowledge of those irregularities and the circumstances surrounding the securing of GNS as the service provider is entirely circumstantial and all based on indirect evidence from which one is asked to infer that Gama had knowledge which he denies. As the trier of fact I am required to have regard to the wider probabilities and the credibility of the witnesses must be weighed in relation to these. The principles for dealing with circumstantial evidence were enunciated in the well known criminal law case of *Rex v Blom*²²⁵ and have been modified by our courts to be applicable where the civil standard of proof of a balance of probabilities applies such as in this disciplinary enquiry. The test is twofold. (a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (b) The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If the proven facts allow for

²²⁵ 1939 AD 188 at 202-3

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another more or equally probable inference, the inference sought to be drawn cannot prevail.²²⁶ Thus where one conclusion is more natural and probable on the evidence, then that is the version which the trier of fact should accept on the probabilities. Circumstantial evidence which meets this standard may be accepted and can be as weighty and compelling as direct evidence.

202 Is the inference that Gama signed knowing that he was approving a confinement consistent with all the proven facts? The answer to this depends on whether it has been proven on the probabilities that Gama saw enough of the documents which he so fleetingly perused. In particular has it been shown on the probabilities that Gama knew at the time that a tender process had not been followed. That I think has not been shown. He knew he had previously given an instruction that an open tender process should be followed. He observed the cover sheet of an open tender process document in Beattie's possession. That goes a considerable way to reasonably persuading someone in Gama's position that an open tender process was probably followed. To add to that there is the fact that Beattie confirmed that an open tender process had occurred. I do not think that on the probabilities it has been shown that Gama knew there was no open tender process. Probably he thought there had been such a process and that is a reasonably probable inference. Though he was in fact mistaken I am not persuaded that in such circumstances the most probable inference is that he knew that he was signing a confinement. The inference sought to be drawn by Transnet as to Gama's knowledge has simply not in my view been shown to be the most probable inference. Gama denies that he actually had knowledge of the content of the document he was signing as constituting a confinement. Given the absence of Gama's involvement in the prior tender processes I am not persuaded that the suspicions which

²²⁶ MacLeod v Rens 1997 (3) SA 1039 ECD at 1049 A-C; H. Mohammed and Associates v Buyeye 2005 (3) SA 122 CPD at 129 C-E.

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arise as to his knowledge and from the inconsistencies in his version of events and the seeming failure on his part to later complain about being misled and his failure to vigorously investigate the irregularities show that it is more probable than not that Gama knew what he was signing. The version that he did not know is at least equally probable and ultimately, despite their being serious suspicions and factors which show the contrary, in weighting up the probabilities the required inference of actual knowledge of a confinement cannot be drawn. I find that I am unable to conclude that is more probable than not that Gama signed knowing that he was approving a confinement and that Transnet has therefore failed to show that Gama acted wilfully rather than merely negligently.

Conclusion on charge 1

203 In conclusion therefore I find that on charge 1 Gama is guilty of misconduct in that:

203.1 He negligently authorised the conclusion of a contract for the provision of security services by GNS on confinement and failed to carry out his duties as CEO in the manner expected of him; and

203.2 He negligently failed to take appropriate steps to investigate the irregularities associated with the halting of the open tender process and the replacement thereof with the GNS confinement tender process and the presentation to him of a document for approval which was the product of a confinement process but which was presented to him on the basis that it was an open tender process.

Having reached the conclusion which I have under this charge, it is unnecessary to consider whether Gama's conduct under this charge also constitutes poor performance as is alleged in the alternative.

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**Charge 2: GAMA'S ALLEGED FAILURE TO COMPLY WITH THE BOARD
STIPULATED CONDITION FOR THE 50 LIKE NEW CONTRACT**

Background to the charge

- 204 Gama painted a picture of TRE being a business which faced serious difficulties, was losing market share and in 2005 made a loss of some R21 million which, by the end of the financial year 2009 had been turned around to an operating profit of over R5 billion. However, the average age of the locomotives in the fleet was 32 years as compared with an average of 12 years for locomotives in comparable railways around the world. To fix these problems it was necessary to assemble a competent team of general managers and managers and a number of managers were let go and replaced.
- 205 Electro Motive Division ("EMD") was previously General Motors Locomotive Division and is a corporation which has been involved in diesel locomotive manufacture for more than a century. Its major competitor is General Electric. Both of these corporations are very large diesel locomotive manufactures in North America and are represented in South Africa. Sibambene Trade Services (referred to as either "Sibambene" or "STS") was the local agent for EMD, principally to sell spare parts to the maintenance market including TRE which maintains locomotives on behalf of TFR.
- 206 In 2006 a joint venture comprising of EMD and STS presented an unsolicited bid, not as part of a tender process, to TRE which was a proposed solution to the problem of the ageing locomotive fleet suffering frequent breakdowns. TFR needed in excess of 1500 locomotives over the next 10 years, but the EMD/STS proposal was a stop-gap solution to provide 50 like new locomotives. The "like new" aspect of the proposed project was that many of the components were not in fact new but were

refurbished. The proposal was that EMD would supply components to South Africa and that a local manufacturer, TRE would assemble these components in order to create the like new locomotives. The traction motors as well as the engines to be supplied were between 5 to 8 years old but would be refurbished and reconditioned and work "like new" and would enable TFR to use new digital equipment in combination with these locomotives. Thus the end product would be a combination of new and like new components. The advantage from TFR's point of view was that the cost of the like new locomotives would be in the order of R10 million less per unit. This unsolicited bid was brought to TFR at the time when it was preparing a major plan for presentation to the Board for replacement rolling stock.

207 Evidence was led of a memorandum from the Transnet Group Financial Planning which was presented to the Transnet Capital Investment Committee on 17 October 2006 regarding the possible acquisition of 50 diesel locomotives from EMD. The purpose of that document was to obtain approval to confine the tender process for the acquisition of the 50 locomotives to EMD/STS.²²⁷ The memorandum also sought authorisation for the Group CEO to conclude sign and execute the commercial contracts for the manufacture and supply of these 50 locomotives. Gama testified that this document was presented and discussed at the Capital Investment Committee meeting.²²⁸

208 A document containing the business case was prepared by the Capital Investment department in support of the 50 like new locomotives from EMD at the end of which a number of signatures appear.²²⁹ Persons who signed in support of the proposal were Mr. Frederick Potgieter the General Manager Transwerk (TRE) Operations, Mr. Percival Mosweu General

²²⁷ Bundle C, page 2; Gama page 21

²²⁸ Page 22

²²⁹ Bundle C, page 40

Manager (Capital Programme) and Mr. Nick Thomson the Chief Financial Officer for TFR. Gama also signed his support for the proposal.²³⁰ The document was similarly signed by Mr. Louis Van Niekerk the Chief Operating Officer for Transnet who noted against his signature that "*Transwerk should be involved*".²³¹ Gama said that his understanding of this was that TRE would be involved in performing some of the work.

209 Mr. Wells, then Chief Financial Officer Transnet, also signed the document. He noted against his signature "*It was agreed that STS would not be involved. Any engineering or assembly to be done by Transwerk*". Finally, on 29 October 2006 Maria Ramos the Group Chief Executive of Transnet signed the document and noted "*I had exactly the same understanding as Chris (Wells) so this is approved on the basis set out above*".

210 There was a discussion at the Capital Investment Committee meeting of 17 October 2006 concerning the fact that Transnet did not need STS to participate. This was because STS was no more than a parts supplier and were in fact an agent and accordingly there was no need for them to be involved in the programme to construct the 50 locomotives.

The Policy Framework

211 The policy framework against which the 50 like new contract was concluded is as follows. The Procurement Policy ("DPP policy") read together with the Delegation of Authority Framework are important policies which establish the boundaries and powers and guidelines within which business decisions are made. Transnet's procurement objectives are set out in the DPP policy. It is the policy of Transnet when purchasing or selling goods and obtaining services, to follow a course of optimum value and efficiency by adopting best purchasing practices in supply management; and ensuring where

²³⁰ Bundle C, page 41

²³¹ Bundle C, page 42

possible that open and fair competition has prevailed. Due regard must be had to the importance of *inter alia* the promotion of Transnet's Interdivisional Support Policy²³² which is contained in and forms part of the DPP policy.²³³ Clause 2.1.1 of the Interdivisional Support Policy contains the following provision:

*"The following Operating Division/Business Units which have been identified as being strategically important to the core business, **must** be utilised by the core businesses and **under no circumstances** may the external market be approached for goods and services falling within their core-competency area. These support units are... Transwerk: Heavy engineering including wagon and locomotive repairs..."*

Later in the same clause the following provision occurs:

"Only if the above strategically important Operating Division/Business Units have indicated in writing that they do not have the capacity to provide the required goods or services, may this be sourced from the external market."

21.2 The aim of this policy is to ensure that work which it is within the capacity of the various divisions within the Group to do is in fact not given to outside sources. Wells confirmed that this policy applied to the 50 like new contract.²³⁴ Wells testified that it was very much contrary to the interest of Transnet to permit STS to perform the work in the 50 like new contract and develop a capacity in competition with TRE rather than to allow TRE to perform the assembly work and have the opportunity to improve its ability to produce work of world class standards.

²³² Clause 1.3.1.4(i) of the DPP Policy, Bundle A2 at page 46

²³³ Clause 2.1 of the DPP Policy

²³⁴ Page 73

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213 Transnet Group Delegation of Authority Group Limits of Authority document applied at the time.²³⁵ Clause 4.1 of that Delegation of Authority framework provides for the sub-delegation of authority in certain circumstances; but this, according to Wells did not apply to the specific delegation afforded to Gama by the board in relation to the 50 like new contract. In any event Wells pointed out that the level of authority for the CEO of an operating unit²³⁶ such as Gama was, was up to R25 million for an unforeseen CAPEX matter where the expense was not budgeted for. The 50 like new contract was valued at over R800 million and therefore the delegation would have to be from the board and in writing. Wells testified that when one signs a document by way of executing a delegation of authority from the board you need to have the board resolution before you to ensure that the contract complies with the requirements of that board resolution.²³⁷

214 Also relevant to this charge is Note 1 in clause 5.5 of the Delegation of Authority Framework deals with contracts and provides in relevant part:

*"Any person who has been authorised to execute any legal documents, including... contracts... on behalf of Transnet and/or its divisions... may only do so with prior advice of the relevant Legal Services department as set out in the Transnet Group Legal Policy."*²³⁸

215 Because of the nature of the contract and the amount involved the 50 like new contract required the approval of the full board of Transnet. That approval first occurred on 13 February 2007 when the matter was

²³⁵ Bundle A2, page 173

²³⁶ Clause 5.1.2 of the Framework document

²³⁷ Page 31

²³⁸ Bundle A2 page 154; page 21 of the Framework document

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discussed by the board and a resolution taken.²³⁹ This first resolution was later amended in circumstances which appear more fully below.

- 216 In terms of the board resolution the responsibility for the implementation of the resolution was delegated to the Spoornet (now TFR) Chief Executive, namely Mr. Gama. This was unbudgeted expenditure that was not in the plan for the year and Gama as the CEO of TFR did not have authority to conclude the contract which was beyond his delegated authority level. It was therefore required that the board delegate this authority specifically to him. Gama did not have authority to sub-delegate this board delegated authority. This evidence was not disputed.
- 217 Gama therefore concluded the contract on basis of the authority delegated to him by the board which authority imposed a specific condition on the contract, but the board condition was not met in contract signed by Gama.
- 218 A complaint was later received in relation to the 50 like new contract and was investigated. Before considering that evidence it is convenient to consider the evidence of Wells which deals broadly with the circumstances and also with Gama's role and conduct.
- 219 Wells set out the background circumstances. He explained that because the 50 like new contract was for over R800 million and was an unbudgeted expenditure not in the corporate plan it required board approval and was therefore processed through the Capital Investment Committee ("CIC") which needed to approve the project. Approval was first required at the divisional CIC Committee and so a document containing the proposed business case for the purchase of the 50 locomotives was put up to that committee. Wells referred to this document²⁴⁰ which at the end thereof was signed variously on 6 and 9 October 2006. All the signatures that appear

²³⁹ Bundle C, page 46

²⁴⁰ Bundle C, page 11 - 42

on the penultimate page of the document are those at divisional level including the Chief Executive Spoornet, Mr. Gama who signed on 9 October 2006. This was prior to the Group CAPEC meeting on 18 October 2006. Wells himself chaired the Group CAPEC meeting in his capacity as CFO at the time. Wells testified that the document was not presented at that CAPEC meeting but an investment summary was presented at the meeting. The purpose of the business case document is stated therein to be *inter alia*:

*"To confine the tender process for the acquisition of 50 EMD's to Diesel (EMD)/Sibambene Trade and Services" and "that the Group Chief Executive be authorised to conclude, sign and execute the commercial contracts for the manufacturing and supply of 50 EMD's..."*²⁴¹.

This proposal came from the Investment Forum at Group level and proposed that ultimately Mr. Gama the CEO of then Spoornet was authorised to conclude sign and execute the contract.²⁴²

220 Wells testified that the discussion around this project was that it was a progressive project which on the face of it provided delivery within a 12 month period of 50 locomotives at a substantially reduced price compared to new locomotives. Moreover, the project had the potential to achieve precisely what Transnet wished to do strategically both for TRE and with its capital programme generally, namely to localise and build expertise for locomotive engineering maintenance and assembly. Wells testified that what was unclear and confusing was the identity of STS as most members of CAPEC, including himself and the Group CEO Ms. Ramos, did not know who STS was, why they should be involved and precisely what the role of TRE would be in this project. It merged that STS was a parts distributor for EMD. The attitude of CAPEC was that it saw no reason why STS should be

²⁴¹ Bundle C page 2, paragraphs 4 and 6

²⁴² Bundle C, page 6

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involved as it was the first locomotive purchase ever executed and Transnet wanted to deal directly with EMD which was known and was the original equipment manufacturer ("OEM") in order to get the OEM's warranty and reputation behind the project. That was quite apart from the security of Transnet dealing with EMD and the OEM as the counter-party as regards risk. Transnet wanted TRE, whose expertise was repair and maintenance of locomotives, to have the opportunity to build expertise and a business and to secure employment and roll out a production facility. Wells said that the discussion got fairly heated but that it was an exciting project and it was clear that CAPEC would agree to it but certain conditions were made very clear, one of which was that STS would not be involved at all. In this regard Wells pointed out that Transnet was sceptical about middlemen having suffered in the past from circumstances where they simply added cost and complexity but no value to projects. At the time TRE had spare capacity and needed more work so this was project was an ideal opportunity to grow the business and extend the type of engineering work performed by TRE. The idea was therefore that TRE would do all the work that could be done locally in order to build expertise and improve its engineering standards, and this project provided an ideal opportunity to do so. Mr. Gama was present at that CAPEC meeting. Initially Gama was very strongly in favour of the involvement of STS, but the CAPEC committee was adamant that they did not want to have any involvement of STS. Ultimately the decision to proceed with the project was approved, but the conditions attached were that STS was not to be involved and that TRE would do all the engineering and maintenance work and assembly work that could be done in South Africa.²⁴³

22-1 The business case proposal document needed some amendments and then required to be signed by the Group CFO and Group CEO before the project

could be admitted into the capital expenditure system. At Group level the Chief Operating Officer, at that time Mr. Louis Van Niekerk, was also required to sign the business case document. The expenditure on this project was beyond even the Group CEO's authority for capital expenditure, which for unplanned items like this was R700 million, whereas the 50 like new contract was for over R800 million. Gama signed his approval of the business proposal on 9 October 2006 it as it was presented and without alteration and before any of the group executives signed it. The three group executives who subsequently signed it however all required an alteration to the business plan. Against his signature on the business plan the COO Transnet, Louis Van Niekerk noted: *"Transwerk should be involved"*. Wells then CFO inserted a handwritten note next to his signature which read: *"It was agreed that STS would not be involved. Any engineering or assembly to be done by Transwerk"*. His signature is dated 20 October. The third signature was that of the Group CEO, Ramos on 29 October 2006. She appended a handwritten note which reads *"I had exactly the same understanding as Chris (Wells) so this is approved on the basis of set out above."*

- 222 Wells testified that the reason it was necessary to make these handwritten notes and qualifications upon signature was because the business case which was presented after the CAPEC meeting of 18 October did not capture the concerns of CAPEC and needed amendment as it did not clearly address the issues which had been raised at the CAPEC Committee regarding STS. The two key issues not addressed in the written business case as presented to the group executives for signature were first that TRE would be involved in all the localised work, and secondly that STS would have no involvement. Wells testified that he discussed these aspects with Van Niekerk who had already appended his handwritten note before Wells signed and that Van Niekerk was in agreement with the note added by Wells. Moreover Ramos later approached Wells to discuss the matter with

him as she could not understand why the business case had not been amended appropriately. She too was very clear that it could only be approved subject to conditions as stated by Wells in his handwritten note. Ultimately the project required to be approved by the board which as at 29 October 2006 when Ramos signed the business proposal had not yet given its approval.

223 Gama then addressed a letter dated 25 October 2006 to EMD and STS²⁴⁴ in which he referred to the 50 like new contract and stated:

"Your proposal to Spoornet delivered on 14 September 2006 with regard to the above refers. Spoornet is hereby pleased to inform you that your offer is hereby accepted for the purchase of 50 like new GT26CU-3 locomotives subject to the conclusion of a formal written agreement between yourselves and Spoornet."

Wells testified that this letter, signed by Mr. Gama was inappropriate. Firstly, he could not issue such a letter until board approval had been obtained and there was as at that date no such approval. Secondly, after the CAPEC meeting of 18 October approval could only have been given for the amended business case whereby STS was not involved and TRE would do all the local work. The letter which Gama signed on 25 October 2006²⁴⁵ gave no indication of either of these conditions which had been stipulated. The request for approval of the 50 like new project was not approved by the board at its November meeting because the Company Secretary had not yet received an amended business case taking into account the requirements of CAPEC and the conditions stipulated by Wells and Ramos. It was only at the board meeting on 13 February 2007 that the signed

²⁴⁴ Bundle C, page 43

²⁴⁵ Bundle C, page 43

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business case, containing the handwritten notes of van Niekerk, Wells and Ramos, served before the board.²⁴⁶

224 Wells himself presented the business case to the board and it was accepted by the board with the specific condition reflected in Wells' handwritten note. The board acknowledged the strategic intent and passed a resolution that STS could not be involved and that TRE would do all the engineering and assembly work.²⁴⁷ The board resolution passed at the meeting 13 February 2007 reads as follows:

"Spoornet: Purchase of 50 EMD Class 34/37 Upgraded Diesel Locomotives for Spoornet GFB

The Board resolved that it grants approval for:

- *The implementation of the critical phase of the locomotive fleet modernisation plan which includes an investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet GFB;*
- *The confinement of the tender to Electromotive Diesel (EMD);*
- *The conclusion signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature.*

The condition for the above approval is that Sibambene Trade Services would not be involved in the contract and that Transwerk would carry out all engineering on assembly and maintenance."

225 Wells testified that the source of the board resolution was his handwritten note against his signature on business case document. The board condition was in the same terms as Wells' note save that the words "engineering or assembly" were changed to "engineering on assembly". This was a pure typing error by the Company Secretary and was not an

²⁴⁶ Bundle C, pages 11 – 42; page 25

²⁴⁷ Bundle C, page 46

aspect that was discussed. Wells testified that the intention was very clear both at the board meeting and from the discussions at CAPEC that all the work that could be done locally by TRE would be done by them.

226 Despite the board stipulation that STS should not be involved, contract negotiations were pursued between TRE and STS. Had the board resolution been given effect to no such contract negotiations would have been required. The fact of such contract negotiations appears from the minutes of the meeting of 5 March 2007 at which Percy Mosweu, Rubin Molhabeng and Pinkie Msoupye represented TRE and negotiated with Messrs. Adams and Erasmus of STS. This was despite the fact that the Gama had knowledge²⁴⁸ of the 13 February 2007 board resolution which excluded the involvement of STS. Mr. Mosweu was the Senior Engineer in TFR responsible for locomotive projects and for this project in particular. It was however the responsibility of Gama to ensure that the conclusion of the 50 like new contract was effected in line with the board resolution. Gama had no power to sub-delegate his duties and responsibilities in this regard given that it was a specific board designated authority without any further authority to sub-delegate without first obtaining an amendment to the board resolution.²⁴⁹

227 Wells testified that given the value of the 50 like new contract and its importance to Transnet it would normally be the responsibility of the Group CEO to conclude, sign and execute such a contract. That is moreover what was reflected in the CAPEC business summary.²⁵⁰ In this instance Gama requested that he be the person in charge of concluding signing and executing the contract. He did this at the CAPEC meeting as this was included in the business case which went to the Investment Forum and later to the COO. This authority was expressly sought in paragraph 14 of the

²⁴⁸ Page 30

²⁴⁹ Page 31

²⁵⁰ Bundle C, page 2 paragraph 6

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business case where it was recommended *"That the Chief Executive (Spoornet) be authorised to conclude, sign and execute the contract for the manufacturing and supply of 50 diesel locomotives, to be delivered within 12 months of dated of signature of contract."*²⁵¹

228 After the 13 February 2007 board meeting Gama addressed a note to Ms. Zola Stephen, the then Company Secretary, in which he indicated a preferred wording of the board resolution which altered its previous wording. The amendment which he sought was that the condition read *"The condition for the above approval is that EMD would work with Transwerk during manufacturing and maintenance of the locomotives"*.²⁵² Wells said that the concern with this wording was that the notion of EMD "working with" Transwerk was very unclear as that could be either a lot or a little work and Transnet did not want a competitor to TRE being established when TRE could itself do the work and thereby utilise its own facilities to full capacity. Wells knew that Stephen did not accede to Gama's request because of what had occurred at a Group Executive Committee ("Exco") meeting held on 28 March 2007.

229 Wells attended the Group Exco meeting held on 28 March 2007. Gama raised the issue of STS's participation in the 50 like new project saying that the board resolution wording was incorrect and needed to be amended. The Group CEO, Ramos responded by saying that one cannot simply change board resolutions and that they can only be amended by the board itself. Gama's attitude was that the contracting parties were not appropriate and that it was not up to Transnet to prescribe who the contracting party should be and that since his previous presentation, EMD and STS were close to consummating a joint venture agreement between themselves and that the contracting party ought to be that joint venture. The concern was

²⁵¹ Bundle C, page 39

²⁵² Bundle C, page 54A

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expressed in the meeting by Exco was that it did not understand why the OEM, namely EMD would seek to prescribe to a customer who should be the supplier and the contracting parties. However, Gama was adamant in the meeting that he had spoken to them and that EMD said they would only do the South African business through the joint venture with STS. Eventually, the Group CEO, wanting to cut debate on the issue which was fairly heated, agreed to go "off-line" (by which is meant outside of the usual line of authority) and Exco agreed that the wording of the amended Exco resolution would be sought by way of a round robin prior to it being taken back to the board. This appears from paragraph 11.1 of the minutes of that Exco meeting which records the following:

"The Committee agreed that the matter be taken off line between Messrs. Gama, Wells, Vallihu, Kahla and Ms. Stephen and the required Committee resolution be sought by way of a round robin, prior to it being taken back to the Transnet Board".²⁵³

230 Wells said that it was understood that the only change which would be made to the previous board resolution would be the identity of the contracting party. Wells said that in the discussion at Exco it remained clear that TRE would do all the work that could be done in South Africa and that the OEM would provide a guarantee. Under those circumstances the joint venture could be a contracting party provided the guarantee was in place and that there was no additional cost to Transnet and that STS was not involved in any assembly work whatsoever. Wells said that Gama's view at the meeting was that he was keen that STS had an involvement. The attitude of the Exco was however to insist that TRE do all the work because strategically that would equip TRE to expand its ability to assemble and do manufacturing work for the original equipment manufacturer, to retain employment and indeed expand and to introduce world class

²⁵³ Bundle C.54J, paragraph 11.1

standards into the business. Specifically TRE did not wish to introduce a competitor in the business into South Africa. It was also important that TRE be equipped to carry out maintenance of the locomotives after production as they did with every other locomotive in TRE.

231 Gama then prepared a document in the form of a memorandum to be circulated to Exco for approval in the round robin process and submitted that document to Stephen under cover of an e-mail dated 12 April 2007.²⁵⁴ On the face of it and according to the title of the document prepared for circulation to Exco it was a recommendation to amend the previous board resolution. However, as Wells pointed out, it did not address the precise concern of the board, namely that STS would be able, at the expense of TRE establish local facilities and expertise. For example in the recommendation section of the document proposing the amendment it is recorded that: *"The relationship (between STS and EMD) enables EMD to develop a local enterprise which does not have assembly capability and skills, increase local content and create employment."* As Wells pointed out this expressly says that STS does not now have the capacity, but this contract will enable it to build that capacity. The document also indicated that the joint venture was in an advanced stage of finalising the involvement of Transwerk in the assembly of 40 of the 50 locomotives on Transwerk facilities, with the initial 10 to be assembled in the United States.²⁵⁵ Wells testified that from the subsequent negotiations which occurred, it is apparent that this statement was not correct.

232 The memorandum also stated that *"tremendous capacity building and business will flow to Transwerk as a result of this transaction."* Following

²⁵⁴ Bundle C, pages 55 and 54K

²⁵⁵ Bundle C, page 57

the execution of the contract this did not occur as STS began to perform the engineering and assembly work, until this situation was later corrected.²⁵⁶

233 The memorandum prepared by Gama then refers to an enclosed revised resolution which the Company Secretary could then recommend to the board for ratification.²⁵⁷ That proposed amended resolution changed the wording of the condition to read as follows: "*The condition for above approval is that EMD would work with Transwerk during the manufacturing and maintenance of the locomotives*".²⁵⁸ This wording was identical to the wording previously proposed by Gama to Stephen (i.e. before the Exco meeting at which this matter was discussed in detail) and did not comply with the decision taken at the Exco meeting of 28 March 2007.²⁵⁹ Wells testified that this wording specifically did not comply in that the idea was not that EMD work with TRE but that the change to the wording of the board resolution would only be that the contracting party would be the joint venture, the other conditions, namely that TRE would do all the work and that STS would not do the work were to remain unaltered.

234 In the event the Company Secretary did not circulate the memorandum for round robin approval by the Exco members because she did not believe that it addressed the requirements stipulated by Exco.

235 As far as Wells was aware, Gama was on leave at the time. Stephen discussed the memorandum with Wells at the time and with Vuyo Kahla, head of Group Legal at the time. The Company Secretary attempted to redraft the wording of the resolution but was running late for the preparation of board meeting submissions which needed to be with board members a week prior to the board meeting. A discussion was held between Wells,

²⁵⁶ Page 41

²⁵⁷ Bundle C, page 58

²⁵⁸ Bundle C, page 59

²⁵⁹ Page 42

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Kahla, Stephen and the Group CEO Ramos who said that it was not necessary to redraft the resolution as the only requirement that was to differ from the original board resolution which would otherwise remain intact, was that the contracting party had changed. Nothing else needed to change.

236 At the April board meeting Mr. Kahla presented the facts, but no new documentation and then amended the proposed amendment to the resolution to read: *"The condition for the above approval is that Transwerk would carry out all engineering on assembly and maintenance"*.²⁶⁰ Wells said that the intention was to amend the resolution only in relation to the identity of the contracting parties. That amended resolution was then passed at the meeting of the board of 26 April 2007.

237 The amended board resolution of 26 April 2007 reads in full as follows:²⁶¹

"The Transnet Board of Directors Resolved that it approves the amendment to the condition contained in the Board Resolution 07/1/3 precluding participation by Sibambene Trade and Services, and that the amended Resolution read as follows:

That The Board resolved that it grants approval for:

- *The implementation of the critical phase of the locomotive fleet modernisation plan which includes an investment of R874.57 million (nominal) in the acquisition of 50 EMD Class 34/37 upgraded diesel locomotives for Spoornet GFB;*
- *The confinement of the tender to Electromotive Diesel (EMD);*
- *The conclusion signing and execution of the contract by the Spoornet Chief Executive for the manufacturing and supply of the 50 diesel locomotives to be delivered within 12 months of date of signature.*

The condition for the above approval is that Transwerk would carry out all engineering on assembly and maintenance."

²⁶⁰ Bundle C, page 61; page 48

²⁶¹ Bundle C page 61

238 According to Wells, the February board resolution was in all material respects the same as the amended April board resolution, save for the identity of the contracting party.²⁶²

239 Gama was not at the board meeting of 26 April 2007.

240 Gama then signed the 50 like new contract between Transnet Limited and EMD, STS joint venture.²⁶³ He did so on 1 May 2007 which was a public holiday. The signing took place at his home. At that stage the contract had been prepared on the basis that the board would agree to change the contracting party and that was the only matter requiring confirmation by the management team before he concluded the contract.²⁶⁴ There was only one working day between 26 April, the day on which the board amended the resolution, and 1 May. Wells testified that unless there had been a special request it was extremely unlikely that any form of communication would have occurred before 2 May 2007 through the office of the Company Secretary notifying persons in the company of resolutions of the board taken at the meeting of 26 April.²⁶⁵ It appears that the contract was already prepared in final form on 25 April 2007 (as is reflected in the header of the signed contract document) and that Gama could therefore not have given the board resolution taken on 26 April 2007 to anyone who was involved in the preparation of the draft contract before 1 May 2007 when he himself signed the contract.²⁶⁶

241 Nearly a year later in around March 2008, Wells learned from the CEO of TRE, Mr. Richard Vallihu, that STS was establishing a separate manufacturing facility at Iscor. Wells discussed the matter with Van Niekerk

²⁶² Page 135

²⁶³ Bundle C, pages 62 - 129 at page 129

²⁶⁴ Gama, page 29

²⁶⁵ Page 51

²⁶⁶ Bundle C, pages 62-129

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the Group COO and together they went to see Ramos. She was extremely perturbed and asked Wells to investigate which he did.

242 Wells' investigations ascertained that Vallihu was in fact correct. During the course of his making enquiries in this regard with Mr. Thomson, the CFO of TRF who was responsible for ensuring compliance with guarantees, payment delivery schedules and other problems relating to the 50 like new contract, Wells said to Thomson he would like to have a meeting with EMD and the various other players to ascertain what was going on and to see whether they could restore what the original board resolution had required. Thomson suggested that Wells simply attend a meeting which had already been arranged of all the parties and set for 10 April 2008 to discuss implementation problems with the contract.

243 Wells attended that meeting of 10 April 2008 at which there were EMD representatives from the United States, local EMD representatives, STS representatives and TRE executives, as well as managers from TFR. Gama was not present at that meeting as he was on leave at the time. A transcript of the relevant portion of the meeting was produced in evidence.²⁶⁷ At that meeting Wells tabled his proposal that TRE do all the engineering work as required in terms of the board resolution and that the parties needed to explore implementing that. Ultimately, the sentiment of the meeting was unanimous, including both EMD and STS, that it would be the appropriate course of action²⁶⁸ to restore the intention of the board resolution and ensure that TRE did all the construction, assembly and maintenance work which it was possible to do in South Africa. It was specifically agreed that the locomotive assembly work would be done by TRE; that work at the Iscor premises would stop, and that the assembly would take place at the TRE Koedoespoort facility. A steering committee

²⁶⁷ Bundle C, page 240

²⁶⁸ Page 57

was established comprising members of TFR and TRE with various representatives from EMD to begin addressing this process. Gama was not himself present at this meeting but Van Niekerk, COO of TFR and two other executive members from TFR were at the meeting and party to the decision and were involved in the steering committee that would give effect to what had been agreed. At no stage did Gama raise any objection to the decision taken at that 10 April 2008 meeting.²⁶⁹

244 Wells testified that on 10 April 2008, after the portion of meeting for which the transcript was later prepared, a closed meeting was held between EMD, STS and Transnet representatives at which total commitment was given to make the proposed changes with the work being done by TRE. At that closed meeting EMD raised the fact that they had "sunk" costs into establishing the Iscor premises and that whilst they were a hundred percent supportive of the decision to move the manufacturing to TRE, they requested compensation for the sunk costs incurred because they had followed the terms of the contract and they wanted to be reimbursed for those costs. Wells asked for an estimate of those sunk costs. The estimate given was in the order of R5 - 10 million, represented primarily by the cancellation of leases and salary payments and some rectification work that had already been done. It was agreed that Transnet would compensate EMD for those costs to the extent that they were valid and that they would need to be audited so that they could be approved by the CFO of TFR. TIA was assigned to audit these costs. In relation to the overall contract price of more than R800 million this was considered immaterial in relation to achieving the strategic aim of TRE performing the work.²⁷⁰

245 Wells later became aware that what had been negotiated between STS and TRE pursuant to the 50 like new contract was that TRE would perform a

²⁶⁹ Page 59

²⁷⁰ Pages 62 - 63

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very limited role, not in compliance with the board resolution. Following the remedial changes the amount of work that TRE performed was approximately three times what they had previously been required to do in the execution of the 50 like new contract.

246 In July 2008 the Group CEO, Group COO, CEO of TRE Vallihu, CEO of TFR Mr Gama and Wells, then Group CFO, all travelled to the United States to meet face to face with the two original equipment manufacturers, General Electrical and EMD to deal with concerns regarding the awarding of the tender to EMD for the 212 locomotives. That process was irregular and had had to be terminated. The value of the 212 locomotive contract was over R6 billion and Transnet needed to deal with EMD's concern that its preferred bidding status was being withdrawn. Discussions in the USA also centred around the move of the 50 like new contract to TRE. The agreement of both STS and EMD to this move was confirmed and the issues of the sunk costs in relation to the 50 like new as well as certain sunk costs on the 212 locomotive contract in respect of design drawings were also discussed. Gama was present when the sunk costs in relation to the 50 like new contract was discussed in the United States in July 2008. According to Wells he raised no objection either during those meetings or privately saying that the compensation for these costs was irregular or wasteful.²⁷¹ In addition, EMD in fact submitted a schedule of sunk costs to TFR and no complaint about this was raised by Gama. Later after STS retracted its position there was a mediation between Transnet and STS in late 2009 early 2010 the outcome of which was that STS did not accept the changes to the 50 like new contract. An agreement was however reached between the parties on sunk costs and the engineering hours wasted on the 212 locomotive agreement.

²⁷¹ Page 67

247. Wells also testified that there was a TFR Audit Committee meeting held in April 2009 at which both he and Gama were present. At that meeting the issue of the sunk costs was raised by the CFO of TFR and he at the time commented that he had not reported on any PFMA implications as the investigation was underway with TIA and he was not yet in a position to assess the implications. To Wells' knowledge Gama never raised any complaint or objection about the issue of the sunk costs between the 10 April 2008 meeting and the April 2009 Audit Committee meeting. (The first time that Wells became aware of any complaint on Gama's part in relation to the change in the contractual report arrangements was in Gama's formal response to Wells' letter raising his concerns arising from the TIA investigations which letter was dated 20 July 2009.²⁷² That aspect is dealt with more fully below).
- 248 Wells explained that in the process of a rectification of the contractual arrangement no insurmountable obstacles arose in relation to pricing guarantees or location of assembly. Indeed he indicated that if for example TRE had been asking prices that were too high in the negotiations with the EMD joint venture, this was an issue that would have been dealt with by referral up the line ensuring that TRE was not being obstructive either on price or for any other reason. Pricing was therefore no excuse for TRE not doing the work. That could simply have been resolved, as was done in other instances by either himself the Acting CEO or by the COO or the Group CEO (at the time Ramos) getting involved or making a decision as to what was fair.
- 249 Wells testified that the 50 like new contract signed by Gama does not comply with the board resolution as stipulated on 26 April 2007 because the board required that TRE do all the work in respect of assembly and maintenance and engineering that could be done and the contract does not

²⁷² Page 70



provide for this. In effect the contract gives STS the ability to decide what work it would do and what work it would sub-contract to TRE or others, if it indeed sub-contracted any work at all.²⁷³

250 In June 2009 after TIA had reported and raised its concerns regarding the 50 like new contract and Gama's involvement, Wells addressed a letter to Gama about these concerns.²⁷⁴ Gama responded in detail to those concerns on 26 July 2009.²⁷⁵ I shall refer to this letter as Gama's "written response". He also attached to his written response various e-mails in support of his contentions to which I shall revert later in these findings.

251 In his written response to Wells' letter Gama referred to the fact that other persons, and in particular Group Legal and Group Finance executives had to read and confirmed the 50 like new contract and were aware of what was contained in the drafts of the 50 like new agreement. Gama said that he was advised by Group Legal that he could proceed with the signature of the contract and this was also his evidence at the disciplinary hearing.

252 Wells testified that even if sign-off had been obtained for example from the CFO at Group level, in terms of the responsibility delegated to him by the board, Gama remained the person who was responsible as the person with delegated responsibility. Wells said that if Gama required sign-off from another executive prior to himself signing, what would be required was a specific sign-off sheet which would enable the person so signing off to state what they had reviewed and whether they had any reservations. This was not done. According to Wells it was not sufficient to simply send a copy of the contract to other executives in a series of e-mails. He pointed out that executives would receive literally thousands of e-mails, copied to them as a means of other people in the organisation saying that they had kept the

²⁷³ Page 75

²⁷⁴ Bundle D1, page 134

²⁷⁵ Bundle D2, page 1

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executives informed, But if a review was required of a document that needed to be obtained in writing.²⁷⁶ Wells explained that a reviewer would typically have to indicate what it is that had been reviewed, whether it was the whole agreement or merely portions thereof and whether he or she had reservations. It would remain incumbent on the person responsible for signing the contract to ensure that any such reservations were dealt with prior to the signing of the contract. Wells accepted under cross-examination that his evidence was that if one wanted to rely on signing off responsibility in regard to agreements that had to be in writing of the person whose sign-off was being obtained was probably something that was not in any Transnet policy. He nevertheless said this was standard practice which was applied generally in Transnet, because otherwise if you wanted to rely on another party's sign-off on an agreement you could not be sure what they had done before signing off.²⁷⁷ When it was put to Wells that no such sign-off documents could be found and that it simply was not the practice, he accepted that it may not be, but said that one would still not be able to rely on the involvement of any particular executive or department unless you obtained the relevant signature.

- 253 There are three places in which Gama is on record as having dealt with his signing of the 50 like new contract namely, in his written response of 20 July 2009; in the High Court papers and in correspondence. In his written response to the issue of whether the contract was being executed outside of the ambit of the board resolution Gama's response focused on Wells' involvement in the meeting on 10 April with all relevant parties present when it was agreed that the right way to go was to revert to what the board had intended and that setting up a competing works for STS at Iscor was precisely what the board did not want to happen. Gama was well aware of

²⁷⁶ Pages 25 - 26

²⁷⁷ Record page 132

the board's intention, yet in his written response he criticised Wells²⁷⁸ for closing the door on the Iscor works and setting up a process to exclude STS from the joint venture. Later in the same document Gama points the finger at Wells saying that it was his decision at the meeting of 10 April to unwind the existing infrastructure at Iscor.²⁷⁹ Further in the same document²⁸⁰ Gama says of Wells that this decision to unwind the position whereby STS was in competition "*resulted in wasteful expenditure where you unilaterally made a decision to compensate without exploring what options were available that could be cheaper*". Wells said that this not a unilateral decision at all. He said he to was invited to the meeting which he had not called, so he raised at the meeting the fact that the relationship between the parties which had actually eventuated was not what the board had intended and that what really ought to happen was that the position should be rectified. He pointed out that it was the requirement of the CEO of Transnet that the board's intention be implemented.

- 254 Similarly in paragraph 2.38 of his written response²⁸¹ Gama accuses Wells of embarking on a mission to redraft the contract at major cost to Transnet that ended up being a huge waste of money when the parties refused to sign it. Wells pointed out that what had really occurred was that in the face of a clear board resolution Gama had permitted a situation to develop which the board had never envisaged and at no stage was any approach made to the board to say that there was a better way of doing things or an alternative way or that a mistake had been made. Neither Gama nor any of his executives had ever approached the board with any such suggestion. What had ensued was in fact unauthorised being outside of the ambit of the board resolution. Gama's response was that the rectification process was a huge waste of money and that calling him to account for the concerns of

²⁷⁸ paragraph 2.37, page 14

²⁷⁹ Bundle D.2, page 15 paragraph 2.35


²⁸⁰ At paragraph 2.37 on page 15

²⁸¹ Bundle D.2, page 16

Wells and the board was an attempt to shift blame onto him. Wells testified that this was absurd. That the 50 like new contract was a massive one with an extraordinarily high profile and that the Group CEO and the board were informed all along as to the process. In fact many senior executives went to the United States to meet with the original equipment manufacturers, and EMD to openly discuss the 50 like new contract, the implications of how it was progressing and ensured that the entire process was transparent. There was no possibility of this having been something which Wells had simply ordered and effected on his own. Ultimately, the process was rectified and the project of assembly of the 50 like new locomotives was conducted on the premises of TRE. A pamphlet showing the assembly work at TRE premises was produced in evidence. This construction work was conducted at Koedoespoort. According to Wells this effected an important enhancement of the capacity of TRE by ensuring employment and skills transfer in relation to the assembly of the locomotives.

255 Wells testified that the 50 like new project once it moved to Koedoespoort was a great success with TRE's employees developing enhanced skills in line with international best practice and that following delivery of the first 50 locomotives TRE intends to offer the product to other markets and has just signed a contract for the procurement of 100 locomotives with another company on the identical conditions as those for the 50 like new project.

256 Wells testified that had Gama reacted differently once it was realised that he had failed to comply with and implement the condition contained in the board resolution, that Gama may well not have ended being disciplined. He said that had Gama really believed that this had occurred because his subordinates had failed to advise him properly and because he failed to obtain the proper advice from the legal advisers through whom the 50 like new contract document was processed, that he would have identified who had failed to advise him properly and taken whatever action he believed was appropriate to remedy that position in order to prevent a similar



occurrence in the future. Moreover, had Gama acknowledged that there was a problem and participated fully in trying to remedy the position and tried ensure that the contract was put in place properly, the position would have been quite different. Wells maintained Gama failed to do this.²⁸²

257 Gama's contention has all along been that the charges brought against him and his suspension were deleterious to his candidacy for the Group CEO post. Wells stated that although any charges which appeared to have substance would be considered in any selection process for the selection of a CEO, the charges would have been brought in the normal course even had Gama already been the Group CEO. Wells also pointed to the fact that the charges arose out of a process the origins of which preceded and had nothing to do with the selection of the new Group CEO.²⁸³

258 Wells accepted in cross-examination that if Gama had in fact sought and obtained legal advice on the 50 like new contract on the issue as to whether it complied with the board resolution and was told that the reference to a "key contractor" being defined as Transwerk in the 50 like new contract constituted compliance with the board resolution, he should be entitled to accept that this constituted compliance with the explicit condition of the board.²⁸⁴ He also said that Gama should have said to the legal adviser show me where that appears in the draft contract and satisfied himself that the contract clearly provided for compliance with the board's requirement in the condition.²⁸⁵

259 Wells accepted that there was no criticism of Gama for having not personally conducted the negotiations with the EMD joint venture for implementation and that it was acceptable that these were handed, together

²⁸² Pages 97 - 99

²⁸³ Pages 105 -107

²⁸⁴ Pages 117 -118

²⁸⁵ Page 117

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with the board resolution, to TRE to deal with STS/ EMD joint venture as Gama explained in his written explanation.²⁸⁶

The origins of the complaint and the investigation

260 Oates testified that the complaint concerning the 50 like new contract originated externally to Transnet through the Public Service Commission which received a complaint which was forwarded to TIA. This was received by TIA in the form of a letter from the Minister of Public Enterprises to the Chairman of Transnet dated 31 January 2008 requesting that the complaint which had been reported should be investigated and a report back made to the Minister of Public Enterprises.²⁸⁷ The complaint was based on a hotline Case Call report related to the 50 like new locomotive contract and was received in the Transnet Chairman's office on 5 February 2008. Three days later on 8 February 2008 TIA was instructed to investigate the matter to determine whether further action needed to be taken. This resulted in a forensic investigation and a report being prepared by TIA.

261 Derek McMaster is an employee of Ernst and Young employed as a Senior Manager in the Forensic Department and has been posted to TIA since May 2006. He has a diploma in criminal justice and forensic investigation. On 8 February 2008 he was instructed to investigate the allegations received. The lead investigator was initially a Mr. Terrence Koekemoer who immigrated to Australia in July 2008, whereupon McMaster became the lead investigator. They worked both together and independently on the investigation until the stage when Koekemoer left.

262 The investigation by TIA culminated in a thirteen page report prepared by McMaster and dated 12 February 2009 (the "McMaster report"). It was handed to the Group CEO Ramos the same day. That report found that the

²⁸⁶ Bundle D.2, page 6, paragraph 2.13; Record page 137

²⁸⁷ Bundle D, page 1

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50 like new contract was signed on 1 May 2007 by Gama as CEO of TFR in terms of a board resolution dated 13 February 2007.²⁸⁸ The report concluded that the condition laid down by the board on 26 April 2007 that Transwerk (now TRE) would "carry out all engineering on assembly and maintenance" was not taken into account in the contract.²⁸⁹ The McMaster report recommended that action be taken against Gama as the relevant signatory who had concluded the contract with the supplier.²⁹⁰ The report also recommended that the 50 like new agreement be rectified to fully reflect the resolution of the board.²⁹¹

263 Oates testified that the mechanism in the 50 like new contract adopted in order to secure fulfilment of the condition stipulated by the board on 26 April was through the definition of "Key Contractors" being defined in the agreement to refer to Transwerk as one of the main sub-contractors. This was in order to ensure that there was no doubt about the role that TRE (then Transwerk) would play in the contract. This definition has to be read with clause 7.5 of the contract where it was agreed that:

"STS shall procure that- (a) the Key Contractors notified to it by Spoomet prior to the Effective Date enter into, simultaneously with or prior to the signing of this Agreement, an agreement substantially in the form set out in schedule 005 (Collateral Agreement)."

Oates testified (and McMaster confirmed) that there was no such schedule 5 to the agreement which meant the agreement was open-ended and that it

²⁸⁸ Bundle D, page 28

²⁸⁹ Bundle D, page 28

²⁹⁰ Bundle D, page 32

²⁹¹ Bundle D, page 31

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was therefore required of TRE to negotiate with STS as to its role in the execution of the 50 like new contract.²⁹²

- 264 The investigation looked into whether Gama had sought advice from the legal department before he signed the contract. Gama stated that he had obtained such advice. Oates could not say whether the legal department gave advice on the agreement in general and on compliance with the board resolution in particular, and deferred to his investigator McMaster on that issue.²⁹³ Oates' understanding was that the legal advice provided was only in relation to how the agreement should be constructed in order to manage the risk between TFR and TRE²⁹⁴ and that while Gama did obtain legal advice he was not advised that he could sign the 50 like new agreement.²⁹⁵
- 265 It should be noted that it appears that the 50 like new contract was already prepared in final form on 25 April 2007 (as is reflected in the header of the signed contract document) and that Gama could therefore not have given the board resolution taken on 26 April 2007 to anyone before 1 May 2007 when he himself signed the contract.²⁹⁶
- 266 McMaster interviewed various persons from the Group Legal department including Mr Vuyo Kahla Group Executive: Legal, all of whom indicated that they had not been requested to look at the 50 like new contract at the time of the signing of the contract. Following Mosweu's disciplinary enquiry McMaster said followed up with various other persons at Group Legal as to the role they had played in the drafting of the 50 like new contract. They were not completely unaware of the contract, having been copied with e-

²⁹² Bundle C, pages 72 and 81

²⁹³ Oates, page 120

²⁹⁴ Oates, page 118-120

²⁹⁵ Oates, Page 118

²⁹⁶ Bundle C, pages 62-129

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mails containing drafts of the agreement being negotiated.²⁹⁷ McMaster also said that Group Legal said they had never seen the contract before,²⁹⁸ which in the context of his other evidence must I think refer to the final draft of the contract. It was put to McMaster in cross-examination that legal services advice was that Gama could sign the agreement and that it took care of the board resolution. McMaster denied this saying that the legal services person said they had never seen the contract before.²⁹⁹ Again in the context of his evidence as a whole this appears to refer to Group Legal department. Although at one point in his evidence McMaster said that there was no explanation given by the Group Legal for why they did not consider the drafts of the contract e-mailed to them,³⁰⁰ McMaster later said that when he asked Kahla about this he explained that although they received copies of the e-mails there was no request made to Group Legal to revise and look at the contract and that the contract was not finalised.³⁰¹

267 McMaster admitted in cross-examination that Kahla was aware of the board resolution as he was the person who in April had motivated the amendment to the earlier February board resolution so that STS would not be involved.³⁰²

268 When the distinction between obtaining advice from Group Legal department or the TFR legal department was explicitly made clear in cross-examination McMaster said that Cleopatra Shiceka Legal Executive at TFR advised Gama in relation to the draft contract but she told McMaster that she was not aware of the board resolution.³⁰³ Pinkie Msoupye however knew about the board resolution and was intimately involved in drafting the

²⁹⁷ The evidence of the detailed content of those e-mails and to whom they were sent is canvassed later in this award

²⁹⁸ McMaster page 130

²⁹⁹ Page 130

³⁰⁰ Page 109

³⁰¹ Page 109

³⁰² Page 122

³⁰³ Page 132

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agreement and liaised with Shiceka.³⁰⁴ She told McMaster that she advised mostly on the TRE resolution and the EMD parent guarantee.³⁰⁵ McMaster said that when he interviewed Shiceka she indicated that the 50 like new contract did allow for TRE to use a sub-contractor and that negotiations with a sub-contractor were conducted from March 2007 and were concluded on 1 February 2008.³⁰⁶ Shiceka indicated that it was Mr Percy Mosweu's responsibility as the project manager and General Manager: Engineering TFR to ensure that TRE assembled the locomotives in accordance with the board resolution.

269 McMaster accepted that Gama had said that the reason it was decided to have a sub-contract because Transnet was reluctant to accept responsibility by TRE for penalties if there were delays because TRE and TFR are the same business under the umbrella of Transnet.³⁰⁷

270 McMaster did not personally interview any of the EMD representatives although Mr. Patrick Nolan the Vice President of EMD was interviewed by Koekemoer before he left. McMaster could not say whether EMD was aware of the board resolution or whether Koekemoer had raised it with Nolan.

271 Whilst initially the investigators accepted that there appeared to have been compliance with the board resolution, McMaster said that they later revised this opinion in around October or November 2008 when it was realised that in terms of the contract STS was always going to assemble the 50 locomotives and that it was never intended that TRE would be the party doing the assembly as required by the board resolution. That was at the

³⁰⁴ Pages 132-3

³⁰⁵ Page 133

³⁰⁶ Page 83

³⁰⁷ Page 133

time that STS refused to continue to co-operate to reverse the situation as is referred to below.

272 McMaster testified about the meeting which took place on 10 April 2008 attended by representatives of TRE (previously Transwerk) and TFR, STS, EMD as well as Oates and Wells.³⁰⁸ McMaster did not attend the meeting but understood that the aim thereof was to get the locomotive manufacturing schedule back on track as production was behind schedule. In summary, at the 10 April 2008 meeting all the parties agreed to rectify the failure to comply with the board resolution subject to Transnet reimbursing STS for their sunk costs. The meeting also sought to ensure that TRE would become the assembler of the locomotives in accordance with the board resolution. The conclusion of the meeting was that all the various parties agreed that the implementation of the board resolution had not been taken into account fully and it was agreed that TRE would become the assembler of the locomotives. What had occurred was that STS had incurred costs and expenditure in setting up the locomotive production works at Iscor and Transnet agreed that it would pay these wasted costs once they were audited and that the manufacturing plant would then be set up at TRE. McMaster was tasked with auditing these wasted costs (referred to above as "sunk" costs) which was his focus in relation to the 50 like new contract at the time following the April 2008 meeting.

273 Prior to the 10 April 2008 the responsibility for the issue of failure to comply with the board resolution had been regarded as that of Percy Mosweu. After the 10 April 2008 meeting the approach was that the board resolution would be complied with and the contractual obligations regularised

274 On 16 October 2008 a letter dated 6 October 2008 was received by Transnet from Werksmans attorneys representing STS indicating that STS's

³⁰⁸ There is a transcript of this meeting at Bundle C, page 240 with a large number of "inaudibles"

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role in the joint venture was to perform the assembly of the 50 like new locomotives in terms of the contract which the joint venture had concluded with Transnet. In October 2008 it therefore became apparent that STS was not prepared to hand over the work to TRE in order to have TRE perform the assembly of the locomotives in terms of the board resolution.

275 McMaster also explained that Transnet required an additional 100 locomotives which were put out for tender as a separate acquisition. The joint venture then sought to interdict that 100 locomotive tender arguing that it would interfere with the contract relating to the 212 locomotives. TIA's resources were taken up with dealing with those interdict proceeding as McMaster as the lead investigator had the knowledge of the circumstances surrounding the 50 like new contract as well as the 212 locomotive contract and Koekemoer had left in July that year. In February 2009 McMaster was asked to submit a report on the issues arising from 50 like new contract. He did so and presented the McMaster report to Oates on 12 February 2009.³⁰⁹

276 In the course of his investigation McMaster concluded that Gama, who had signed the 50 like new contract, had failed to ensure that the condition laid down by the board resolution which authorised Gama to conclude the contract had been complied with. The way that this should have been achieved was to ensure that prior to the conclusion of the contract with the joint venture a sub-contract was in place with TRE doing the work as a key contractor sub-contracted to the EMD/STS joint venture to perform the work identified in that sub-contract.

³⁰⁹ Bundle D, page 20

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277 McMaster's report recommended that the agreement be rectified to fully reflect the board resolution and that action be taken against the signatories involved who had concluded the 50 like new contract.³¹⁰

8 April 2009 interview with Gama

278 McMaster thereafter interviewed Gama on 8 April 2009 in order to clarify Gama's understanding of the board resolution in relation to the 50 like new contract. McMaster confirmed the accuracy of the transcript of the portion of that meeting in which he was involved.

279 McMaster said that the responsibility in terms of the board resolution rested on Gama to conclude sign and execute the contract.³¹¹ McMaster confirmed that in the interview Gama suggested that it was Mosweu of TRE once the contract had been handed over to them, who had the responsibility to ensure that the terms of the board resolution were complied with.³¹² McMaster said that this was incorrect because a person delegated and authorised to perform a task by the board was personally responsible and could not further delegate that obligation imposed on him by the board.

280 McMaster interviewed the CEO of TRE Mr. Richard Vallihu who stated that he had not seen the board resolution when the contract was being negotiated. (This evidence that Vallihu did not know about the board resolution and the attitude of the board was contradicted by Wells' evidence when he accepted that Vallihu was present at that Exco meeting of 28 March 2007 and would therefore have known that the intention of the board

³¹⁰ Bundle D.1, pages 31 -32

³¹¹ Page 104

³¹² Page 100

as reflected in the 13 February 2007 board resolution was that TRE do all the work.³¹³)

281 The investigation revealed difficulties encountered in the course of negotiations between TRE and STS. Vallihu of TRE indicated that STS sought to acquire the Transwerk premises on a lease and then employ the Transwerk staff to perform the work on the TRE premises.

282 McMaster said that Gama's statement made during the interview that it was not possible for Transnet to supply premises was incorrect. Although premises were not available at the TRE facility at Koedoespoort, TRE did offer premises in Bloemfontein which STS turned down on the basis that the location was too distant. Negotiations were underway for TRE to provide premises to STS in Germiston when those negotiations fell away because STS found premises at Iscor.³¹⁴

283 In relation to the rectification of the contract McMaster testified that an agreement was concluded on 28 July 2008 between the EMD wing of the joint venture on the one hand and TRE and TRF on the other for the performance of the work in relation to the 50 like new contract being done by TRE. That was a satisfactory resolution to the whole issue and initially was thought to have settled all the issues between the parties. As already referred to above STS later disputed the position and sought to enforce the contract of 1 May 2007 being the 50 like new contract and claim damages. McMaster testified that that issue with STS remained unresolved as at the time of Gama's disciplinary hearing.

³¹³ Page 127

³¹⁴ Page 102

284 There were various e-mails referred to in evidence in relation to the drafting of the 50 like new contract. In support of his contentions Gama attached and referred to various e-mails in his written response letter³¹⁵.

285 These e-mails refer to various drafts of the 50 like new contract and aspects of the contract then being prepared.³¹⁶ These e-mails are essentially a series of e-mails between the legal advisors of EMD and Transnet concerning various contractual provisions.

286 McMaster accepted that the e-mail of 12 April 2007 was sent by Cleopatra Shiceka: General Council Spoornt to EMD's attorney and to various persons in Transnet including Peter Volmink in the Transnet Legal Department, Martha Ngowe also in the Legal Department and Vuyo Kahla of Group Legal. A similar e-mail was also sent later the same day to the same parties and in addition to Pinkie Msoupye of TRE. The e-mail concerned the EMS JV contract and commented on various clauses in the contract, including clause 7.1 and called for comment to be made to either herself or Pinkie Msoupye.³¹⁷ There was also an e-mail from Shiceka to most of the same recipients on 19 April 2007 enclosing a copy of the latest proposed parent guarantee by EMD and calling for comment thereon. A further e-mail was sent by Shiceka to EMD's attorney, Gustav Adams of STS, Frikkie Marais of Spoornt and Kabamba Muteba of Spoornt and again copied to Msoupye, Ngowe, Kahla, Volmink and also to Mandisa Mondie as well as to Nick Thomson both of Spoornt. That e-mail similarly attached the EMD parent guarantee and referred to the final draft thereof. There were three attachments to the e-mail but McMaster did not ascertain what those were.³¹⁸ He accepted that they were probably the parent guarantee clause, the board resolution in some form and the version of the

³¹⁵ Bundle D2, page 1

³¹⁶ Bundle D.2, pages 140 - 149

³¹⁷ Pages 122 - 123; D2, page 140

³¹⁸ Page 125

50 like new contract as at 19 April 2007. In addition there was an e-mail from Rothschild, EMD's attorney, to Shiceka dated 19 April 2007 which was again copied to a large number of persons within Transnet including Msoupye, Muteba and Frikkie Marais in which *inter alia* Rothschild says "*I am assuming that Spoornet has confirmed its prior agreement that only the STS sub-contracts will be subject to the collateral agreement provisions of section 7, and the revised agreement attached so reflects*".³¹⁹ McMaster confirmed that the contractor here referred to the "key contractor" in the agreement. This e-mail also referred to the standard Transnet sub-contract which Msoupye was using.

287 McMaster said that Msoupye was managing the contract process and on 26 April 2007 Shiceka sent an e-mail to one Hannalie Kumm of Spoornet with the "*Contract 50 like new locomotives final contract*" attached together with a request that it be printed and file created for it.³²⁰ The previous day, Msoupye who was managing the process sent an e-mail to Shiceka on 25 April attaching various schedules and drawing to the attention of Kabamba Muteba and Frikkie Marais that "*I do not have schedules 5, 14, 19 and 20 please check your records and update the information with list of schedules on page 3 of the contract document.*" (Schedule 5 was the critical schedule which was missing from the contract ultimately signed.) This e-mail clearly points out at that stage that the schedule was missing. McMaster did not ask Marais what had happened to schedule 5.³²¹ Earlier the same day Mosuype sent a contract referring to the 50 like new final contract which reads "*Enclosed herewith schedules to the above contract which I sent through in batches of three e-mails*". It also notes that "*Siya (i.e. Gama) will*

³¹⁹ Bundle D.2, page 145; page 126

³²⁰ Bundle D.2, page 148; page 128

³²¹ Page 129

*need a special power of attorney from the Group CE to sign this contract as the contract value is in excess of R300 million.*³²²

288 The latest in these e-mails was the e-mail from Cleopatra Shiceka on the afternoon of 26 April 2007 which was the same day as the board meeting at which the condition to the resolution was amended. It is clear that the exchanges between the legal advisors in relation to the contractual provisions at that point, did not take into account the wording of the amended board resolution which, at that stage could not have yet been available to them.

289 It was pointed out to McMaster that Note 2 under clause 5.4 of the DPP policy states:

"Any commercial agreement (for the purchase of goods of services) must be signed by an authorised employee Supply Management (Procurement) to indicate that all steps as per clause 5.5 below have been followed and that all procurement related governance has been adhered to".

Asked whether this had been complied with McMaster said there had been no sign-off at Group level and he could not say who at Supply Management Procurement was responsible for signing off in terms of this clause.³²³

290 It will be recalled that the 50 like new agreement was signed on 1 May 2007. McMaster testified that up until the point when Mr. Adams of STS reversed the approach indicated at the 10 April 2008 meeting that the parties would correctly implement the board resolution so that TRE would perform the assembly work, it appeared that the 50 like new contract had actually taken into account the board resolution which had simply not been complied with in the implementation of the contract.³²⁴ He accepted that the

³²² Bundle D2, page 148

³²³ Page 135

³²⁴ Page 136

people who believed that the contract had in fact taken the board resolution into account included Shiceka, Msoupye, Oates of TIA and McMaster himself. McMaster accepted that Mr. Nick Thomson (the CFO of TFR) also accepted that the contract took into account the board resolution as is evidenced in the transcript of an interview with him.³²⁵ McMaster said that it was only the implementation of the contract which had to be corrected.³²⁶ Indeed all concerned believed as at 10 April 2008 that the 50 like new contract did comply with board resolution and that it was simply a case that the contract had not been correctly implemented.³²⁷

291 McMaster accepted, that on the basis of the evidence and the letters from Gustav Adams of STS that STS was contractually entitled to do the work that understanding changed. McMaster said that he had during the investigations and in the course of discussions in September through to November 2008 realised that the contract actually did not comply with the board resolution. In December 2008 there was a legal opinion which advised that the board resolutions had not been complied within the 50 like new contract. However during that period the investigators including himself were engaged in dealing with the interdict process before they proceeded to obtain the relevant legal advice regarding non-compliance with a board resolution in the 50 like new contract.³²⁸

292 In a status report on 50 like new locomotives dated 25 March 2008 and prepared by Mr. Rheeders Matthys Project Manager of TRE³²⁹ it is reported that during May 2007 it was agreed that the scope of work in the assembly of the locomotives would be changed and that since the original requirement from EMD/STS the scope was reduced substantially.³³⁰

³²⁵ Bundle D.2, page 64; page 139

³²⁶ Page 139

³²⁷ Page 137

³²⁸ Page 138

³²⁹ Bundle D.2, pages 135 - 138

³³⁰ Bundle D.2, page 135 - 136; page 141

Subsequent to that and in the meeting in April 2008 it was agreed how the implementation of the contract would be rectified.

293 McMaster accepted that Gama had said that board resolution had been handed to TRE although it was available to the persons negotiating the agreement.

294 It was put to McMaster in cross-examination that it is inconceivable that Mr. Vallihu, Chief Executive TRE was unaware of the board resolution despite his having told McMaster that he was unaware of the board resolution.³³¹ On Wells' evidence this appears to be correct as discussed above. It was further put that Gama signed the agreement acting on legal advice which he received from in-house legal personnel and that as far as he was aware the contract complied with the board resolution and that was also the view of all concerned until October 2008. McMaster accepted that this was correct.³³²

295 In re-examination McMaster confirmed that it had been put to him that Mr. Vallihu was present at the CAPEC meeting of 13 November 2006.³³³ The evidence is that the board resolution in its final form was determined on 26 April 2007 and that as at 13 November 2006 the board resolution was vastly different and was not settled in its final form.³³⁴ It was then pointed out that the series of e-mails in relation to the contract between Transnet and the STS/EMD joint venture were being circulated as at 25 April 2007, whereas the amended board resolution was only finalised the following day on 26 April 2007. McMaster testified that the amended board resolution was vastly different from that of 13 February 2007,³³⁵ and that it further differed from the resolution proposed in Gama's memorandum dated 11 April 2007

³³¹ Page 144

³³² Page 144

³³³ Bundle C, pages 9-10

³³⁴ See Bundle C, page 10

³³⁵ Page 147

in which he recommended the amendment to the board resolution³³⁶ and attached his proposed amendment.

296 Gama testified that because STS was part of the team that had brought the concept to Transnet it was foreseen that it may be difficult to pursue the project while excluding STS. On the other hand STS did not ever have the capability to perform the assembly themselves. This was a capability which TRE had and Gama was quite sure that TRE would be able to execute the project.³³⁷

297 Gama said that the issue of STS's involvement had first been raised by Mr. Vallihu the CEO of TRE saying that STS was simply a parts manufacturer. The other executives and managers at the Capital Investment Committee meeting had concurred with him that there was no need to involve STS and that it was much more appropriate for Transnet to deal directly with the original equipment manufacturer which was EMD. The idea was that EMD would supply all the components on a complete knockdown basis to TRE which would then assemble the components into a locomotive. Quality assurance and supervision would be maintained by EMD because they had performed such work before. No major issues were foreseen with this arrangement.³³⁸ Gama testified that by the time he attended the Capital Investment Committee meeting on 17 October 2006 it had been decided that STS would be excluded and that TRE would perform the work.³³⁹ Gama denied that the debate at the CIC meeting on 17 October where it was decided to exclude STS from doing the work had been a heated debate as Wells claimed.³⁴⁰

³³⁶ Bundle C, page 55 at pages 58 and 59

³³⁷ Gama page 24

³³⁸ Gama page 25

³³⁹ Gama page 26

³⁴⁰ Page 26

298 On 26 October 2006 Gama signed a letter addressed to Mr. Albert Enste, Vice President, International Sales and Services for EMD as well as to Mr. Gustav Adams the Managing Director of STS.³⁴¹ This letter informed EMD and STS that:

"Spoornet is hereby pleased to inform you that your offer is hereby accepted for the purchase of 50 like new... locomotives, subject to the conclusion of a formal written agreement between yourselves and Spoornet".

299 Gama explained that although he signed this letter and it went out under his name it was not drafted by him. He described this letter as a *"non-binding letter of intent"* which he said the "engineers" had requested immediately after the discussions on 17 October 2007. The reason was that it was necessary to enable EMD to at least start to procure some of the long lead items required for the manufacture of the locomotives. Gama explained that the issue was raised with the General Manager Mr. Percy Mosweu of TFR and the CFO of TFR Mr Nick Thomson who had then drafted the letter which he had signed. He said that it was an oversight that the letter was addressed to STS as well as to EMD despite there having been a decision on 17 October that STS should be excluded.³⁴² He said that at that stage the engineers had probably not been properly briefed as to the need to exclude STS, and hence the oversight.³⁴³

300 Gama testified that in January 2007 Mr. Enste of EMD visited South Africa. At that time he indicated that EMD wanted to ensure that they were compliant with South Africa's BEE requirements, that he was here to formalise some kind of joint venture with STS and that STS would be the

³⁴¹ Bundle C, pages 43 -44

³⁴² Gama pages 26 -28

³⁴³ Gama page 28

contact for Transnet on the project. Gama indicated to him that as far as TRF was concerned STS was simply a parts manufacturer and that as agreed with Transnet they would be excluded from the project. EMD then indicated that they had already had discussions with STS about the joint venture, that EMD was geographically far away and needed a local project manager for logistic and supply chain issues and that STS could do this work. Enste said that they could not see their way clear to excluding STS who, apart from anything else had conceived of the 50 like new concept.³⁴⁴ EMD felt they could not exclude STS in the circumstances.

Discussion and conclusions: 50 like new contract

- 301 It is common cause that Gama signed the 50 like a new contract on the strength of the authority delegated to him by a board resolution. It is also common cause that in the terms of the 50 like new contract, properly construed, and particularly having regard to the absence of schedule 5 thereto, Gama failed to give effect to the condition stipulated by the board to the effect that "*TRE would carry out all engineering on assembly and maintenance*".
- 302 The above quoted portion of the board's condition for the approval of the contract was not amended by the changes which were effected to the board resolution of 13 February 2007 by the later resolution of 26 April 2007. What did change between those two resolutions is that the original wording to the effect that "*Sibambene Trade Services would not be involved in the contract*" was omitted from the amended board resolution.
- 303 Having regard to the evidence of what led up to the amendment of the board resolution, it is clear that the only change which it was contemplated would be made to the previous board resolution was the identity of the

³⁴⁴ Pages 29 - 30

contracting counter-party. From the discussions of which Gama was well aware, the board was prepared to countenance the involvement of STS as part of a joint venture with EMD provided that TRE did all the engineering on assembly and maintenance and provided STS was not involved in any assembly work whatsoever. The board resolution was under those circumstances amended in order to permit STS to be a party to the proposed contract.

- 304 Gama signed the 50 like new contract on 1 May 2007. The draft of the contract which had been prepared for Gama to sign was prepared on 25 April 2007 and was therefore drawn without having regard to the amended board resolution which was only taken the following day.
- 305 As to the key aspect of TRE being required to perform the work and STS not doing the work, the fact that the amended board resolution may not have reached Gama or come to his knowledge before he signed the 50 like new contract is immaterial as both those notions were already contained in the previous board resolution passed in February. Even on Gama's own version (at the hearing anyway) neither of those aspects was the subject of the amendment which he sought as that change related only to STS being a possible counter-party. (It is of course so that if Gama signed believing that the board resolution had been amended so as to encompass his proposed wording that TRE would "work with" STS, this would tend to support Transnet's contention that Gama sought to obtain the alteration to the board resolution so as to permit STS to set up in opposition to TRE and perform all or most of the work. That belief on Gama's part has however not been shown on the probabilities).
- 306 The absence of schedule 5 to the contract (what was termed a "collateral agreement") was not explained. It is clear from the series of e-mails exchanged shortly before the contract was signed and in particular on 25 April 2007, that the TFR managers concerned were aware that this

schedule was missing.³⁴⁵ McMaster did not ask Mr. Frikkie Marais (author of the e-mail of 25 April 2007 which queried the absence of schedule 5) what had happened to schedule 5. The nature of schedule 5 in general terms – as I understand it – is that it would be a collateral agreement setting out the work which TRE would perform as a sub-contractor. On the evidence it is not clear whether there ever was a schedule 5 in existence or not. There is no explanation for why schedule 5 was never obtained and attached to the contract.

- 307 The effect of the absence of any such clause in the contract and the absence of schedule 5 having regard to the provision of clause 7.5 and the definition of “key contractor” in the contract was that it was not guaranteed that TRE would carry out all of the work on assembly and maintenance. After some coaxing under cross-examination Gama agreed that there was no clause in the contract which secured TRE doing all the local work on engineering, assembly and maintenance.³⁴⁶ He accepted that there was no guarantee that TRE would carry out any work as a matter of certainty.³⁴⁷ In fact TRE had to go and negotiate with the STS/EMD joint-venture, cap in hand as it were, to try to secure some of the assembly and maintenance work in relation to the 50 locomotives which the contract envisaged would be assembled in South Africa. Therein lay the failure to comply with the board resolution.
- 308 It was common cause that with this contract in hand, STS proceeded to set about establishing an engineering assembly works at the Iscor premises. The STS engineering works was in direct competition with the work performed by TRE.

³⁴⁵ Bundle D1, page 148

³⁴⁶ Gama, pages 31-33


³⁴⁷ Gama, page 26


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- 309 Gama had no authority to conclude the 50 like new contract other than the authority delegated to him in terms of the board resolution. The evidence also established that it was not open to Gama to delegate his responsibilities in regard to ensuring compliance with the board resolution.³⁴⁸ Clearly therefore, his authority was subject to ensuring compliance with the condition contained in that resolution. Gama failed to ensure such compliance.
- 310 The question which arises is whether Gama's failure to comply with the board resolution was negligent or whether, as was contended for by Transnet, the probabilities establish that he wilfully disregarded Transnet's intentions as contained in the board resolution and which he clearly understood.
- 311 In support of the submission that Gama wilfully sought to circumvent the import of the board resolution Transnet relied on the following facts and circumstances.
- 311.1 After the board resolved in the first (February) resolution that TRE would carry out the work, Gama specifically advocated the inclusion of STS in the joint-venture in his memorandum of 11 April 2007. The basis on which he sought to do so was with a proposed wording being that *"The condition for above approval is that EMD would work with Transwerk (now TRE) during the manufacturing and maintenance of the locomotives."*³⁴⁹ (underlining added). This would have had the effect that it would permit STS/EMD to perform the work which the board expressly wanted TRE to perform and would potentially permit STS to establish itself as a major competitor of TRE.

³⁴⁸ Oates page 93

³⁴⁹ Bundle C, page 59




- 311.2 Gama's version that the intention of his proposed rewording of the resolution was merely to secure that STS could be a counter-party to the contract and was not in order that estimates perform the work, is possible, but the inaccurate wording of his proposed amendment clearly raised alarms at the time for the other executives involved, who accordingly refused to adopt that wording
- 311.3 Gama signed the contract without proper and careful determination that the requirement of the board that TRE do the local work was adequately captured in the agreement.
- 311.4 Regardless of whether Gama was aware of the terms of the amended wording of the resolution at the stage when he signed on 1 May 2007 (the amended resolution only having been passed days before on 26 April 2007), he was certainly clearly aware of the import and intention of both Exco and the board in relation to TRE doing the local assembly and maintenance work.
- 311.5 Gama then entrusted the implementation of the 50 like new agreement to Mr. Percy Mosweu General Manager: Engineering TFR. Gama failed to himself monitor the implementation of the agreement in such a manner so as to ensure that the condition that TRE do the work was complied with. In this regard it was pointed out that Mosweu was later shown to have an interest in STS which was in conflict with his duties as a manager representing Transnet. There is however no evidence that Gama either knew or should by the exercise of reasonable care have discovered Mosweu's conflict of interest. The fact that Gama entrusted implementation to Mosweu when the latter in fact was conflicted may be a suspicious circumstance, but until the evidence links Gama by showing that he knew of Mosweu's position or was in cahoots with Mosweu, it remains no more than a suspicion. As Wells I think conceded, Gama
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was perfectly entitled generally to delegate the implementation of the 50 like the agreement to his General Manager Mosweu, so nothing adverse can be inferred from his conduct in this regard.

311.6 What is also relevant is the fact that Gama failed to inform his management team of the clear and unequivocal instructions of senior executives of Transnet and of the board as reflected in the amended resolution in regard to the requirement that the TRE to all the local work. The context of this failure is that this was a very sizeable contract and there was only a single condition imposed by the board.

311.7 Also relevant to this picture is the fact that Gama says that he was not informed by his subordinates that STS was in the process of establishing a facility in competition with TRE. This was despite his meeting regularly with Mosweu his General Manager responsible for the implementation of the contract. In this regard of course the fact that Mosweu was shown to have an interest in STS probably means that Mosweu would not have volunteered information about the establishment of STS's competing facility as he would probably want to keep such information away from Gama. Nevertheless, Gama failed to himself make direct enquiries. Gama did not assert that Mosweu has misled him. On Gama's version he only became aware of what had occurred when this was later brought to his attention by Group executives. This occurred after Mr Vallihu the CEO of TRE had alerted Wells (then Acting Group CEO) to the problem.

311.8 The evidence of Gama's lack of interest in remedying the situation once it was realised that is STS had set up in competition with TRE and his failure to pursue and investigate those of his subordinates and even legal advisers who were responsible for having not



advised him adequately, may in principle properly be regarded as a factor tending to show that Gama intentionally evaded compliance with the board resolution. The evidence in this regard is not however particularly convincing. It should be said in Gama's favour that the decision to rectify the situation was really a *fait accompli* after the 10 April 2008 meeting (a least until STS decided in October 2008 to enforce the contract) and that the implementation thereof could legitimately have been left in the hands of Gama's subordinates. It was also pointed out for Gama that the only outstanding aspect of the reversal of the position was the contract negotiation with STS which admittedly remains outstanding, but there is no evidence that Gama was ever asked to conduct or had anything to do with those negotiations.

311.9 Another factor is the letter which Gama signed on 17 October 2007 and addressed to STS as well as to EMD despite there having been a board decision that STS should be excluded.³⁵⁰ Gama said that it was an oversight. In the context of Gama's knowledge of the board's attitude at the time, this is a serious oversight. The fact that this letter was prepared by Gama's subordinates does not excuse Gama's negligence in this respect.

312 It was argued that Gama's conduct was consistent throughout with an intention on his part to sideline TRE in favour of STS setting up in competition. This, so it was argued for Transnet, is the most probable scenario which emerges on the evidence.

313 Gama's case is that he should be acquitted of this charge and its alternative. It was submitted for Gama that the evidence establishes that he obtained legal advice which confirmed that the contract gave effect to the

³⁵⁰ Gama pages 26 -28

board resolution and that initially at least, Oates and his forensic team were similarly persuaded that this was so.

- 314 It was pointed out that at the latest on 10 April 2008 it was clear to all concerned that the board resolution had not been carried out and there was no difficulty in establishing that Gama had signed the contract which failed to implement that resolution. In fact, the situation was reversed and the work reverted to TRE by about July 2008 as was evidenced by a glossy marketing brochure produced in evidence.³⁵¹ It was contended that as at 10 December 2008 according to Oates there was absolutely nothing to implicate Gama. It is argued that this situation changed in December 2008 or January 2009 following the obtaining of a legal opinion a copy of which was not made available by Transnet, despite two the other legal opinions having been produced.
- 315 Gama submits that he relied on the legal advice which he obtained from the TFR legal department and on his version also from the Group Legal department. In fact Sicheka of the TFR legal department did furnish some legal advice. Sicheka's explanation as to how the board resolution was complied with satisfied with the investigators at least until legal advice was obtained.
- 316 It was submitted that as the CEO of a very substantial organisation Gama of necessity had to rely on his subordinates and could never have negotiated and executed the contract on his own. It was submitted that Gama's explanation as to why he acted as he did and relied on the advice he obtained does not justify the conclusion that he failed to accept responsibility.

³⁵¹ Bundle c, page 434



- 317 Before signing the 50 like new contract Gama was required in terms of the Transnet policies to obtain prior advice from the relevant Legal Services department.³⁵² The evidence is not clear as to whether in this case that requirement meant that the advice had to be obtained from the Group legal department or the TFR legal department. In fact the Group legal department probably played no role in the drafting of the contract.³⁵³ Although the Group Legal staff were copied on various e-mails which contained a draft of the contract they stated that they were not ever requested to look at and review those contracts or the final contract.³⁵⁴ It was Shiceka in the TFR legal department who in fact advised Gama in relation to the contract.
- 318 McMaster said that Shiceka told him that she was however not aware of the board resolution.³⁵⁵ Msoupye, also of the TFR legal department, did however know about the board resolution. Msoupye was intimately involved in drafting the agreement and liaising with Shiceka. The advice given to Gama was however channelled through Shiceka.³⁵⁶
- 319 McMaster said that he asked the Group Legal executives, including Kahla, why it was that they had been copied on the e-mails with the draft contracts, but there was no explanation for this. These were draft contracts in the course of the negotiations and Kahla said that they were never requested to review the final contract and the contract was never finalised.³⁵⁷
- 320 Gama's answer to the allegation that he failed to secure a wording in the contract whereby TRE would perform all the local work to the exclusion of STS was that prior to his signing the document he was advised that the document was with the Group Legal apartment and was further advised by

³⁵² Bundle A2 page 154; page 21 of the Framework document

³⁵³ McMaster, page 108

³⁵⁴ McMaster, page 109

³⁵⁵ McMaster, page 132

³⁵⁶ McMaster, page 132-3

³⁵⁷ McMaster, page 109

the executive officer for the contract, Mr. Mosweu General Manager Engineering TFR, that he could proceed with the signature of the contract.³⁵⁸ Mosweu has since been disciplined for his conflict of interests due to his interest in STS and resigned from Transnet during that process.³⁵⁹

321 Gama said that there had at an earlier stage been discussions with legal on the manner in which the terms of the board resolution would be met in the contract. There had been some debate about the problem of Transnet contracting with itself in the form of TRE. Defining TRE as a "key contactor" was the method adopted of securing TRE's position in doing all the local work without passing the risk of non-performance or of late delivery back to Transnet.³⁶⁰ This Gama described this as what he understood was the "elegant way" provided by the legal advisors.³⁶¹ Gama said he had previously and long before the time of signature discussed the relevant clauses with legal advisors in the TFR legal team and Group Legal and he was satisfied that they had applied their minds to the issue.³⁶² However the issue which Gama identifies as that which he was given advice on was *"the issue of securing TFR's participation without passing on the risk of non-performance or late delivery back to Transnet."*³⁶³ That is consistent with what Sicheka told investigator McMaster – namely that she had advised on that issue and on the EMD guarantee – but had not advised on the issue of ensuring that the contract be worded so that TRE would do all the work as per the board's condition.

322 Asked in cross-examination whether he had checked to ensure that the contract contained a clause which stipulated that TRE would carry out all

³⁵⁸ Bundle D2, page 11 paragraph 2.29

³⁵⁹ Singh, page 43

³⁶⁰ Gama, page 25-26

³⁶¹ Gama, page 27

³⁶² Gama, page 26-27

³⁶³ Gama, page 26

engineering and maintenance work, Gama avoided any direct answer to the question saying only that there was a clause in terms of which TRE was defined.³⁶⁴

323 Gama maintained that he had no motive to change or interest in changing the board resolution,³⁶⁵ which assertion contradicts the fact that his memorandum of 11 April 2007 sought to alter the resolution, but he maintained that the intent was always that TRE would do the work³⁶⁶ and he said his understanding was that TRE was preparing to do the work.

324 The company bears the onus to establish wilful conduct on Gama's part. There is no real dispute about the fact that prior to his signing the contract Gama had approached and interacted with the in-house legal advisers at TFR in regard to aspects of the contract. Gama maintained that he accepted that his advice for those legal advisers was to the effect that the board's requirement that TRE perform the work was met in terms of the contract. Actually that appears to be wrong in that he was not ever specifically advised by Shiceka that the requirement in the board resolution had been met in the contract wording. The investigators ascertained from the in-house legal advisers that they had offered advice on other aspects of the contract but not specifically on that aspect. That hearsay evidence was not confirmed at the disciplinary hearing by testimony from any one of the legal advisers at TFR.

325 Wells said that it was not sufficient for Gama to have satisfied himself that the relevant legal advisers were copied on e-mails with drafts of the agreement. He said that if Gama wanted to rely on their sign-off he had to specifically ask them to consider particular aspects of the contract and obtain specific sign-off on that aspect so that he could be sure that the

³⁶⁴ Gama, page 27

³⁶⁵ Gama, page 28

³⁶⁶ Gama, page 28

material issues had in fact been considered by the legal adviser. In cross-examination however Wells had to concede that there was no such policy requirement in regard to sign-off procedures within Transnet. In the end therefore Wells' evidence on this aspect can be put no higher than that it was a practice followed by some within Transnet and may be the most advisable practice, but it cannot be said that Gama's failure to obtain specific sign-off was irregular or that it was in breach of a practice required in Transnet. Wells is no doubt correct that it was unwise for Gama not to obtain specific sign-off, but and that is with the wisdom of hindsight.

- 326 The crucial question is whether it can be said that the probabilities that when Gama signed the 50 like new contract he did so with the conscious realisation that the wording of clause 7.5 read with the definition of a "key contractor" and the fact that the collateral agreement in the form of schedule 5 was missing, or whether he was merely negligent in this regard and believed that the document which he was being presented with to sign had been approved by the relevant legal advisers and properly prepared by his managers within TFR. While there are certainly grounds for suspicion as to Gama's intention and state of mind when he signed the contract – based on the probabilities of the surrounding circumstances relied on by Transnet as set out above – was intentionally to promote STS. To make a finding that Gama acted wilfully in this regard it is necessary to infer from those circumstances that it is more probable that Gama intentionally signed the contract knowing that it failed to secure the work for TRE than that he did so merely ignorantly. If all that can be inferred is that that he did so merely because he failed to understand at the time of signing the full import of the contractual provisions properly construed with the contract being read as a whole, including having regard to the missing schedule – then he may be negligent, but that is not wilful conduct on Gama's part.

- 327 The principles applicable to drawing such an inference on the civil standard have been set out above under the GNS contract section of these findings and apply similarly here. It is not necessary to repeat them.
- 328 In the light of the undisputed evidence that later, once the fact of STS having set up an assembly plant in opposition was realised and then rectified, other Transnet managers and executives and the internal audit investigators who were tasked with investigating the irregularities all laboured for a considerable period of time under the misapprehension that *terms* of the contract were not so much the problem as the *manner of its implementation*, it cannot I think be said that on a reading of the contract by a lay person - such as Gama was - it would have been unequivocally and blindingly obvious that the contract failed to secure the local work exclusively to TRE. Put otherwise, it is not so improbable that Gama would have realised this failure in the terms of draft contract which had been prepared for him to sign, and about which there had been at least some previous discussions involving the relevant legal advisers, that he must on the probabilities necessarily have realised that what he was signing failed to comply with the board resolution. That is so, even if, as I have found above, of the probabilities that the subject of the legal advice was not pertinently the question of whether or not the contract provided that only TRE would do the work. It follows that Transnet has failed to prove on a balance of probabilities that Gama signed the contract wilfully in the knowledge that and with the intention that STS rather than TRE would perform the work.
- 329 It does not however follow that Gama was not negligent in failing to ensure that the condition that TRE perform the work was embodied in the terms of the contract. The next question to be determined is whether Gama's conduct in signing a contract without securing compliance with the board resolution was negligence and constitutes negligent misconduct.

330 This was an important contract for a significant amount of money. The board had laid down only one single condition and had tasked Gama with executing the contract. He should in the circumstances have taken extraordinary care to ensure that he captured the import of the condition in the contract. This he failed to do. On his own version Gama failed to read the 50 like new contract and make himself sufficiently aware of its content and implications in order to ensure compliance with the board resolution. There is no doubt that Transnet has established that Gama was negligent in failing to secure a contract in terms which provided for TRE to perform all the local work even though he had conferred with his legal department on some aspects, but not on the critical aspect of compliance with the board resolution. This negligent failure does constitute misconduct.

331 Having reached the conclusion which I have on this charge, it is unnecessary to consider the alternative aspect of this charge, namely whether Gama's conduct also constituted poor performance.

Conclusions

332 In conclusion therefore on this charge I find that Transnet has failed to establish on the probabilities that Gama wilfully signed the 50 like new contract in the knowledge that according to the terms of the contract STS would perform the local work rather than TRE. Transnet has however established that Gama was negligent when he signed the contract without securing the work to TRE as specifically required by the board resolution which he was tasked to implement.

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Charge 4 : UNWARRANTED CRITICISM OF TRANSNET EXECUTIVES

- 333 The essence of this charge is that Gama has either directly or through his attorneys during the course of the investigation and the High Court proceedings, and more recently made statements critical of the motives, conduct and integrity of senior executives of Transnet and members of the board which were unjustified and unreasonable and calculated to cause harm. It is also contended that they indicate an irretrievable breakdown in the trust relationship between Gama as the CEO of TFR and Transnet.
- 334 Transnet contends that Gama's conduct in dealing with the allegations against him and in particular his wide-ranging attacks on agents and officials of Transnet during his attempts to ward off the enquiry, and his use of the public media in making these attacks, constitutes unwarranted conduct that is in itself destructive of the employment relationship and for this reason is to be regarded as misconduct.
- 335 Gama testified that he did not believe that his conduct as set out in this fourth charge means that his relationship with Transnet had irretrievably broken down.³⁶⁷ He indicated that he is prepared to apologise to Mr Wells the Acting Group CEO (who was the target of numerous of these statements) and said that he can work with Wells.
- 336 Before considering the merits of this charge it is apposite to set out the detail of some of the criticisms made by Gama and on which Transnet relies and Gama's testimony in relation thereto.
- 337 Gama's attitude was initially displayed during the interview conducted by Madhav when, as set out above, Gama stated that the discussion which they were having wherein Madhav was questioning him about his authority

³⁶⁷ Gama, page 48

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and the terms of the confinement in relation to the GNS contract were "... discussions that we tend to have here, are really just discussions that are aimed by others to cast aspersions on my integrity and I am not going to allow that."³⁶⁸

338 Many of Gama's statements were aimed at Mr. Wells. Gama brought a High Court application against Transnet and various Transnet executives, including Wells. Wells referred to various passages in that application in which Gama under oath made allegations against Transnet and its executives. These included allegations that Wells was conspiring to scuttle Gama's chances of being considered for appointment as the Group Chief Executive ("GCE"); that the timing of the notice by Mr Maharaj was not coincidental and was deliberate with a view to casting a cloud of suspicion and doubt over Gama's appointment as GCE and that the purpose of taking disciplinary action was to prejudice his chances of appointment. Wells denied any conspiracy on his part. He pointed out that he had no power to determine or influence the appointment of the GCE. He was not the person who had decided to issue the notice of disciplinary action as that was issued by Mr. Maharaj Group Executive : Human Resources. Wells said that the disciplinary action against Gama was not taken lightly and moreover it was not Wells' decision to initiate such action. Effectively this was driven by the Transnet board after two external legal opinions had recommended disciplinary action.

339 Further allegations by Gama in his High Court affidavit claim that the disciplinary process was unlawful and unfair and was motivated by an attempt to prejudice his position and to pursue false allegations against him when he was not responsible for the difficulties which had arisen due to the shortcomings of Mr. Wells.³⁶⁹ Gama further alleged that the disciplinary

³⁶⁸ Bundle D1, page 101
³⁶⁹ Record, page 45

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action had been initiated specifically with the ulterior purpose of prejudicing his prospects as a candidate for GCE.

340 The High Court application was unsuccessful and the court found that there was no indication of any prejudicial behaviour by Wells against Gama.

341 Reference was also made to the contents of a letter dated 31 August 2009 from Gama's attorney Mr Langa to Mr. Philip Hourquebie, the CEO of Ernst and Young³⁷⁰ in which it is alleged on Gama's behalf that Ernst and Young *"continues to be a 'conspirator' against Mr. Gama on many issues which should be raised with Mr. Gama as internal auditors but they are instead raised by Chris Wells... and Gama's CFO Nick Thomson."*³⁷¹ The same letter refers to Ernst and Young as having abandoned its internal audit responsibilities to Gama *"by participating in an investigation and a witch-hunt and his Cabal against Mr. Gama..."*³⁷² Wells dismissed these allegations as nonsense.

342 In a further letter from attorney Langa dated 31 August 2009 to Maharaj concerning the suspension of Gama the allegation is made: *"Mr. Wells stands to benefit, directly, from the fabrication in that he hopes to conceal the massive financial cost that he caused Transnet to suffer when he made a hasty and unsubstantiated decision when he ordered STS to move their assembly from Iscor to Transwerk at the cost of Transnet."*³⁷³ Wells denied that this statement was factually correct. He said that the decision referred to was the last thing that he benefited from and that it was anything but a hasty and unsubstantiated decision. The decision was not one taken by him in isolation as it was a massive strategic decision, but that Transnet had no alternative but to do this in order to complete the process and abide by the

³⁷⁰ Bundle F, page 14

³⁷¹ Bundle F, page 15 paragraph 6

³⁷² Bundle F, page 15 paragraph 7

³⁷³ Bundle F, page 19 paragraph 7

board resolution which required TRE to perform the local assembly and maintenance work rather than for STS, a competitor, to do the work.

- 343 In the same letter Gama's attorney states in relation to the decision to move the assembly works that *"This decision was unnecessary as STS could have built about 10 locomotives at Iscor and built the remaining 40 from Transnet"*. Wells stated that it was highly unlikely that STS had the capability to perform the work even in part, as it had run into enormous problems. However, as he pointed out, the key issue was in any event not whether STS was able to perform the work but was the fact that STS was were in terms of the board resolution precluded from doing the local work which was supposed to be done by TRE.
- 344 A further allegation is made in this letter that the timing of Gama's suspension by way of letter on 24 August 2009 was no coincidence and *"It reflects a sinister and mala fide attempt to subvert the candidacy of our client for the group CE position."*³⁷⁴ Wells testified that the issuing of the disciplinary notice on 24 August 2009 was simply following the process that had been set in motion by the board.
- 345 Later in the same letter the statement is made: *"The information at Mr. Gama's disposal shows that "information" of this default was obtained in the course of malicious skulduggery against him that was aimed at prejudicing Mr. Gama's candidacy for the position as GCE or so as to prefer Mr. Wells' candidate and in so doing discrediting Mr. Gama, at Transnet's expense, which is by itself a much more serious form of misconduct than any alleged charge against Mr. Gama."*³⁷⁵ Wells denied the allegations of malicious skulduggery either by himself or the board or any other executive. Wells stated that he did not have a preferred candidate that nobody sought his

³⁷⁴ Bundle F, page 20 paragraph 9

³⁷⁵ Bundle F, page 23 paragraph 25

opinion as to the candidacy and his opinion would in any event have had no import.

346 The next paragraph of the same letter questioned the conduct of Ms. Ramos the former Group CEO where it was stated that "*The investigation launched by Mr. Wells therefore essentially brings the responsibilities of the recently departed GCE and Chairman of Transnet into question, and not Mr. Gama's responsibilities and conduct.*"³⁷⁶ Wells denied this. He pointed out that the initial investigations were the result of tip-offs launched not by him or by Ramos and that once TIA had tabled its internal forensic reports in February 2009 the further investigations and disciplinary processes simply took their course. Wells also pointed out that TIA has no power to decide on disciplinary action which remains the responsibility of the relevant executive within Transnet once the reports have been made by TIA. I would add that if a TIA report indicated serious misconduct and the relevant executive failed to institute appropriate disciplinary steps, such executive could himself be criticised or even disciplined.

347 In a letter of 27 November 2009 to Maharaj attorney Langa on behalf of Gama conveyed his belief that the request to return his laptop and to have his office computer investigated by Transnet was "*a measure to fabricate further allegations as to the current charges against him...*"³⁷⁷ Wells denied that there was any fabrication of charges or that there was an attempt to trump up a charge as alleged later in the same letter. He regarded these allegations against Transnet as not only being nonsense but also constituting serious allegations against Transnet.³⁷⁸ Wells testified that the statements in this letter were totally unfounded and said that these were statements made in relation to an executive controlling the disciplinary

³⁷⁶ Bundle F, page 23 paragraph 26

³⁷⁷ Bundle F, page 73 paragraph 1

³⁷⁸ Bundle F, page 73

process and undermined Transnet, including the audit process, the integrity of its executive employees and ultimately the board.³⁷⁹

348 In a letter dated 8 December 2009 by attorney Langa to attorney Todd of Bowman Gilfillan³⁸⁰ various further allegations are made including that Transnet "... went shopping around for a legal opinion that would tell them what they are currently doing after the first major law firm advised Transnet that their intentions to convert the internal audit report procedural findings into this farce will not meet the approval of the law."³⁸¹ Wells denied shopping around from attorney to attorney for advice. He was aware of only two legal opinions, namely that taken by the chairman of the board from attorneys ENS and the opinion obtained from Bowman Gilfillan. The evidence did however establish that there was a third legal opinion³⁸² which was not produced at the hearing.

349 The same letter referred to "a desperate attempt by Transnet to illegally gain access into Mr. Gama's computer files and information when they knew very well that they could have spoken to him for his consent or talk to us".³⁸³ Wells commented that taking control of computer files, laptops and desktop computers was a normal process in the course of disciplinary activity and would occur with any employee in a similar position.³⁸⁴

350 This letter also refers to "a trail of unlawful invasion of privacy, violation of his right to be treated fairly by Transnet and the destruction and non-compliance of corporate practice and governance with the intent to pursue the misuse and abuse of process law in order to deny Mr. Gama his legal

³⁷⁹ Record page 57

³⁸⁰ Bundle F, page 80

³⁸¹ Page 80, paragraph 2

³⁸² McMaster, page 137

³⁸³ Page 80, paragraph 4

³⁸⁴ Record page 59

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right to be treated fairly by Transnet".³⁸⁵ Wells denied that there was any violation of Gama's rights and misuse and abuse of the law to deny him his rights. Indeed, the present disciplinary enquiry is an opportunity for Gama to defend himself before an independent tribunal.

351 In a further letter of 15 December 2009 by attorney Langa to Bowman Gilfillan reference is made to "*Transnet's frustration and desperation to break the law at every available opportunity*."³⁸⁶ Wells did not know what was being referred to here but was not aware of any attempt to break the law and said that this was a preposterous allegation.

352 Wells testified that these allegations levelled against and Transnet and himself other Transnet executives were untrue and hurtful. He pointed out that these statements had to be seen in the context of (the undisputed evidence of) the tip-offs in relation to both the 50 like new and the security contract being the origins of the investigations. The process of initiating and conducting the investigations into Gama's conduct involved Ramos' decision to pursue the investigations and ultimately was placed before the board which decided to pursue the matter. The board then tasked Wells with that responsibility of executing the process. He did not initiate the charges.³⁸⁷ Later Wells passed the matter to Maharaj Group Executive HR to take the process further in the form of a disciplinary enquiry. According to Wells this entire process within Transnet was an open one and an attempt to get to the right result. There is no reason not to accept this evidence.

353 Wells testified that these statements had a profound effect on the relationship between Gama on the one hand and Transnet on the other. He said that there was a loss of trust in Gama who was trying to bring Transnet

³⁸⁵ Bundle F, page 81

³⁸⁶ Bundle F, page 88, paragraph 4

³⁸⁷ Page 105

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into disrepute, making false accusations against the board and making false allegations against Wells. Wells testified that Gama's statements had prompted the Chairman of the board to ask TIA to review the allegations which were found to be without substance. This showed a total breakdown in the relationship between Transnet and Gama, particularly following his suspension.

354 Wells said that it was highly unlikely that this relationship was retrievable given that many of these comments were made on public record and undermined the board and Transnet executives as well as the disciplinary process and TIA. Wells found it very difficult to see how the relationship between Transnet and Gama could be restored.³⁸⁸

355 Finally, Wells testified that when serious allegations of misconduct such as those in relation to the GNS security contract and the execution of the 50 like new contract were brought to the attention of a Divisional Chief Executive Officer Transnet would expect that executive to investigate and explore the solutions, and if there is evidence of wrong doing to take action. This Gama had failed to do both in relation to the GNS contract and the 50 like new contract.³⁸⁹ This contributed to the breakdown in the relationship according to Wells.

356 Gama pointed out that the 50 like new charge concerning the non-implementation of the board resolution related to conduct which had been identified 15 months previously in April 2008, so the obvious question was why was this charge raised at that late stage – with the Madhav and McMasters reports going to Ramos on 12 February 2009 and Gama being charged on 24 August 2009 and suspended on 1 September 2009. Gama's case is that if these statements reflect a normal and understandable

³⁸⁸ Page 63

³⁸⁹ Record page 65

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reaction on his part in circumstances. The circumstances were that he was one of the five short listed candidates for the Group CEO position and interviewed a few days before the board meeting of 13 February 2009. He had the expectation that he may get the position. He had significant support both inside and outside of Transnet. Gama contended it was understandable that he should be upset at his suspension when he knew that he had significant support and he also knew that in 2007 he had signed the 50 like new agreement which had difficulties, but that these had been sorted out. It was put to Wells that whether he was able to influence Gama's prospective candidacy or not, charges of this nature would not advance Gama's candidacy. Wells answered that although he was not part of the relevant board meeting, he had been advised that the chairman had said that the charges were not to be taken into account and were only dealt with after the decisions relating to the prospective CEO had been made.³⁹⁰ Wells denied that the difficulties relating to the 50 like new contract had been sorted out and pointed out that the contractual relationship with STS was still in the process of being sorted out. Gama maintained that it was normal for him to have asked: "Why are they charging me now when this happened 18 months ago?" and to infer that the charges and suspension bore some relationship to his application for the position of Group CEO.

357 In addition Gama referred to the fact that in March 2009 there were rumours that he was under investigation. He approached the then chairman of Transnet, Mr Phashwana who denied that he was under investigation.³⁹¹ Sometime after the investigators' 8 April interview and before 11 May 2009 when Gama met with Wells and was told that he was under investigation, Gama was then informed by Mr Dube, a businessman whom he knew, about the conversation which he said he had unexpectedly overheard at the Park Hyatt Hotel on 21 March 2009. The gist of the conversation which

³⁹⁰ Pages 106-107

³⁹¹ Gama, page 69

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Dube said he overheard was that four men – two of whom Dube knew and identified as Wells and Mr van Niekerk - had a discussion about the fact that if Gama intended to become the Group CEO they would do everything in their power to make sure that he did not.³⁹² Gama said that what he stated in the court application papers was because he was under pressure and angry at what was going on.

358 Gama said at the hearing that he was prepared to apologise to Wells and would have a discussion with Wells about the allegations he had made against him. He said that he could work with Wells in future.

359 Gama conceded that the accusations which he made against Wells were serious.³⁹³ He also accepted that he had never approached Wells to discuss the matter with him before accusing him in public of a serious conspiracy.³⁹⁴ His explanation was that he felt he was being persecuted.³⁹⁵ Gama accepted that he had acted unfairly towards Wells by making accusations in public against him without first giving him an opportunity to deal with them and accepted that with the benefit of hindsight and being able to reflect on the matter he would have done things differently.³⁹⁶

360 It was argued for Mr Gama that it is not necessary to decide whether or not to accept or reject the evidence of Mr Dube concerning the conversation which he overheard at the Park Hyatt. That is correct as the issue is really Gama's state of mind. Dube said one of the persons involved in the discussion which he overheard was an Indian man possibly by the name of Bret Maharaj.³⁹⁷ Mr Pradeep Maharaj, Group Executive Human Resources, was consequently called to testify about the incident which Dube overheard

³⁹² Gama, pages 71-73

³⁹³ Page 56

³⁹⁴ Page 55

³⁹⁵ Pages 56-7

³⁹⁶ Page 58

³⁹⁷ Dube page 30 and pages 24 to 25

as he was of Indian origin. Maharaj said that he did not participate in the selection process for the Group CEO and denied at any stage having a conversation in which the merits or demerits of the candidates for the position were discussed. He also denied ever having been to the Park Hyatt Hotel. Under cross-examination he did accept - hypothetically- that it was possible that the three executives of Transnet could have made that the hotel on 21 March 2009 which was a public holiday.³⁹⁸

361 It was not disputed by Gama that the various comments made in the court application and in the correspondence and elsewhere as set out above had never been made or should not be attributed to him.

362 In argument on behalf of Mr Gama was submitted that a relationship of trust was still possible there being no evidence that anyone would not be able to work again with Mr Gama and in the light of his preparedness to apologise to Wells. I was urged to view Gama's comments in the light of the circumstances which prevailed and the explanations given by him. It was contended that his suspicions that there was more to the charges than a simple disciplinary process were not unjustified and unreasonable.

363 For Transnet it was argued that Gama's conduct was unwarranted, destructive of the employment relationship and should be declared to be misconduct. The charge alleges that these statements are indicative of an irretrievable breakdown in trust relationship between Gama and Transnet³⁹⁹ and indeed both parties made submissions addressed to that aspect, which in my view is an aspect that goes to the question of sanction which is not presently the subject of consideration in these findings. The fourth charge however also refers⁴⁰⁰ to Gama's criticisms having resulted in a situation of incompatibility between him and Transnet and its leadership. This charge

³⁹⁸ Pages 90-92

³⁹⁹ In paragraph 4.3

⁴⁰⁰ In paragraph 4.62

also refers to Gama's statements having been calculated to cause harm to Transnet, and that they were not justified or reasonable for him to make in the circumstances.⁴⁰¹ The Transnet Disciplinary Code sets out examples of disciplinary transgressions for which disciplinary action may be taken. Included under "Primary Offences" are the following which are relevant: "*Gross insubordination or serious disrespect; When an employee, at any time, acts in a defiant or provocative manner towards a person of authority in the company; and Insulting behaviour.*" In these findings what must be considered is whether Gama's statements constitute misconduct as envisaged by any of these categories of primary offences.

364 It may be so that Gama thought he had reason to believe that Wells and other Transnet executives were conspiring against him to ensure that he did not succeed in becoming the new Group CEO. No such conspiracy has been proved. Gama was no doubt suspicious, but those suspicions have not proved to be justified and I do not think that they can be regarded as reasonable suspicions. A reasonable person in Gama's position would not in my view have been prepared to utter the criticisms which he did, some in public and others in correspondence, unless he had certain evidence in support of his claims which it appears Gama did not have.

365 The statements are critical of Wells in particular, but also infer a wider criticism of Transnet executives and arguably even of the Transnet board for having an ulterior motive and conspiring in preferring the charges against Gama. These are serious allegations and allege dishonest conduct. This constitutes serious disrespect and gross insubordination insofar as criticisms were made of Wells who was then the Acting Group CEO. Certain of the criticisms also constitute insulting behaviour and conduct which is defiant and provocative of persons in authority. TIA was criticised as was the previous Group CEO, the Chairman of Transnet and Transnet in

⁴⁰¹ In paragraphs 4.1 and 4.2

general. The fact that Gama is belatedly prepared to apologise to Wells and discuss the issues with him whilst perhaps going some way to resolving their personal differences, but does not constitute a reason why this conduct should not be regarded as being misconduct as defined in the Transnet Code. In my view Mr. Gama overstepped the mark with his trenchant criticism which impugned the honesty of Wells and other senior executives.

366 For these reasons I find that Gama is guilty of misconduct under this charge.

Transnet's delay in instituting the disciplinary proceedings

367 Clause 6.2 of the Transnet Disciplinary Code deals with the disciplinary process and provides that:

"6.2.1 A disciplinary hearing must be held as soon as possible after the commission of an alleged offence.

6.2.2 Transnet must endeavour to hold the disciplinary enquiry as soon as possible after it has finalised its investigation into the conduct of an employee. While Transnet will make every effort to ensure that discipline is implemented contemporaneously with the offence allegedly committed by the employee, it is recognised that certain investigations will take longer to complete and that it is not always possible to bring disciplinary proceedings contemporaneously."

368 For Transnet it was submitted that the present case falls within the category of cases for which provision is made in clause 6.2.2 which recognises that there may be inevitable delays in instituting disciplinary proceedings. It is worth emphasising that the starting point for determining whether there has been an unacceptable delay as envisaged in this clause is the date at which the investigation into the conduct of the employee is finalised.

369 Gama was charged with misconduct on 24 August 2009 having first been informed on 11 May 2009 by Wells that he was formally the subject of an

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investigation in relation to both the 50 like new contract and the GNS security contract.

370 In relation to the 50 like new contract the fact of Gama's having failed to comply with the board resolution was established in about March 2008 and certainly by 10 April 2008. On 10 April 2008 a meeting was arranged for the purpose of discussing the update on progress in the 50 like new contract implementation. The progress to be reported on at that meeting was an update on how many locomotives had been manufactured as the contract had been awarded almost a year earlier on 1 May 2007. The meeting was not a report on the progress of any investigation. It was attended by senior executives, including representatives of TRE. Mr Wells then Group CFO had by then ascertained that the board resolution had not been complied with so he attended that meeting, raised that point and said that Transnet had an obligation to rectify the contract to ensure that it was in line with the board resolution. All parties present, which included STS and EMD, then agreed that this would be done.⁴⁰² At that time the relevant Group executives knew of the facts underlying the complaint against Gama that he had failed to secure in the 50 like new contract the board's requirement that TRE perform all the local work. That was already an accepted fact in the investigation which did not require further investigation as to whether or not there had been non-implementation of the board resolution.⁴⁰³

371 It was conceded in argument for Transnet that there was a significant delay from that point in April 2008 until the time when the investigators concluded and recommended that charges be brought against Mr Gama in relation to this issue. The McMaster forensic report by TIA which recommended that action be taken against Gama as the signatory to the 50 like new contract was concluded and handed to Oates and also to Ramos the Group CEO on

⁴⁰² Oates page 57

⁴⁰³ Oates page 108

[Handwritten signature]

12 February 2009. That was some 10 or 11 months after it was known that Gama had concluded the contract without ensuring compliance with the board resolution.

The 50 like new investigation

372 The investigators explained the delay in investigating the 50 like new charge some detail. In summary, the evidence established in relation to the circumstances of this delay is as follows. It is not set out strictly in sequence as the various witnesses all had different input relevant to the delay issue.

373 Wells testified that the Transnet Chairman Mr. Phaswana came to him with the first tip-off document which related to the 50 like new locomotives which was received via the Minister of Public Enterprises on 5 February 2008.⁴⁰⁴ Ramos was away at time, Wells handed the document to the TIA team and asked them to investigate.

374 Oates testified⁴⁰⁵ that when TIA received the call case in relation to the locomotive tender he needed to identify and authenticate as quickly as possible the nature and ambit of the allegations. The first step was to determine who was alleged to be involved and in this process a detailed CIPRO search was conducted which identified a number of entities. Probably 20 companies were involved with some 100 directors all interlinking. This took some time to investigate and understand. Wells said that later during the course of the investigations he attended a meeting at which a detailed chart was shown depicting corporate structures, owners and registered shareholders and directors of various related companies in relation to the 50 like new and 212 locomotive procurement processes. At

⁴⁰⁴ Bundle D, pages 1 - 3.


⁴⁰⁵ Page 49

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one of those meetings Gama was present. Wells testified that this was an extraordinarily complex investigation and that the diagram depicting the various interrelated entities and individuals apparently involved was a real spider web. TIA had to wade through the various corporate records and there was a large amount of work to be done in this regard. This took a lot of investigation time to get to the bottom of what was occurring.

375 At the 10 April 2008 meeting already mentioned above all the parties to the 50 like new contract agreed to rectify the position. Oates' explained that initially the focus of the efforts of all concerned were to ensure that the situation was rectified so that the board resolution was fully complied with. During the meeting of 10 April 2008 STS raised the issue that it had incurred wasted costs in setting up its manufacturing facility and that those costs needed to be addressed. It was agreed that Transnet would look at those costs subject to their being reasonable and capable of audit. The TIA team was thereafter responsible to perform this audit function. This also engaged the team's resources.

376 Oates testified that TIA performs numerous investigations at any one time. The normal process adopted by the Ernst and Young team with TIA is that update reports are prepared throughout an investigation at various stages where appropriate rather than at specified regular intervals. That was similarly the process adopted by TIA in this instance. Rectifying the situation which arose out of the 50 like new contract involved shifting back to TRE the locomotive manufacturing facility that had been created outside of TRE. This entailed finalising an appropriate agreement between STS and TRE; identifying the wasted costs that had been incurred by STS and auditing those costs. The rectification also entailed entering into a termination agreement with STS which involved the Transnet legal team. Oates said that all this took place from about June 2008 until about October or November of 2008.



like new contract with Transnet's lawyers. He was then advised by the lawyers that the contract was very favourable to the service provider. On closer inspection of the contract Oates determined that STS was in a strong position pursuant to the contract which arrangement was in fact in conflict with the board resolution.

384 Initially, Oates had accepted the explanation given to him by the TIA team, namely that the terms of the 50 like new contract had made allowance for compliance with the board resolution. In other words, the fact that the board resolution had not been complied with did not mean that in terms of the contract that was actually entered into the resolution could not have been complied with. Oates conceded that from March 2008 until January 2009 the investigative team did not perform any work on determining whether the board resolution had been complied with because that had already been accepted at a very early stage in the process in March / April 2008.⁴⁰⁹ Oates and his entire investigative team were satisfied with the initial explanation which was given to them by in house legal advisers that the 50 like new agreement was concluded in terms which permitted compliance with the board resolution, although he qualified this by saying that the TIA team were not legal experts.⁴¹⁰

385 In January 2009, on the basis that rectification would never be achieved, Oates asked the investigation team to ascertain who had to be held responsible for the situation and tasked them to review the board resolutions in detail.

386 Oates explained that the investigation into the 212 locomotives did not end there as there were other aspects which required resolution. A deputation, which included Gama, was sent to the United States to explain to the

⁴⁰⁹ Oates page 115

⁴¹⁰ Oates page 116

original equipment manufacturer ("OEM") a company known as EMD what had occurred around the procurement process. This was very sensitive because no wrong doing on the part of EMD had been identified but another unrelated tender for 100 locomotives had gone out and Transnet had to defend an attempt to interdict the awarding of this contract which was linked to the 212 locomotives contract. According to Oates the TIA investigators were involved until about March or April 2009 in relation to the 212 locomotives contract and the court proceedings. Accordingly the TIA team was essentially fully occupied in the defence of the interdict proceedings from about mid-December 2008 through to mid-March 2009. In the period June to December 2009 there was a lull in the investigation process relating to the 212 locomotives as this was the period in which the senior executives and managers visited the USA to explain to EMD (as well as General Electric who was the other tendering party in the process) what had occurred. During this lull or "*interim period*" referred to by Oates the TIA team refocused their attention on investigating and correcting what had occurred in the 50 like new contract.

387 This investigation into the 50 like new contract culminated in the McMaster report of 12 February 2009. That report suggested that corrective action be taken against Gama as the signatory to the agreement and was based on legal advice which Oates had obtained.⁴¹¹

388 In relation to the 50 like new contract Wells accepted under cross-examination that Gama's failure to carry out the board resolution of 26 April 2007 was a breach which was known to him in April 2008. He also conceded that when the deputation including Ramos, Gama, Vallihu and Wells which went to the United States in July 2008 to meet with EMD, all knew that Gama had not complied with the board resolution. Asked why Gama had not been charged at that stage with failure to comply with the

⁴¹¹ Oates page 66

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board resolution Wells' answer was that a further detailed investigation was continuing into the locomotive assembly contract and that although they knew there was a problem with compliance they were not sure why it had happened and who was responsible, what explanations there were for the situation and what the full implications were thereof. Wells accepted that the implications became more serious in the minds of the investigators when it became clear what the agreement was with STS.⁴¹² Pressed as to what this further investigation would have entailed other than a comparison of the terms of the board resolution and the terms of the contract ultimately signed with the joint venture it became clear in cross-examination that further investigation was not really necessary in order to establish the fact of the breach. However the implications of the breach were what Wells kept referring to in his answers and those implications were not clear until very much later and did require further investigation.

389 Wells accepted that he knew as at April 2008 that the board's condition that TRE perform the work had not been complied with but he did not accept that the charge which Gama faced was limited to that aspect. Wells contended, correctly in my view, that the charge goes beyond that and relates also to the implementation of the board resolution. In this regard the charge specifically refers to the execution of the contract. It was then put to Wells that to the extent that it was possible to implement the board resolution that had occurred by July or August 2008. Wells disagreed with this saying that the transfer of the work back to TRE had occurred by then but that even as at the time of the disciplinary hearing the contractual arrangements had not been concluded and were not in place. He contended that the implications thereof could be very large or very small but were still unknown.⁴¹³

⁴¹² Page 79

⁴¹³ Page 88



390 It was put to Wells that it was unfair to Gama that he was charged in August 2009 for the failure to comply with the board resolution in the 50 like new contract when some 16 or 17 months earlier in April 2008 it was clear to all that the board resolution had not been complied with.⁴¹⁴ Wells accepted that the genesis of the charge had occurred in April 2008 but pointed out that the ramifications thereof and implications therefore continued and only became clear much later. Also, the difficulties pursuant to the 50 like new contract as initially implemented with STS have not been fully resolved.

The GNS security contract investigation

391 While the primary complaint over delay in getting to the disciplinary process stage related to the 50 like new investigation, it was never cleanly separated out from the investigation into the GNS security contract irregularities, and rightly so. In relation to the GNS contract the evidence established the circumstances of the investigation as follows.

392 The first indication of irregularities surrounding the GNS contract originated on around 9 or 10 October 2008 when Mr. Gary Peter Head of Internal Control for Transnet approached Oates and showed him an anonymous letter which had been received by Ramos the Group CEO. The letter was date stamped 18 September 2008 and contained *inter alia* allegations of irregularities regarding GNS. It mentioned the name Siyabonga Gama and suggested that he be interviewed.⁴¹⁵ The cover sheet to the letter bore a note from Wells asking Gary Peter to review the anonymous letter and discuss it with Oates. Wells' note was dated 9 October 2008.


393 Oates then marked-up on the anonymous letter seventeen points which required investigation in order to assess the authenticity of the claims made in the letter. The letter referred to Gama in only two places, first as the


⁴¹⁴ Record pages 109 -110

⁴¹⁵ Oates page 69; Bundle D1, pages 4 - 10

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person who had brought the company GNS to Gauteng (for one or other reason known to him). Second, the letter suggested that Gama as the Chief Executive of TFR be interviewed in relation to the complaints in the letter. Importantly, the letter did *not* allege that Gama had exceeded his authority including the GNS contract.

- 394 The anonymous letter also contained allegations concerning an alleged rape, not related in any way to Mr. Gama. Oates testified that these allegations were taken very seriously by the Group CEO Ms. Ramos. The rape allegation was ultimately not pursued only because the victim was not prepared to lay charges of sexual harassment. The rape allegation and the human resources irregularities initially took precedence in those investigations.
- 395 After he had performed the background check on the aspects which he had noted in the anonymous letter (and numbered 1-17 on the document) Oates' advice to Mr Peter was that he viewed the allegations as very serious and that they required full investigation. The background checks revealed that the allegations were fairly accurate and as a result further work was required to determine whether the claims of irregularities were unfounded or not.
- 396 On 1 December 2008 a complaint was referred to TIA which arose from Tip-Offs Anonymous which is an independent organisation contracted to Transnet to receive on a confidential basis any complaints in relation to Transnet. Many of these complaints are of a human resources nature and would not be dealt with by TIA. Complaints involving fraud or corruption or very sensitive matters were referred to TIA. This second tip-off dealt with the same issues as the first but in a slightly different fashion. Tip-offs would not necessarily be routed through a Transnet executive but in this instance Oates said that both Peter and Wells would have known about this complaint in the second anonymous tip-off.
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- 397 On 1 December 2008 Oates received an e-mail from Wells instructing him to investigate allegations which were set out in an e-mail addressed to Ramos of 19 November 2008 and which concerned the TFR security department. Oates contacted Mr. Nick Thomson the CFO at TFR and advised him of the issue and the need to investigate aspects regarding the security department. Thomson said that he should first speak to Gama which Oates then did.
- 398 Oates then met with Gama at a breakfast meeting on 10 December at Esselen Park. The meeting was also attended by Mr. Naicker, the Group Forensic Manager. In broad terms Oates informed Gama that there were three aspects to be investigated: the rape investigation, the investigation of irregular appointment and promotion of friends and the investigation into the GNS contract.
- 399 The lead investigator at TIA in relation to the security contract investigation was Mr. Madhav. He began his investigation into the GNS contract in early December 2008. The investigation process was that in order to investigate Gama's involvement in the GNS contract Madhav met with his investigating team members, including Lenny Da Silva and Subaz Chetty to decide how to proceed. The initial process of the investigation was to obtain background searches on the various companies and entities mentioned in the call reports to see whether they are interlinked and then to check whether from a process point of view, internal Transnet procedures had been correctly followed in terms of the DPP policy and any other policies. Madhav himself, together with Chetty determined whether the correct processes had been followed and approached and interviewed persons in the TFR security department. They first approached Mr. Khanye who was the Contracts and Admin Manager in the security department and therefore in possession of the relevant documentation. That was in early December 2008. Khanye provided the investigators with a file which contained the signed GNS contract, the GNS confinement motivation, the GNS
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confinement document which had served before HOAC as well as some e-mails. The GNS contract was the formal contract which Mr Fernhead had signed in June 2008. Mahav testified that the GNS confinement document would have been obtained from Khanye by the investigation around early December 2008 by one of the investigation team members.

400 Madhav pointed out that the GNS confinement motivation and GNS confinement request to the HOAC both contained references to an open tender that had been cancelled. The investigators therefore had to obtain those tender documents to investigate what tender process had been followed. Madhav pointed out that the matter was not straight forward given that without a review of the documents of the previous process it was not possible to say whether Gama had exceeded his delegation because there could in fact have been an open tender process.

401 As of 10 December 2008 the investigators were not aware of any allegations of misconduct against Gama. Madhav testified that as he was relatively new in the TIA he would not have known Gama's authority without examining the DPP and Delegation Framework documents but that in around December 2008 he would have ascertained that Gama had exceeded his authority on confinement. Madhav said that on 15 December 2008 he had discussions with Messrs. Singh and Petit⁴¹⁶ which confirmed what their investigation had already established, namely that Gama had apparently exceeded his authority in approving a confinement in excess of R10 million.⁴¹⁷ Certainly by the end of December 2008 therefore they had examined the contract with GNS and knew that it exceeded Gama's authority, knew that this was serious and that legal advice had to be obtained.⁴¹⁸ Madhav said that given that Gama was a very senior employee they had to be very sure of an allegation that he had breached

⁴¹⁶ Reflected in his report at paragraph 4; Bundle D1, page 54

⁴¹⁷ Madhav page 122

⁴¹⁸ Pages 126-7

his authority on confinement before recommending that any steps be taken against him.

- 402 In about January 2009 Oates had a face-to-face meeting with Ramos at which he expressed his concern about the signatories to the GNS contract.⁴¹⁹ (Oates testified that he gave no feedback to anybody on the board or at the level of the Audit Committee save that to the latter committee he mentioned that there was an investigation taking place around the locomotives contract and the security contract.)
- 403 Madhav concluded his investigation towards the end of January 2009 and thereafter it took a few weeks to settle some outstanding matters in relation to that investigation.⁴²⁰ His report on the GNS contract was handed to Oates who in turn handed it to Ramos on 12 February 2009.
- 404 The Group CEO Ramos was leaving Transnet at the end of February 2009. On 19 February 2009 Oates met in Cape Town with the Transnet Chairman Mr. Phaswana and Professor Geoff Everingham the Chairman of the Audit Committee and Mr. Joubert of the Risk Committee and Mr. Norman Hastings of the Remuneration Committee. Oates presented the TIA reports of McMaster and Madhav at this meeting and went through the key aspects of those reports. Shortly thereafter Oates was contacted and informed that the chairman and directors had decided to obtain a legal opinion from attorneys Edward Nathan and Sonnenbergs (ENS).
- 405 In March 2009 attorney Stewart Harrison of ENS who had been requested to provide an opinion on whether allegations of misconduct against Gama

⁴¹⁹ Oates pages 6-7

⁴²⁰ Page 85

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warranted disciplinary action met with the two lead investigators. Harrison provided an opinion dated 26 March 2009.⁴²¹

- 406 Oates thought that he may thereafter have again met with Phaswana to give him an update and he would have met with attorneys ENS after Phaswana briefed them for an opinion. Oates was not certain whether he had again met with Phaswana before attending a further meeting on 23 April 2009 when he reported back.
- 407 The 23 April 2009 meeting was called by the Chairman of the board Phaswana who called a meeting of the chairmen of all the sub-committees on the board together with attorney Stewart Harrison from ENS who had prepared the legal opinion. Oates testified that at that meeting a decision was made to pass both these investigations on to the Acting Group CEO, who at that stage was Mr. Wells.
- 408 In discussion with Maharaj, Oates and the Board's Legal Advisor Wells decided that it would be advisable to obtain for himself his own separate legal opinion before deciding how he would proceed. Wells then sought such an opinion from attorneys Bowman Gilfillan who were instructed in March 2009 attorneys to provide an opinion as to whether Gama had exceeded his delegation of authority. (The previous opinion requested of those same attorneys related to a different aspect namely the consequences of the absence of PSIRA registration).
- 409 The legal opinion from Bowman Gilfillan attorneys was provided in the form of a letter to Mr. Maharaj dated 29 May 2009 and was produced in evidence.⁴²² The legal advice was to the effect that the issues were serious, needed to be dealt with through an appropriate process which would give Gama an opportunity to respond to the specific issues.

⁴²¹ Oates, page 8

⁴²² Bundle D1, page 123

- 410 Oates met with Gama on 2 June 2009 and in the interim obviously Oates had various meeting with his investigative team.
- 411 Desirous of a resolution of a collegial nature Wells then put the various allegations in writing and by way of the letter of 18 June 2009 requested a written response from Mr. Gama to his concerns.
- 412 During July 2009 Oates was called to meet with Chairman Phaswana and Wells after a board meeting in order to report back on the investigations.
- 413 Madhav was the lead investigator on the GNS contract. He also testified about matters which are relevant to the issue of the delay in his investigation between the December 2008 and February 2009. The relevant parts of his evidence are as follows.
- 414 At the stage where the investigation commenced in December 2008 into the GNS contract had just come to end as the period of the contract was for 1 year from November 2007 to end of October 2008. The initial perusal of the tender file documents revealed several anomalies. The two main anomalies were (i) that the evaluation criteria utilised to evaluate the tender were not stipulated clearly, and (ii) that the price evaluation was misleading as it did not take into account the overall costs or the price that the bidders were actually proposing. This led to discussions with the Chief Procurement Officer and various other Supply Chain managers focusing on resolving those problems.
- 415 Madhav said that during the period December 2008 to February 2009 one of the biggest problems that they had with regard to the investigation was obtaining the documentation from TFR and from the Supply Chain Department and the Security Department. At times the investigative team had to physically go into the relevant offices of Supply Chain and Security to obtain the files with the required documentation.

416 Towards the beginning of the investigation in December 2008 and in January 2009 many people were on leave and it was difficult to contact them to extract either information or documentation and to obtain their explanations of what had transpired.⁴²³

417 In order to obtain a holistic view of what had occurred and place it in context it was necessary to consider documents which preceded the GNS confinement contract as well as those subsequent to the GNS contract. The investigation into the situation which preceded the GNS contract revealed that CPI was appointed during November 2005 to conduct certain specialised security services relating to the apprehension and prosecution of persons responsible for cable theft in the Gauteng region. The circumstances of the conclusion of CPI contract, its extensions and termination were also relevant and required investigation. . Madhav testified that it took a very long time to find the file which dealt with the open tender process that had preceded the GNS confinement (but been stopped). This required a physical search at the supply chain offices in order to find the documents.⁴²⁴

418 In addition Madhav said that both Senemala the Security Manager for TFR and Khanye the Manager Security for TFR were not entirely cooperative with the investigation and the investigators had repeatedly to go to their offices in order to obtain the information requested.⁴²⁵ Madhav also testified that after he submitted his report on the Security Department on 12 February 2009 to Mr. Oates he continued with his investigation up until the time of the present hearing.


⁴²³ Madhav page 69

⁴²⁴ Madhav page 68

⁴²⁵ Madhav page 60

- 419 On 8 April 2009 Madhav and McMaster interviewed Gama in relation to their respective investigations in order to clarify with him various aspects of their investigations.
- 420 On 9 April Oates sent an e-mail to Gama clarifying and answering a question raised by Gama in the interview held on the previous day by the investigators Madhav and McMaster regarding the two enquiries. That e-mail clarified the issue of who was mandating the investigators explaining that because the investigators had previously reported to Ramos who had since left Transnet, the Chairman of the Board Mr. Phaswana had instructed that the investigators report directly to the board and not to any members of the executive. That remained the situation until 23 April 2009 when the board referred the matter back to the then Acting Group CEO, Wells for finalisation as set out above.⁴²⁶
- 421 It was submitted for Transnet that in the case of the GNS security contract there was no material delay between the time of the receipt of the original tip-offs around 9 October 2008 and the stage when Gama was advised on 10 December 2008 of the investigation into the irregularities the GNS contract – which investigations were at that stage not directed at or focused on Gama. There was also no particular delay in obtaining the Madhav report which was given to the outgoing CEO on 12 February 2009. Having regard to the nature of the investigation into the GNS security contract and the evidence of the investigators as to the circumstances of the security contract investigation. I accept the correctness of these submissions.
- 422 On 12 February 2009 both the Madhav and the McMaster reports by TIA were handed to the Group CEO Ms Ramos. The events which followed after 12 February 2009 in instituting disciplinary steps were not specifically criticised in respect of the delays involved. Rather, the focus of Gama's

⁴²⁶ Bundle D122(b); Oates page 101



complaint about delay was that he was only charged in August 2009 in relation to the 50 like new contract when Transnet executives had been aware 16 or 17 months earlier of the fact of his having signed the contract without complying with the board resolution.

423 For completeness, the events which occurred after 12 February 2009 related to the instituting of disciplinary steps are summarised as follows:

423.1 The person who was responsible for deciding whether or not to implement disciplinary steps against Gama was the Group CEO Ms Ramos. She left Transnet at the end of February 2009 and in consequence handed the matter of both investigations over to the board at the February 2009 board meeting.

423.2 Thereafter the Chairman of the board (together with other board members) was briefed by Oates and the chairman sought independent legal advice. In the circumstances of the alleged misconduct involving a very senior employee, this was a reasonable and appropriate step to take.

423.3 The legal advice obtained indicated that the issues were serious and warranted further investigation and possibly disciplinary action. The board accepted this advice and handed the matter back to the executive on 23 April 2009 by which time Mr Wells was the Acting CEO.

423.4 Wells in consultation with Maharaj and other executives decided to seek his own independent legal advice as to whether to proceed with disciplinary action against Gama.

423.5 On the 11 May Wells met with Gama, told him that he was the subject of a formal investigation and sought his co-operation. Wells offered a collegial approach to discussing and resolving the issue.


Pursuant thereto Wells set out his concerns in detail in writing and these were sent to Gama on 18 June 2009. Gama was invited to respond thereto. Gama requested additional time to answer and ultimately furnished his written response on 20 July 2009.

423.6 After considering Gama's written response a decision was then taken during August 2009 to charge Gama with misconduct.


423.7 Formal charges were drawn up and handed to Gama on 24 August 2009.

424 Undoubtedly Transnet dealt with the complaints against Gama cautiously. It is clear that both the board and later Wells, once he became seized of the matter, were at pains not to act precipitously or unnecessarily and to institute formal disciplinary proceedings if they could be avoided. Before proceeding two external legal opinions were obtained. The investigators interviewed Gama in April 2009 to clarify aspects with him. Thereafter, and before he was charged, Gama was afforded the opportunity to furnish written submissions in response to the detailed written concerns raised by the Acting CEO, Wells. It is submitted that Gama's senior position and standing as an executive of Transnet have in fact tended to shield him from what might otherwise have been far more swiftly taken disciplinary steps. This appears to be correct.

425 There is little doubt that this was an unusually complicated investigation. In relation to the 50 like new contract the investigators were significantly sidetracked by having to deal with the more immediate problem of whether the R6.5 billion 212 locomotive contract which was about to be signed was subject to similar irregularities. Understandably, that investigation took precedence. Thereafter, the TIA team was significantly engaged in dealing with the interdict proceedings. However, it is clear that the main reason why steps were not immediately taken was because the view of both the in-



house legal advisors and the TIA investigators was that the contractual arrangement could be regarded as having complied with the board's condition that TRE perform the local work and that it was only the *implementation* of the contract (i.e. with STS performing the work) which had failed to comply. Under those circumstances the focus was not on the fact of Gama's failure to comply with the resolution but was rather on seeking to rectify the situation. Only once it became clear that STS intended to sue for damages and refused to co-operate in rectifying the situation did the investigators again focus on determining who was accountable for the consequences of the failure to comply with the board resolution. These events account in large measure for the delay in reaching the point where Gama was charged with misconduct in relation to the 50 like the contract.

- 426 In addition, the fact that the GNS contract investigation was underway and that from December 2008 Gama was potentially also implicated in irregularities in relation to that contract is also relevant. It would have made no sense from about January 2009 onwards to charge Gama separately in relation to the 50 like new charge and then have to again charge him in relation to the GNS contract if it transpired that disciplinary action was called for in relation to that charge as well.
- 427 This is not a case in which there is no explanation for the delays which have occurred. On the contrary, Transnet's investigators and executives have offered a full explanation and exposition of the events which occurred. There is nothing inherently wrong with the approach adopted by Transnet to these investigations. Certainly, it may have been preferable to pursue the issue of Gama's failure to comply with the board resolution at an earlier stage. However, it is clear that the full implications of Gama's failure to ensure that the 50 like new contract resulted in TRE performing the local work were not realised until a very much later stage. In this regard, it is relevant to consider that clause 6.2.2 of the Transnet Disciplinary Code envisages that an enquiry will be held as soon as possible after the
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investigation is finalised. Although there is no dispute that in March and certainly by April 2008 the relevant Transnet executives were aware that Gama had failed to comply with the board resolution, that was not all that was considered relevant and necessary to investigate before pursuing what would obviously be disciplinary proceedings which would be potentially very disruptive to the organisation. The investigation continued with the preparation of the McMaster report, the obtaining of external legal opinions, an interview with Gama in April 2009 and an opportunity for Gama to present his side of the story in his written response to Wells' concerns. It could be argued that the investigation was only sufficiently complete for the final decision to be made as to whether or not disciplinary proceedings should be instituted after Wells had had the opportunity to consider Gama's written responses made on 20 July 2009. Gama was formally charged about one month later. There is indeed something to be said for the submission that Transnet was perhaps "over cautious" in its approach to perusing discipline against Mr Gama.

428 From 1 September 2009 Gama was suspended. I presume that such suspension was on full pay as there was nothing to suggest the contrary. A persuasive factor in the present circumstances is that there is nothing in the delay which has caused any material prejudice to Mr Gama or which can be properly described as either unexplained or so grossly unfair that it may be taken to preclude the employer from taking disciplinary steps. Gama's suggestion that the disciplinary proceedings were part of an orchestrated campaign to prevent his becoming the new Group CEO has not been established on the evidence. It can therefore not be said that he was prejudiced as regards his application for that post as a consequence of the delay in the disciplinary proceedings. Certainly, the fact that Gama applied for the post of CEO can never be a reason why disciplinary proceedings should not have been preferred against him where there was sufficient evidence for the executives responsible to reasonably decide that




disciplinary action was required and that Gama needed to explain fully in a disciplinary enquiry what had occurred in relation to both the 50 like new contract and the GNS contract. Neither is there any evidence of conduct by Transnet that could be characterised as a waiver on its part such that it would be precluded from calling Gama to account for his conduct.

429 In consequence, I find that the delays such as they are do not constitute grounds for why Transnet should not proceed with this disciplinary enquiry against Gama.

The alleged inconsistency Issue

430 On the issue of inconsistency in relation to discipline Oates was cross-examined in relation to a tender process audit report into procurement dated 7 October 2008 which was sent to the General Manager: Group Strategic Supply Management (Exhibit G). Whilst that report contained various recordals of confinement contracts concluded beyond the level of authorisation and reported on instances of contracts having been concluded and money spent without formal contract documentation in place, Oates pointed out that this report had to be distinguished from a fraud investigation because it was simply an internal audit report which was a report to management on its controls. This was entirely different from a forensic investigation which is the other type of work which TIA performs for Transnet. In a forensic investigation one receives an allegation and pursues a process of establishing the authenticity of the allegation made. The tender audit report which was referred to was a tool to address management controls and as such the fact that an overall report classification of "unsatisfactory" was given based on a number of instances identified in the report meant no more than that the audit revealed that corrective action should be taken by management. Such corrective action is a management function and not the function of TIA.. The report was



essentially aimed at identifying risks in the procurement system which management should seek to address.

- 431 Mr Singh who was the General Manager Compliance for Transnet in 2007 and 2008 and later held the post of Key Financial Officer was then called to testify on the issue of compliance. He received the October 2008 audit report into procurement (Exhibit G) a few days before he testified in the hearing. He explained what the report entailed. He accepted that it identified nineteen instances of what are termed "Level 1 Observations" which are observations by the auditors of circumstances which *"could cause material financial, regulatory or reputational risk at Group level. Deviations from the Group's approved Code of Ethics. Deviations from the Group's approved policies e.g. DPP. " or "Multiple individual control failures which result in multiple control objectives/risks not being appropriately mitigated."*⁴²⁷ He was however not in a position to provide information regarding the underlying circumstances leading to each of these Level 1 Observations. There was accordingly no evidence led of the circumstances of the various underlying instances which the auditors identified in this report where managers had exceeded their delegated authority or breached Transnet's policies or Code of Ethics in other ways.
- 432 There is accordingly no evidence of another set of similar, never mind identical, circumstances in which Transnet made different decisions or adopted a different approach to disciplining its employees from the approach adopted in Gama's case. The only evidence is that of the auditor's categorisation in a compliance report by TIA, but the underlying facts of the instances which gave rise to that report were not canvassed in evidence before the enquiry.

⁴²⁷ Bundle G, typed page 43; Singh: record page 50

433 There was unchallenged evidence that in each case conducted by Transnet a discretion was exercised in relation to the particular circumstances and Gama does not identify any case where someone who did what he is alleged to have done was treated differently and not charged. Gama has failed to lay a credible basis for the claim of inconsistency and accordingly there is no question of Transnet having failed to discharge the onus to disprove the allegation of inconsistency.⁴²⁸

434 I find that there is no merit in the argument of inconsistency.

Conclusions and Summary of Findings

435 I understand that these findings are in the nature of a recommendation to Transnet. In summary, and for the reasons fully set out above, I find Gama guilty of misconduct on charges 1, 2 and 4.

436 These findings have dealt only with the merits of the misconduct charges. The issue of what sanction ought to be imposed in consequence of the findings of misconduct which have now been made is to be considered under the Transnet Disciplinary Code and Procedure⁴²⁹ in a separate proceeding as was the arrangement which was made with the parties at the close of the previous hearing.

D.M. Antrobus SC
Disciplinary Enquiry Chairman
Sandton Chambers
4 June 2010

⁴²⁸ Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC)
Parmalat SA (Pty) Ltd v CCMA and others [2009] 6 BLLR 558 (LC)

⁴²⁹ Clause 6.3.1

ANNEXURE "K"



MINISTRY: PUBLIC ENTERPRISES

REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, Pretoria, 0028

CABINET MEMORANDUM NO : 9 of 2010
 DATE : 27 October 2010
 FILE NUMBER : 2/2/1

1 SUBJECT

The appointment of Non-Executive Directors to the Transnet Board.

2 PURPOSE

- 2.1 For Cabinet to concur with the nominations of Non-Executive Directors to the Transnet Board of Directors; and
 2.2 Further concur with the nomination of Dr. Mandla Gantsho as Chairperson and Non-Executive Director of the Transnet Board of Directors.

3 SUMMARY

- 3.1 Transnet's Articles of Association provide for a minimum of ten (10) Directors and a maximum of eighteen (18) Directors. The current Transnet Board consists of eleven (11) Board Members of which nine (9) are Non-Executive Directors and two (2) are Executive Directors namely Mr Christopher Wells (Acting Chief Executive Officer) and Mr Anoj Singh (Acting Chief Financial Officer), who are *ex officio* members of the Board.
- 3.2 It is recommended that twelve (12) nominees be considered for appointment to the Transnet Board as Non-Executive Directors. The Department further

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recommends the appointment of Dr Mandla Gantsho as the Chairperson of the new Transnet Board of Directors.

- 3.3 With these new appointments, the Transnet Board will consist of fifteen (15) Non-Executive Directors and two (2) Executive Directors; a total of seventeen (17) Directors. One (1) vacancy will remain on the Board which will be filled at a later stage.

4 STRATEGIC FOCUS OF THE MEMORANDUM

The Transnet Board is a critical State Owned Enterprise Board and thus requires a complement of members with the requisite skills, experience, expertise and representation, especially in light of the extensive capital expansion programme currently underway.

5 DISCUSSION

- 5.1 Transnet's current Articles of Association provide for a minimum of ten (10) Directors and a maximum of eighteen (18) Directors on its Board of Directors.
- 5.2 The current Transnet Board (attached as Annexure A) consists of eleven (11) Board Members including two (2) Executive Directors namely Mr Christopher Wells (Acting Chief Executive Officer) and Mr Anoj Singh (Acting Chief Financial Officer), who are *ex officio* members.
- 5.3 From the current Transnet Board, the Department intends to retain three (3) Non-Executive Directors namely Mr MJ Hankinson, Ms NA Matyurnza and Ms NBP Gcaba for purposes of continuation and knowledge of the business.
- 5.4 In view of the current vacancies, the Department noted the skills gap on the Transnet Board. To address this gap, the Department recommends that the Board must be strengthened in a number of areas including but not limited to: financial, economics, logistics, legal, business, rail sector expertise, project management, human resources, public policy and ports specialist.
- 5.5 In this regard the candidates below have been identified as having the appropriate skills and experience in the areas mentioned above and are

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proposed to be appointed as new Non-Executive Directors to the Transnet Board. Their comprehensive CV's are attached as Annexure B.

NAME	CURRENT POSITION	EXPERTISE
1. Dr. Manda Gantsho	Chief Executive Officer – Nova Capital Africa	Financial / Business
2. Mr Joel Netshitenzhe	Member: National Planning Commission (NPC)	Policy
3. Mr Peter Malungani	Executive Chairman – PEU Group	Financial / Business
4. Mr Israel Skosana	Executive Director and Chairman – Kapela Investments	Financial
5. Ms Nazmeera Moola	Macro Strategist & Sales for Macquarie Bank	Economics
6. Mr Michele "Mike" Fannuchi	Consultant – VALS	Logistics
7. Ms Doris Tshepe	Managing Director and practising attorney – Cheadle Thompson & Haysom Inc.	Legal
8. Ms Wrenelle Stander	Managing Director – Sasol Gas	Business
9. Ms Nombulelo "Pinky" Moholi	Managing Director - Telkom SA Business	Business
10. Mr Vijay Raman *1 (See end of table)	Director – Chakra Infrastructure Consultants	Rail Specialist
11. Mr Ben Magara *2 (See end of table)	Anglo Platinum -Executive Director for projects and engineering	Project Management
12. Mr Harry Gazendam	Senior Executive Advisor – Toyota Motor Corporation Japan and Toyota South Africa	Human Resources

Not named by role but that might be a conflict of interest

*1 Indian National

*2 Zimbabwean National with SA citizenship

5.6 The profiles of the proposed candidates address the skills gap that currently exists on the Board. These appointments will strengthen the Board's capacity in fulfilling Transnet's mandate and implementing the company's business strategy.

5.7 The appointment of the new Non-Executive Directors will be for a three (3) year term, subject to annual review by the Minister of Public Enterprises.

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- 5.8 With these appointments, the new Transnet Board (attached as Annexure C) will consist of seventeen (17) Directors comprising of fifteen (15) Non-Executive Directors and two (2) Executive Directors. There will be one (1) vacancy on the Board which will be filled at a future date.
- 5.9 Excluding the international candidates (rail specialist and project management candidate) the Board composition will consist of 53% African, 27% White, 13% Indian and 7% Coloured with 65% being male and 35% being female.
- 5.10 With respect to the one (1) vacancy that will remain on the Board, it should be noted that the Department is currently in the process of identifying a suitable candidate to fill this position which has been earmarked for a ports specialist.
- 6 IMPLEMENTATION PLAN**
- Following Cabinet concurrence, the Minister of Public Enterprises will appoint the new Non-Executive Directors to the Transnet Board for a term of three (3) years, subject to annual confirmation.
- 7 ORGANISATIONAL AND PERSONNEL IMPLICATIONS**
- None
- 8 FINANCIAL IMPLICATIONS**
- None. The financial obligation with respect to the new appointments will be to the cost of Transnet.
- 9 COMMUNICATION IMPLICATIONS**
- The Minister of Public Enterprises will communicate the appointment of the new Non-Executive Directors to the existing Transnet Board, the new nominees and other relevant stakeholders, after obtaining Cabinet approval.
- 10 CONSTITUTIONAL IMPLICATIONS**
- None

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11 IMPLICATIONS FOR VULNERABLE GROUPS

None

12 SECURITY IMPLICATIONS

None

13 DEPARTMENTS AND PARTIES CONSULTED, RESPONSES AND COMMENTS

13.1 Department of Public Enterprises

13.2 The memorandum was not finalised in consultation with the Director Generals' Cluster.

14 RECOMMENDATIONS

It is recommended that Cabinet –

14.1 Concurs with the appointment of Dr. Mandla Gantsho as a Non-Executive Director and Chairperson of the new Transnet Board for a term of three (3) years, subject to annual confirmation by the Minister of Public Enterprises. This appointment will be effective from 15 November 2010.

14.2 Further concurs with the appointment of Mr Joel Netshitenzhe, Mr Peter Malungani, Mr Israel Skosana, Ms Nazmeera Mooia, Mr Michele Fannuchi, Ms Doris Tshepe, Ms Wrenelle Stander, Ms Nombulelo Moholi, Mr Vijay Raman, Mr Ben Magara and Mr Harry Gazendam as Non-Executive Directors to the Transnet Board for a term of three (3) years, subject to annual confirmation by the Minister of Public Enterprises. This appointment is effective from 15 November 2010.

14.3 Notes that Mr MJ Hankinson, Ms NA Matyumza and Ms NBP Gcaba will be retained from the current board for purposes of continuation and knowledge of the business. They will be retained for a term of three (3) years subject to annual confirmation by the Minister of Public Enterprises.

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15 OFFICIAL RESPONSIBLE FOR THE MEMORANDUM

I declare that the memorandum adheres to the guidelines provided by the Cabinet for drafting of memoranda.

Name: Ms Raisibe Lepule

Designation: Acting Deputy Director General

Telephone: 011 431 1099

Cellular: 082 885 7109

16 HEAD OF DEPARTMENT

Name: Dr. Andrew Shaw

Designation: Acting Director General

Telephones: 011 431 1075

Cellular: 082 941 8257

17 AUTHORISATION FOR PROCESSING THE MEMORANDUM

**BARBARA HOGAN, MP
MINISTER**

27 October 2010

Is there a need for an electronic presentation to be done in addition to the memorandum? No

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ANNEXURE "L"



MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: 012 431 1118 Fax: 012 431 1039
Private Bag X9073, Cape Town, 8000 Tel: 021 461 6379/7 Fax: 021 465 2381/461 1741

Hon. J G Zuma
The President of the Republic of South Africa
Private Bag X 1000
PRETORIA
0001

Dear President Zuma,

Re: Transnet Chairperson

1. Thank you for speaking to me telephonically last night about this matter.
2. For over a year now, Transnet's Board has been operating with an Acting Chair. At its AGM this year on 24 July 2010, the terms of Board members and the Acting Chair had to be extended until such time that a new Board is appointed. In my view, any extension of longer than two months would not be ideal as in these circumstances it would open the company and government to further reputational risk.
3. As discussed with you previously, Transnet's work has far-reaching consequences for the South African economy. Transnet has to focus on its build programme within the context of a constrained balance sheet, leveraging private sector investment capacity, attracting freight from road to rail and improving efficiency. The success of the implementation of Transnet's five year expenditure of ZAR84 billion clearly requires a strong Board.

BJ

4. Given the importance of Transnet to the SA economy, and the need for stable leadership at the Board level, it is absolutely necessary to proceed with the appointment of a Chairperson and other Board members with the requisite skills. To this end, my department has prepared a Cabinet Memorandum for discussion at Cabinet but which it has not yet submitted. This is because we agreed that we would discuss the matter first so that I can ascertain your final views on the composition of the Board and in particular the Chairperson.
5. To confirm, in respect of the position of the Chairperson, I raised the following potential candidates: Mr Manda Gantsho and Mr John Copelyn. Both of their CV's are attached for your ease of reference.
6. I kindly request an appointment at your earlier convenience to discuss this matter further with the Deputy Minister and myself in order that we are able to discuss your views on the preferred candidate for Chairperson and thereby expeditiously deal with this matter in the interests of Transnet, government and the country.

I look forward to hearing from your offices shortly.

Sincerely,



MS B HOGAN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 8 September 2010



ANNEXURE 'M'



Eskom Board

Chief Executive Strategy Document
Board Breakaway

Date:
29 October 2009

Enquiries:

Dear Board Members

I have reflected on this matter overnight. I believe this is a matter of national importance.

This matter is about the role of the SOE's in this phase of the democracy. It is about the future of this country. It is not about the relationship between the Chairman and the Chief Executive.

My remarks of frustration in the Board meeting can in no way be construed to be an offer to resign. The Chairman has expressed similar frustrations numerous times and has not been treated in this manner.

I was stunned by the response of the Board to say they accept my offer and wish to communicate with immediate effect.

The real issues are the following:

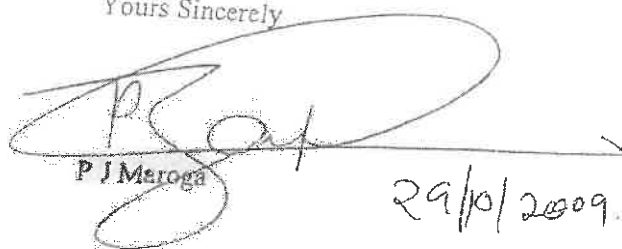
1. I have put before the Board a very comprehensive Strategy Document about the direction I propose Eskom should take.
2. The Strategy articulates very key matters of national importance relating to our contribution to this developing democracy.
3. I am of the firm view that the Board must engage on the matters articulated in this Strategy Document as this is most important duty of the Board
4. The real issues between the Chairman and myself are rooted in differences on the role of Eskom in this phase of our democracy and role clarity between the Chairman and the Chief Executive.
5. I believe as a Board we will be failing the country if we do not show leadership on this matter.

Conclusion

I have not offered to resign and I am not offering to resign.

I believe the role of Eskom is key to the development of our country during this phase of the democracy. It is a view I believe strongly in and a view I am willing to fight for whatever the consequences.

Yours Sincerely



P J Maroga

29/10/2009.

cc Minister Barbara Hogan
Minister Dipuo Peters



ANNEXURE "N"



Minister Barbara Hogan
The Eskom Board

Date:
9 November 2009

Enquiries:

Dear Minister,

I wish to affirm the following with regard to my status as Chief Executive and Director of Eskom:

1. I remain the Chief Executive and Director of Eskom.
2. The shareholder, at the highest level, have confirmed that, any action regarding my status as Chief Executive and Director of Eskom, must be requested formally and granted by the shareholder. I have affirmed that no request has been formally lodged and none has been granted.
3. I have been told that all unauthorized actions taken by the Board of Directors since the 28 October 2009 are rescinded.
4. I am at work in my office in Megawatt Park.
5. Everyone should cease and desist from any action or communication that undermines the confidence in Eskom and demoralises the employees during this critical time.
6. As a Director, I will fully participate in all Board activities.

In the interest of Eskom and the country, I am continuing the leadership process that is transparent and collaborative; as well as moving forward with the Vision I have outlined and the changes I intend to make to build the Eskom required for this critical economic developmental stage of our democracy.

Yours sincerely,


P.J. Maroga
Chief Executive: Eskom

Cc

Board
EXCO
Managing Directors
Minister, Department of Energy
Portfolio Committee Chair, DPE
Portfolio Committee Chair, DOE

Head Office
Megawatt Park, Maxwell Drive, Sunninghill, Sandton, PO Box 1091, Johannesburg 2000 SA
Tel +27 11 900 3161 Fax +27 11 900 5803 www.eskom.co.za

Directors: R.M. Gertzel (Chairman), P.J. Maroga (Chief Executive), L.C. Cole, S.D. Dube, L.G. Josephson (Swedish)
P.J. Lee (Portuguese), W.G. Lurie (Zulu), P.M. Mabasa (Xhosa), J. Mkhondo (Tswana), P.D. Mofokeng (Afrikaans), A.J. Morgan
U.M. Nkomo (Shona), S. Nkomo (Zulu)
Eskom Holdings Limited Reg No 2002/013527/03





MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: 012 431 1118 Fax: 012 431 1039
Private Bag X9079, Cape Town, 8000 Tel: 021 461 6378/7 Fax: 021 465 2381/461-1741

Hon. J G Zuma
The President of the Republic of South Africa
Private Bag X 1000
PRETORIA
0001

Dear *President Zuma,*

Re: Safcol Chairperson

Thank you for taking the time to speak to me about this matter last night. As discussed with you, in order for us to have a more meaningful opportunity to discuss this position before taking it to Cabinet, early yesterday, I withdrew the item from the agenda of today's ESEID Committee meeting.

However, given the urgency of the matter as a result of:

- the AGM for SAFCOL being scheduled for 28 September 2010
- new appointments to the Board that have to be made
- Parliamentary and other legislative reporting requirements

I trust then that you will revert to me with your views on the proposed candidate for Chairperson quite soon and before the next cabinet meeting.

Kindly note that I have written to your office for permission to submit the memo to the next cabinet meeting

I am available to meet with you at any time once you have had an opportunity to peruse the said CV.

BJA

I trust that this is in order and look forward to hearing from your offices shortly.

Sincerely,



MS B HOGAN, MP

MINISTER OF PUBLIC ENTERPRISES

DATE: 8 September 2010



Carolus Cheryl (3/17):

ANNEXURE "P"

Hi, had good mtg with Andrew to conclude outstanding KPMG matter we discussed. Have asked him to discuss final with you so we can conclude before 31Mar. Cheryl

Me (6/2):

Cheryl, I am in India w President now. Is there any truth to rumour that SAA is going to terminate its route to Mumbai? This is a rumour here, and we need clarity.

Carolus Cheryl (6/2):

No. We will not be terminating Mumbai. It must be Jet Airways still lobbying for this. We remain on the route with 4 frequencies. All best for India

Me (6/2):

thnks

Carolus Cheryl (6/5):

Ms B, hope u recovering frm trip. I need to talk re KPMG procedures, processes and timings. Sun a.m or eve best for me. Have lunch guests. Rgds, cheryl

Carolus Cheryl (7/16):

We sent letter late afternoon outlining steps to

[Handwritten signature]

ANNEXURE "Q"



SMS / MMS



13:01

Carolus Cheryl (8/30):

Hi B, FYI SAA is at SCOPA tomorrow. Also note CEO/ Chairman from Jet Airways (India) will be in SA for India SA mtg. He's lobbying hard for SAA to end Mumbai flite. We reject this. Pls let me know if he is trying to meet you so we can brief. I apologised for mtg. Said he should talk to Siza. rgds cheryl

Me (8/30):

Good luck w Scopa. No he has not tried to meet with me

Me (9/30):

Hi, apparently Fani has said on 702 that SAA is pursuing a jv with Ethiopian Airlines?

Carolus Cheryl (10/1):

Hi, Ethiopian now joined Star Alliance. So new co-op options for us. Confusing media interpretations about possibilities. Apparently dpe comms was briefed

Me (10/1):

thks

Me (10/19):

ANNEXURE "R"

Me (6/6):

thinks

Me (6/6):

Gama guilty on 3 out of 4 counts. Report handed in Friday, 200 pages

2Fatima Hassan (6/6):

What is the 4th?

Me (6/6):

Signing off on contract without Board authority

2Fatima Hassan (6/7):

Rumours

Dm becomes min

U dm for health

vm the dm for dpe

or

Dm stays dm

Fikile becomes min

2Fatima Hassan (6/8):

They wanna know if u can sign petition? What did sue recommend? Or will you be the lone minister again....?

2Fatima Hassan (6/8):

Apparently we are being asked to contribute

Cherise Walker

From: Barbara Hogan <hogan.private@gmail.com>
Sent: 08 October 2018 17:58
To: Rethabile Makhetha
Cc: Peter Harris
Subject: Fwd: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan

Begin forwarded message:

From: Shaheda Seedat <shaheda@kathradafoundation.org>
Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
Date: 14 June 2017 at 10:08:14 AM SAST
To: hogan.private@gmail.com
Cc: Neeshan Balton <neeshanb@gmail.com>

----- Forwarded message -----

From: Zohra Areington <zohra.areington@gmail.com>
Date: 11 July 2011 at 12:08
Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
To: bahogan <bahogan@mweb.co.za>, Neeshan Balton <neeshanb@gmail.com>, shaheda seedat-
 <shadesseedat@gmail.com>

----- Forwarded message -----

From: Odhav, H : New Delhi First secretary <OdhavH@dirco.gov.za>
Date: Mon, Jul 11, 2011 at 11:27 AM
Subject: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
To: Zohra Areington <zohra.areington@gmail.com>
Cc: amkathrada@mweb.co.za.

Dear Zohra,

Attached the e-tickets for Mr Kathrada and Ms Hogan. Finally.

With Best Regards

Hema Odhav | South African High Commission : New Delhi

Office Tel: 91 11 2614 9411 - 20 | Fax: 91 11 2614 3605 | Email: odhvh@foreign.gov.za

Please consider the environment before printing this e-mail.

----- Forwarded message -----

From: "nafisa" <Jnb12@flywell.co.za>

To: "Ashu" <ashu@sahara.co.za>

Date: Mon, 11 Jul 2011 14:42:20 +0530

Subject: Re E ticket KATHRADA/AHMEDMR



171, 7th Avenue, Mayfair, Johannesburg
P.O Box 1456, Johannesburg, 2000
Tel: +27 11 830 1500
Fax: +27 86 680 9286

Afterhours Nos: +27 82 571 6501

+27 82 562 2700

+27 82 227 3072

Website: www.flywell.co.za

Electronic Ticket Receipt and Itinerary

Passenger:	KATHRADA/AHMEDMR	Agency Reference:	T5GQC8
------------	------------------	-------------------	--------

This receipt will be required at check-in, and must be presented to customs and immigration if requested.

Your identity document / passport is required for all passengers on all flights both domestic and international.

Electronic Ticket Details										
Airline Reference					ECCHMB					
Electronic Ticket Number					5895188928402					
Issuing Airline					Jet Airways India					
Date of Issue					Monday, 11 July 2011					
Passenger Name					KATHRADA/AHMEDMR					
Frequent Flyer Number										
Travel Agency and IATA Number					XL FLYWELL TRAVEL		77233531			
Coupon	Carrier	Flight	Date	Class	From	To	Departs	Fare Basis	Status	Bag
1	9W	241	Fri, 15 Jul	P	JNB(A)	BOM(2)	11:00	P4RTSAHA	OK	40K
2	9W	2237	Sat, 16 Jul	I	BOM(1)	DEL(3)	02:25	P4RTSAHA	OK	40K
3	9W	2067	Tue, 19 Jul	I	DEL(3)	BOM(1)	22:05	P4RTSAHA	OK	40K
4	9W	242	Wed, 20 Jul	P	BOM(2)	JNB(A)	02:05	P4RTSAHA	OK	40K

Flight Details										
Flight	Date	Class	From	To	Departs	Arrives	Status	Seat	Meals	Bag
9W241	Friday, 15 Jul 11	P	O R Tambo International Arpt, Johannesburg, Terminal A	Chhatrapati Shivaji, Mumbai, Terminal 2	11:00	23:35	Confirmed	005A		40K
9W2237	Saturday, 16 Jul 11	I	Chhatrapati Shivaji, Mumbai, Terminal 1	Delhi Indira Gandhi Intl, Delhi, Terminal 3	02:25	04:25	Confirmed	001A		40K
9W2067	Tuesday, 19 Jul 11	I	Delhi Indira Gandhi Intl, Delhi, Terminal 3	Chhatrapati Shivaji, Mumbai, Terminal 1	22:05	00:05#	Confirmed	001A		40K
9W242	Wednesday, 20 Jul 11	P	Chhatrapati Shivaji, Mumbai, Terminal 2	O R Tambo International Arpt, Johannesburg, Terminal A	02:05	07:40	Confirmed	007G		40K

Denotes Next Day Arrival

Flight 9W2237 - Operated By Jet Airways Connect

Flight 9W2067 - Operated By Jet Airways Connect

General Remarks

**** THANK YOU FOR BOOKING AT XL FLYWELL TRAVEL ****

Important Notice For Travellers With Electronic Tickets:

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby Incorporated by reference.

These conditions may be obtained from the issuing carrier.

Agent Details:

Nafisa Wadiwala

Travel Consultant

Tel: +27 11 830 1500

Fax: +27 86 680 9286

Email: jnb12@flywell.co.za

All transactions processed are subject to our Standard Terms and Conditions.

----- Forwarded message -----

From: "nafisa" <Jnb12@flywell.co.za>
 To: "Ashu" <ashu@sahara.co.za>
 Date: Mon, 11 Jul 2011 14:42:42 +0530
 Subject: Re E Ticket HOGAN/BARBARAANNEMS



171, 7th Avenue, Mayfair, Johannesburg
 P.O Box 1456, Johannesburg, 2000
 Tel: +27 11 830 1500
 Fax: +27 86 680 9286

Afterhours Nos: +27 82 571 6501

+27 82 562 2700

+27 82 227 3072

Website: www.flywell.co.za

Electronic Ticket Receipt and Itinerary			
Passenger:	HOGAN/BARBARAANNEMS	Agency Reference:	T5GQC8

This receipt will be required at check-in, and must be presented to customs and immigration if requested.

Your identity document / passport is required for all passengers on all flights both domestic and international.

Electronic Ticket Details										
Airline Reference					ECCHMB					
Electronic Ticket Number					5895188928403					
Issuing Airline					Jet Airways India					
Date of Issue					Monday, 11 July 2011					
Passenger Name					HOGAN/BARBARAANNEMS					
Frequent Flyer Number										
Travel Agency and IATA Number					XL FLYWELL TRAVEL		77233531			
Coupon	Carrier	Flight	Date	Class	From	To	Departs	Fare Basis	Status	Bag
1	9W	241	Fri, 15 Jul	P	JNB(A)	BOM(2)	11:00	P4RTSAHA	OK	40K
2	9W	2237	Sat, 16 Jul	I	BOM(1)	DEL(3)	02:25	P4RTSAHA	OK	40K
3	9W	2067	Tue, 19 Jul	I	DEL(3)	BOM(1)	22:05	P4RTSAHA	OK	40K
4	9W	242	Wed, 20 Jul	P	BOM(2)	JNB(A)	02:05	P4RTSAHA	OK	40K

Flight Details										
Flight	Date	Class	From	To	Departs	Arrives	Status	Seat	Meals	Bag
9W241	Friday, 15 Jul 11	P	O R Tambo International Arpt, Johannesburg, Terminal A	Chhatrapati Shivaji, Mumbai, Terminal 2	11:00	23:35	Confirmed	005D		40K
9W2237	Saturday, 16 Jul 11	I	Chhatrapati Shivaji, Mumbai,	Delhi Indira Gandhi Intl,	02:25	04:25	Confirmed	001C		40K

			Terminal 1	Delhi, Terminal 3						
9W2067	Tuesday, 19 Jul 11	I	Delhi Indira Gandhi Intl, Delhi, Terminal 3	Chhatrapati Shivaji, Mumbai, Terminal 1	22:05	00:05#	Confirmed	001C		40K
9W242	Wednesday, 20 Jul 11	P	Chhatrapati Shivaji, Mumbai, Terminal 2	O R Tambo International Arpt, Johannesburg, Terminal A	02:05	07:40	Confirmed	007K		40K

Denotes Next Day Arrival

Flight 9W2237 - Operated By Jet Airways Connect

Flight 9W2067 - Operated By Jet Airways Connect

General Remarks

*** THANK YOU FOR BOOKING AT XL FLYWELL TRAVEL ***

Important Notice For Travellers With Electronic Tickets:

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby incorporated by reference.

These conditions may be obtained from the issuing carrier.

Agent Details:

Nafisa Wadiwala

Travel Consultant

Tel: +27 11 830 1500

Fax: +27 86 680 9286

Email: jnb12@flywell.co.za

All transactions processed are subject to our Standard Terms and Conditions.

Rethabile Makhetha

From: Barbara Hogan <b.hogan2@me.com>
Sent: Monday, 08 October 2018 12:05
To: Rethabile Makhetha
Subject: Fwd: Please print out from Barbara

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: Fwd: kathy in India
Date: 07 June 2017 at 4:17:07 PM SAST
To: richpop@me.com

Hi Richard,

We flew to India on 15/07 2011, arriving in Mumbai 16/07/2011. We must have travelled on to Delhi that same night.

We left Mumbai on 19th July 2011 and arrived in South Africa on 20 July 2011. It appears that we travelled Jet Airways. We paid our own travel insurance for what that is worth!

It seems to be a trip to commemorate Madiba's birthday on 18th July and was organised by:

India International Centre
 Gandhi Peace Foundation
 South African High Commission
 United Nations Informatics Centre
 Working Group on Alternative Strategies.

best wishes,
 Barbara

Begin forwarded message:

From: "Sahm Venter" <Sahmv@nelsonmandela.org>
Subject: kathy in India
Date: 19 July 2011 at 10:02:08 AM SAST
To: "Ahmed Kathrada" <amkathrada@mweb.co.za>, "Barbara Hogan" <hogan.private@gmail.com>, "Neeshan Balton" <neeshanb@gmail.com>, "shaheda seedat" <shadesseedat@gmail.com>

Students raise a toast to Mandela's spirit

Harsha Baruah, Hindustan Times

New Delhi, July 18, 2011

✉ Email to Author

First Published: 23:44 IST(18/7/2011)

Last Updated: 23:46 IST(18/7/2011)

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1 Comment

✉ Email  print

It was a highly insightful meeting that students from 18 schools in and around the Capital had on Monday with Ahmed Kathrada, a close associate of Nelson Mandela, South Africa's first black president and icon of the country's anti-apartheid movement. During his meeting with the members of GenY, which coincided with the worldwide celebrations of Mandela's 93rd birthday, the 81-year-old Kathrada touched upon a wide range of subjects which included his long stints behind bars lasting nearly 25 years for his role in the anti-apartheid movement and the role he played after his release from prison in 1990, including his role as a member of South African parliament. Kathrada, born in South Africa to parents who had migrated there from Gujarat, highlighted the struggle waged by the country's majority black and coloured communities against discrimination at the hands of the minority whites. Citing such an example, he said that black prisoners like Mandela had to wear short trousers while he, being an Indian, was made to wear long ones.

When he referred to his initiation to politics at the age of 12, curious students were eager to know what prompted him to take the plunge at such a young age. Kathrada replied: "I had friends whose parents were politically active. They sometimes used to give us work like sticking posters. That's what got me started."

Referring to a short phase when he and some companions made the transition from peaceful protest to militant struggle against apartheid, he explained, "We, at first, used passive resistance. But when they did not yield, we trained soldiers to make bombs and sabotage institutions that were symbols of apartheid. But we ensured that this was carried out in such a way that no one was hurt."

As to what motivated him during the struggle, he said, "Inside the jail, we were protected. No policeman was going to come and shoot us. It was our comrades outside who were being killed and tortured. Once, in a place called Soweto, 600 young students were killed. All this kept us motivated."

Kathrada also referred to the strong ties between India and South Africa, where Mahatma Gandhi had launched his Satyagraha in South Africa in 1906, and anti-apartheid campaigners like Mandela drew inspiration to fight inequality from the former.

Asked if Gandhi's brand of non-violence would work in today's world, where war and conflict seem to be the order of the day, he said, "We would not advise other

countries on the best course of action to resolve conflicts. But yes, we struggled through passive resistance, and we succeeded."

The interaction was preceded by the inauguration of an exhibition of paintings by the students of Blue Bells International School, and cultural programmes, including the recital of We Shall Overcome, in which the audience joined in.

The event was jointly organised by the India International Centre, the Gandhi Peace Foundation, the South African High Commission, the United Nations Informatics Centre and the Working Group on Alternative Strategies.

[more from this section](#)

Best,

Sahm Venter
Senior Researcher
Nelson Mandela Foundation
Tel: +27 11 547 5600
Fax: +27 11 728 1111
Web: www.nelsonmandela.org

**Nelson
Mandela**

By Himself

"The purpose of freedom is to create it for others."
-Nelson Mandela

Nelson Mandela

Rethabile Makhetha

From: Barbara Hogan <b.hogan2@me.com>
Sent: Monday, 08 October 2018 12:14
To: Rethabile Makhetha
Subject: Fwd: India Correspondence regarding July 2011 trip

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: India Correspondence regarding July 2011 trip
Date: 10 June 2017 at 12:02:06 PM SAST
To: richpop@me.com

Hi Richard,

I have been trying to find details of the trip you referred to. I found this correspondence in Kathy's papers. Zohra Areington was Kathy's PA and is also his niece.

Best wishes,
Barbara

Main Identity

INDIA J

From: "Zohra Areington" <zohra.areington@gmail.com>
 To: "amkathrada" <amkathrada@mwab.co.za>
 Sent: 11 July 2011 10:30 AM
 Attach: ATT00016.htm
 Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan

----- Forwarded message -----

From: Odhav, H : New Delhi First secretary <OdhavH@dirco.gov.za>
 Date: Mon, Jul 11, 2011 at 10:19 AM
 Subject: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
 To: Zohra Areington <zohra.areington@gmail.com>
 Cc: "Balatseng, D : Delhi, Minister Counsellor" <BalatsengD@dirco.gov.za>,
 "Reynhardt, M : New Delhi Counsellor Multilateral" <ReynhardtM@dirco.gov.za>

Dear Zohra,

Below is the reservation for Dr Kathrada and Ms Hogan. As I had discussed with on the telephone, the Mission had stipulated that we would prefer a more time friendly routing and that they should depart on Friday evening, however the company that is assisting with this reservation indicated that this was the best that they could do. We have requested for the e-tickets and will mail it to you upon receipt.

2 * Business Class Tickets

Here is the itinerary for the Mr. Kathrada.

1.1KATHRADA/AHMEDMR 2.1HOGAN/BARBARAANNEMS
 1. 9W 241 P 15JUL JNB BOM HK2 1100 2335 O
 2. 9W 2237 P 16JUL BOM DEL HK2 0225 0425 O
 OPERATED BY JET AIRWAYS KONNECT
 3. 9W 2067 P 19JUL DEL BOM HK2 2205 #0005 O
 OPERATED BY JET AIRWAYS KONNECT
 4. 9W 242 P 20JUL BOM JNB HK2 0205 0740 O

With Best Regards,
 Hema Odhav

For
 652-8788
 DU

2011/07/11

Rethabile Makhetha

From: Barbara Hogan <hogan.private@gmail.com>
Sent: Monday, 08 October 2018 18:04
To: Rethabile Makhetha
Cc: Peter Harris
Subject: Fwd: Story not worth following

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: Re: India Correspondence regarding July 2011 trip
Date: 10 June 2017 at 12:16:12 PM SAST
To: Richard Poplak <richpop@me.com>

Its interesting that it was from DIRCO staff and they appear to be quite coy about who was arranging the flights.

On 10 Jun 2017, at 12:09 PM, Richard Poplak <richpop@me.com> wrote:

Thanks Barbara

We've all agreed that this isn't a story worth pursuing. That said, I think it's interesting, and I want to thank you for following up on it. I'll let you know if you and Kathy pop up in any more emails or documents as more stuff becomes searchable.

Rich

Sent from my iPhone

On Jun 10, 2017, at 12:02 PM, Barbara Hogan <hogan.private@gmail.com> wrote:

Hi Richard,

I have been trying to find details of the trip you referred to. I found this correspondence in Kathy's papers. Zohra Areington was Kathy's PA and is also his niece.

Best wishes,
 Barbara

See attached file(s)<170610115540.jpeg>

Time Line Transnet

November 2007

Public Service Commission (PSC) receives a tip-off about 212 locomotive tender irregularities at Transnet Freight Rail (TFR). Minister Erwin verbally refers the matter to GCEO at Transnet, Maria Ramos. (MR)

31 January 2008

Minister Erwin writes to the Chair of Transnet, Mr Fred Phaswana, regarding the allegations and requests an investigation. Transnet Internal Audit (TIA) is instructed to investigate.

First half of March 2008

Investigations commence.

During May 2008

Disciplinary Action instigated against the General Manager in Transnet Freight Rail, the person believed to be primarily responsible for the irregularities. He resigns.

During the course of the investigation it appeared that the CEO of TFR, Mr Gama had done the final sign off on a locomotive contract with a company called Sibambene Trade Services (STS) with on the strength of a Board Resolution, but that he had not complied with a *specific* condition of that resolution namely that Transnet Rail Engineering i.e. not STS would carry out all engineering on assembly and maintenance on the locomotives. This was to strengthen Transnet's engineering and maintenance in its engineering division.

18 September 2008

The GCEO of Transnet, Maria Ramos, receives an anonymous letter about irregularities with a security contract given to General Nyanda Security (Pty) Ltd. There are several further related follow-up tip-offs in the ensuing weeks.

2 October 2008

Ramos instructs Chris Wells, the Chief Financial Officer (CFO) and Vuyo Kahla, the Company Secretary, to investigate matters referred to in the anonymous letter. The matter is referred to Transnet Internal Audit and Ernest and Young get involved with a Mr Oates heading the team.²¹

21 November 2008.

Maria Ramos resigns as Group CEO (GCEO) of Transnet, effective end February 2009.

Board embarks on search for new CEO in close engagement with Minister of Public Enterprises, Bridget Mabandla.

26 November 2008

First meeting with Minister and Transnet delegation to discuss the search process for new CEO. Discuss criteria, process, time-lines etc.

Invite Minister to nominate possible names that can be added to the search. Emphasized that each short-listed candidate will be put through various professional and competency tests. (Saville and Holdsworth).

From 26 November 2008 to 25 March 2009

Extensive engagements ensued between Chair of Transnet and Minister Mabandla on CEO search.

9 December 2008

Chris Wells (CFO) puts his name forward as one of the candidates for CEO position.

10 December 2008

Meeting between Group Forensic Manager of Transnet Mr Naicker, Mr Oates, and Mr Gama to inform him of the coming investigation in respect of security tender and to hear his views.

12 December 2008

Chris Wells withdraws his candidature for CEO position before shortlisting took place. Shortlisted candidates included 2 internal candidates, one of whom was Mr Gama, and 3 external candidates.

9 –11 February 2009.

Sub-committee of the Board, including the Chair, does CEO interviews.

On the last day, Minister Jeff Radebe, then Minister of Transport, and Minister Mabandla accidentally met up with the Chair of Transnet and Minister Radebe had sight of the list of names on the short-list on Minister Mabandla's instructions to the Chair.

On 12th February 2009,

Mr Oates of TIA forwards draft status report to Ms. Ramos at her request relating to both investigations, on locomotives and security tenders.

13th February 2009

At a closed meeting of *non-executive* directors, the Transnet Board agrees that only **ONE** candidate, Pravin Gordhan, is suitable for recommendation to the Minister based on the outcomes of the interviews, reference checks and competency assessments of all candidates. **There is no shortlist of other possible candidates.** only Mr Gordhan. The other candidates were not considered suitable/ready for a job of this complexity, a fact corroborated by the professional tests and assessments that were done. Mr Gordhan was considered to be head and shoulders above the rest.

After the closed Board meeting M. Ramos briefed the Directors on the status of both forensic investigations. This was *after* the decision to appoint Mr Gordhan. Amongst other things, the Draft Report had identified concerns about Mr Gama's role and conduct in relation to each of the investigations.

20 February 2009

Pravin Gordhan withdraws as a candidate. A few months later he becomes the Minister of Finance after the General Elections of May 2009. Letter to Min Mabandla says that Transnet has engaged a second search agency to find a new candidate that may have been missed in the first round.

27 February 2009.

After private discussions between Chair and Minister, Transnet announces Mr Chris Wells (CW) is appointed the acting GCEO of Transnet and Anoj Singh, an employee at Transnet in Finance Division, the acting CFO.

02 March 2009

Minister Mabandla says that before they commence with the search she wants the profiles and a detailed report sent to her so that she can assess and respond comprehensively. If a new process is necessary then the criteria, profiles and recommendations of the Board of each candidate will be submitted to a **government panel**. She receives the Report. Various correspondences ensue between Chair and Minister on the matter, whereby Minister is also fully briefed about investigation of tender irregularities, which include Mr Gama.

25 March 2009

Mr Phaswana, Chair of the Transnet Board resigns with effect from 31 July 2009.

26 March 2009

Edward Nathan Sonnenberg (ENS) provides a legal opinion to the Board saying that the allegations against Mr Gama warrant disciplinary action.

22 April 2009

General Elections. ANC wins nationally.

23 April 2009

Board passes both of these investigations over to Mr Chris Wells, the acting CEO for follow up action.

10 May 2009

President Zuma is inaugurated as President of South Africa.

11 May 2009

I am sworn in as Minister of Public Enterprises.

29th May 2009

A second legal opinion from Bowman Gilfillan states that the issues are serious, Needed to be dealt with through an appropriate process which would give Mr Gama an opportunity to respond to the specific issues.

9 June 2009

I meet with a Transnet delegation led Mr Phaswana. They went ahead with a search for a new candidate as they could not ignore their fiduciary duties as a Board and "sit and wait and do nothing". Recommend Mr Sipho Maseko as their candidate for CEO position. He was the

18 June 2009

Wells puts allegations in writing to Gama requesting a written response. Gama asks for extension.

Mid-June

Brief President in full. He insists that Gama must be the GCEO.

Mid-July 2009

At DPE Preparations for AGM: 4 Board members standing down+CEO appointment.

Quorum is 10.;MOI allows 14

20 July 2009

Gama responds in writing to allegations.

29 July 2009

Min Hogan "Decision Memo to Pres. Zuma providing a comprehensive report of all Transnet and Gama related matters . Request President to approve appointment of Gama. No response.

24 August 2009

Formal charges are drawn up and handed over to Gama after considering his written responses.

27 August 2009

In a speech given at UKZN Minister Jeff Radebe "denounced the Transnet Board and the decision to suspend Gama as a "gross injustice." Sunday Times 30 August 2009

30 August 2009

Headline in Sunday Times 30 August 2009: "ANC Backs Suspended Transnet Boss Gama"

31 August 2009

Themba Langa Attorneys, on behalf of Gama, contest his suspension: letter cc'd to Min Hogan. Eversheds Reply. *

1 Sept 2009.

Transnet formally suspends Gama and a little later in the month he launches an application in the High Court to challenge his suspension.

2 September 2009

Randall Howard, the General Secretary of the South African Transport and Allied Workers Union (SATAWU) issues a statement in support of Gama.

"SATAWU will ensure that no puppet appointment takes place until the disciplinary process of Gama is completed even though at the cost of keeping the untransformed cabal in place a little longer. SATAWU is in the processto clean up the lily white Transnet Capital Projects....."

7 September 2009

SACP issues a statement in support of Gama .

"We wish to express serious concerns about what appears to be an attempt by certain elements within and outside Transnet to clearly frustrate the appointment of Mr Gama as CEO despite his illustrious career, commitment to public service and strong credentials."

11 September 2009

ANCYL issues a statement.

"Siyabonga Gama should be appointed a GCEO and business goes on as usual in Transnet. Any attempt to persecute and isolate him will be met with massive resistance from the youth of South Africa. The suspension of Gama is a with-hunt to block him from the GCEO position and should be immediately withdrawn."

13 September 2009

"Minister of Communications and ANC heavyweight General Sphiwe Nyanda says suspended Transnet executive is being persecuted in the same manner as Jacob Zuma." Sunday Times 13 September 2009

13 September 2009

[" The controversy over who is to become chief executive of Transnet is proving to be damaging to the parastatals and the individual who may get to occupy the hot seat. It has also become a political hot potato that could scorch Public Enterprises Minister Barbara Hogan.

" Barbara must go. She is still going to give us problems going forward.....an ANC National Working Committee said this week." City Press 13 September 2009.

13 September 2009

"The level of political interference at Transnet does not bode well for the effective management of parastatals.....The question of who is right and who is wrong is not for the ANC to determine. Neither is it terribly good practice to level the race card at the Board and the executive team at Transnet. The Board is diverseTheir reputations are being sullied and it will be little surprise if they walk in the next fortnight." Editorial City Press.

7 October 2009

Justice J Spilg dismisses Gama's application with costs in South Gauteng High Court. .

"Paragraph 107 There is also no case made out of the perceived bias that can affect the legality of the process. Much less that of institutional bias.

13 January 2010 - 25 February 2010

Gama Disciplinary Hearings

31 January 2010

Themba Langa lawyers send Letter of Complaint from to Speaker about Hogan "bias " contained in an answer given by her in Parliament.

Sunday Argus 31 January 2010* "Hogan goes for Gama" or something to that effect.

Sunday Times 31 January 2010*

5 March 2010

Cassim Findings of Disciplinary Hearings Senamela and Khanye *

4 June 2010

Findings made in Gama Disciplinary Hearings (Antrobus)* Guilty on 3 Charges.

- EXCEEDING OF DELEGATED AUTHORITY IN APPROVING GNS CONTRACT.
- GAMA'S ALLEGED FAILURE TO COMPLY WITH THE BOARD STIPULATE CONDITION FOR THE 50 LIKE NEW CONTRACT
- UNWARRANTED CRITICISM OF TRANSNET EXECUTIVES

28 June 2010

Findings on Sanctions in Disciplinary Case. *

Gama dismissed on all three counts.

27 October 2010.

Cabinet Memo 9/2000 Requesting Approval for The Appointment of the Chair and new Non-Executive Directors for Transnet. MEMO WITHDRAWN By Cabinet Secretariat, after I have been through the same due processes as before. Phone-call with President, MEMO sent onwards to him, no reply, formal letter to him requesting permission to expedite, Cabinet Secretariat withdraw Memo.

31 October 2010

President Zuma removes me from Cabinet and offers me the Ambassadorship of Finland which I decline.

8 December 2010

Minister Gigaba gets Cabinet Approval for new Board at Transnet. On the Board is Iqbal Sharma.

STATEMENT OF BARBARA HOGAN

THE PURPOSE OF THIS STATEMENT

1. The purpose of this statement is to set out the reasons for my dismissal as the Minister of Public Enterprises as well as my experiences relating to the conduct of the former President of South Africa, President Jacob Zuma ("President Zuma"), in respect of his involvement in the affairs of State Owned Entities ("SOEs"), which I believe influenced President Zuma's decision to remove me from office.

PERSONAL HISTORY

2. I was born and schooled in Benoni, and I obtained an Honours degree in Development Studies from the University of the Witwatersrand.
3. I joined the African National Congress ("ANC") as an underground political activist in 1977. In 1979, I enrolled for a Master's degree focusing on unemployment in South Africa.
4. In 1981, I was detained and sentenced to ten years imprisonment, having been found guilty of high treason. During my incarceration, I enrolled for a Bachelor of Commerce degree and midway through my degree, I was released, a week after the ANC was unbanned on 9 February 1990.
5. In April 1990, I was appointed by the Interim Leadership Core of the ANC to sit on the Interim Leadership Committee ("ILC"), which was mandated to set up the structures of the ANC in Gauteng. I was later elected as the full-time

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General Secretary of the Gauteng ANC, a position I held until the end of 1992.

6. In 1994, I was elected as an ANC MP in the National Assembly and served mainly on the Portfolio Committee on Finance (which I chaired from 1999 to 2004) and on the Standing Committee on Public Accounts. I also chaired the Audit Commission that oversaw the work of the Auditor-General.
7. I participated in the Finance Theme Committee that dealt with the financial aspects of the Constitution for the duration of the Constitutional Assembly, and I was later appointed to the Accounting Standards Board.
8. In September 2008, the former President of South Africa, President Kgalema Motlanthe, appointed me to cabinet as the Minister of Health.
9. In May 2009, following the national elections, President Zuma appointed me as the Minister of Public Enterprises and Mr Enoch Godongwana was appointed as the Deputy-Minister of Public Enterprises.
10. I served as the Minister of Public Enterprises until 31 October 2010, when I was removed from office by President Zuma. I have no knowledge of the reasons for my dismissal, as they were not explained to me. As such, I am only in a position to provide information relating to the events leading to my dismissal as the Minister of Public Enterprises, which are set out below.

SOEs FALLING UNDER MY JURISDICTION

11. A total of 9 (nine) SOEs and public entities fell within the jurisdiction of the Department of Public Enterprises ("DPE"), including Eskom, Transnet, SAA, SA Express, Denel, Infraco, PBMR, Alexkor, and SAFCOL.
12. The DPE also had several specialised units, which were headed mainly by Deputy Director-Generals under the supervision of a Director General - who

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at the time of my appointment was Ms Portia Molefe. The specialised units were responsible for the close monitoring of the SOEs that fell under the DPE's jurisdiction and would advise and report directly to me.

PRESIDENT ZUMA'S DIRECT INTERVENTION IN THE APPOINTMENT OF CHIEF EXECUTIVE OFFICERS ("CEOs") AT SOEs

13. President Zuma took a very active, and at times, inappropriate interest in who was to be appointed to the Boards of SOEs. I shall give two illustrations in relation to Eskom and Transnet.

Eskom

14. In 2009, Eskom's CEO, Mr Jacob Maroga ("Mr Maroga"), resigned during a Board meeting. Despite Mr Maroga's subsequent insistence that I reinstate him, I refused. Labour issues of CEOs in relation to their Boards fell outside my jurisdiction as the Minister, and also the Board of Eskom had unanimously refused his request for reinstatement after he had resigned.
15. President Zuma placed considerable pressure on me to persuade the Board to reinstate Mr Maroga. Finally on the day that the Board informed staff that Mr Maroga was leaving, President Zuma angrily phoned me to tell me to instruct the Board to cease this process immediately, just as the Board was about to address a press conference to communicate Mr Maroga's departure. The press conference was hastily cancelled, causing considerable embarrassment and huge press speculation about the actual employment status of Mr Maroga, and considerably diminishing the reputation of Eskom.
16. A while later, Mr Maroga returned to his office at Eskom in a much-publicised event, on President Zuma's instructions. On the same day, Mr Maroga released a letter to the Press, addressed to myself as Minister, which essentially stated that he was reinstated as CEO of Eskom at the behest of

3 BAK

President Zuma and that, in future, he could be removed only with the approval of President Zuma. Under pressure, President Zuma was constrained to phone Mr Moroga to instruct him to immediately vacate his office in Eskom, saying he could only return with my approval.

17. Not only was President Zuma behaving inappropriately by actively intervening in matters that are essentially the prerogative of a Board, but it was also apparent that President Zuma had been privately meeting with Mr Maroga behind my back and finalising a deal with him without my knowledge or input. He exhibited no loyalty or honesty with a Minister in his Cabinet. Mr Maroga later sued Eskom and myself for R85million and lost with costs.

Transnet

18. President Zuma insisted that Siyabonga Gama ("Mr Gama"), an employee of Transnet, be appointed as the CEO of Transnet. At the time, there was an acting CEO. The Board had considered Mr Gama as a candidate but had nominated another excellent candidate to be CEO. Mr Gama was facing an inquiry regarding certain irregularities and the Board was also of the opinion that he was not yet CEO material. When I refused to put Mr Gama's name to Cabinet until the findings of the disciplinary process had been concluded, President Zuma prevented me from nominating both the Board's chosen candidate, as well as designating a new Chairperson of the Transnet Board, when the term of office of the latter expired. Transnet had to endure a considerable period of instability, having both an Acting Chairperson and an Acting CEO. Mr Gama was later found guilty on 3 out of 4 counts, each count warranting a dismissal, and was dismissed from Transnet.
19. Since my appointment, I, and my Deputy-Minister, refused to cooperate with President Zuma's inappropriate interference with the Boards of SOEs and his apparent disregard of proper corporate governance. I believe that our resistance to the interferences of President Zuma was one of the factors that lead to my removal from office and the assignment of the Deputy-Minister to another Department.

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PRESIDENT ZUMA'S DISREGARD FOR CORPORATE GOVERNANCE

20. High standards of corporate governance in SOEs are essential, not only for the good governance of the company and its investors and borrowers, but also for the proper functioning of the economy, given the strategic position in the economy of many SOEs. As such, Boards are expected to adhere to the highest standards of corporate governance as exemplified in the King Code of Corporate Governance.
21. The Shareholder's Agreements that govern the relationship between the DPE and SOEs empower the Minister to hold SOEs accountable by providing certain key performance areas and requiring Ministerial approval for certain decisions taken by the Board. As the Minister of Public Enterprises, I engaged with the SOEs on strategies, policies, financial and operating results. My engagements with the SOEs were always through the Board or the Chairperson. I would only engage with the CEO of a SOE on issues delegated to them by the Board.
22. As the Minister of Public Enterprises, I was responsible for the appointment of the Board of Directors and the Chairpersons of each SOE that fell under my jurisdiction. Unless otherwise stipulated in legislation or Memorandums of Incorporation, it was my strong view, in line with KING III, that CEOs are appointed and accountable to their Boards. The practice was that Boards provided the Minister of DPE with a recommendation for their preferred candidate/s for a CEO position, and the Minister takes their proposal to Cabinet for approval. Once appointed, CEOs should not go over the heads of their Boards to a Minister on their issues; nor should they lobby Cabinet Ministers, ANC structures or political leaders or, similarly allow themselves to be lobbied by outside nefarious interests. Regrettably, this standard principle of CEO accountability was not universally honoured, and CEOs

would sometimes by-pass Boards, and even Ministers, in pursuit of their objectives.

23. Political interference is extremely damaging to a SOE, because it disempowers the Board and Senior Management, often forcing them to constantly second-guess proposals and approvals. In addition, no political authority or civil servant has the entire skill set or the resources to manage SOEs on a day to day basis, or to provide the requisite strategic direction and leadership to the SOE. In corporatized SOEs there has to be a respectful delineation of powers and authority between the SOE and the Board and its Senior Managers, otherwise proper management and leadership will fail.
24. It is crucial that politicians and civil servants provide an enabling environment for SOEs to accomplish their work. However, the manner in which President Zuma conducted himself in relation to constantly interfering with executive appointments to SOEs reflected a deep lack of understanding and disregard for corporate governance.

PRESSURE TO TERMINATE SAA'S SOUTH AFRICA-MUMBAI ROUTE

25. In June 2010, I was part of an official State visit to India, led by President Zuma. Whilst I was there, I heard rumours that SAA intended to terminate its South Africa-Mumbai route. As such, I sent a text message to then Chairperson of the SAA Board, Cheryl Carolus ("Ms Carolus"), enquiring whether the rumours were true. Ms Carolus responded to my text message, stating that the rumours were untrue, saying it must be Jet Airways still lobbying for this. However, it should be noted that during my India visit, the Chairperson of Jet Airways was persistently following me around, trying to meet with me. I declined to engage with him as I did not have the authority to make any business decisions on behalf of the SAA Board.
26. In August 2010, Ms Carolus sent me another text message informing me that the CEO of Jet Airways was in South Africa and would be lobbying for

SAA to end its Mumbai flight, and that SAA rejected this. She also requested me to inform her if the CEO of Jet Airways requested to meet with me, so that I could be briefed accordingly. In October 2010, I was removed from office by President Zuma. My successor, Malusi Gigaba, later cancelled SAA's Mumbai flight.

CONCLUSION

27. In the circumstances, I am unable to provide definitive reasons for my removal as the Minister of Public Enterprises; however, the information set out herein serves to highlight some of the events leading up to my removal from office, as well as the inappropriate conduct of President Zuma in addressing issues relating to the governance of the DPE and the SOEs for which it was responsible.

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Dated at JOHANNESBURG on this 30th day of July 2018.


BARBARA HOGAN

ANNEXURE "K"



MINISTRY: PUBLIC ENTERPRISES

REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, Pretoria, 0025

CABINET MEMORANDUM NO : 9 of 2010
 DATE : 27 October 2010
 FILE NUMBER : 2/2/1

1 SUBJECT

The appointment of Non-Executive Directors to the Transnet Board.

2 PURPOSE

- 2.1 For Cabinet to concur with the nominations of Non-Executive Directors to the Transnet Board of Directors; and
 2.2 Further concur with the nomination of Dr. Mandla Gantsho as Chairperson and Non-Executive Director of the Transnet Board of Directors.

3 SUMMARY

- 3.1 Transnet's Articles of Association provide for a minimum of ten (10) Directors and a maximum of eighteen (18) Directors. The current Transnet Board consists of eleven (11) Board Members of which nine (9) are Non-Executive Directors and two (2) are Executive Directors namely Mr Christopher Wells (Acting Chief Executive Officer) and Mr Anoj Singh (Acting Chief Financial Officer), who are *ex officio* members of the Board.
- 3.2 It is recommended that twelve (12) nominees be considered for appointment to the Transnet Board as Non-Executive Directors. The Department further

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recommends the appointment of Dr Mandla Gantshe as the Chairperson of the new Transnet Board of Directors.

- 3.3 With these new appointments, the Transnet Board will consist of fifteen (15) Non-Executive Directors and two (2) Executive Directors; a total of seventeen (17) Directors. One (1) vacancy will remain on the Board which will be filled at a later stage.

4 STRATEGIC FOCUS OF THE MEMORANDUM

The Transnet Board is a critical State Owned Enterprise Board and thus requires a complement of members with the requisite skills, experience, expertise and representation, especially in light of the extensive capital expansion programme currently underway.

5 DISCUSSION

- 5.1 Transnet's current Articles of Association provide for a minimum of ten (10) Directors and a maximum of eighteen (18) Directors on its Board of Directors.
- 5.2 The current Transnet Board (attached as Annexure A) consists of eleven (11) Board Members including two (2) Executive Directors namely Mr Christopher Wells (Acting Chief Executive Officer) and Mr Anoj Singh (Acting Chief Financial Officer), who are *ex officio* members.
- 5.3 From the current Transnet Board, the Department intends to retain three (3) Non-Executive Directors namely Mr MJ Hantkinson, Ms NA Matyumza and Ms NBP Gcaba for purposes of continuation and knowledge of the business.
- 5.4 In view of the current vacancies, the Department noted the skills gap on the Transnet Board. To address this gap, the Department recommends that the Board must be strengthened in a number of areas including but not limited to: financial, economics, logistics, legal, business, rail sector expertise, project management, human resources, public policy and ports specialist.
- 5.5 In this regard the candidates below have been identified as having the appropriate skills and experience in the areas mentioned above and are

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proposed to be appointed as new Non-Executive Directors to the Transnet Board. Their comprehensive CV's are attached as Annexure B.

NAME	CURRENT POSITION	EXPERTISE
1. Dr Mandla Gantsho	Chief Executive Officer – Nova Capital Africa	Financial / Business
2. Mr Joel Netshitenzhe	Member: National Planning Commission (NPC)	Policy
3. Mr Peter Malungani	Executive Chairman – PEU Group	Financial / Business
4. Mr Israel Skosana	Executive Director and Chairman – Kapela Investments	Financial
5. Ms Nazmeera Mobla	Macro Strategist & Sales for Macquarie Bank	Economics
6. Mr Michele "Mike" Fannuchi	Consultant – VALS	Logistics
7. Ms Doris Tshepe	Managing Director and practising attorney – Cheadle Thompson & Haysom Inc.	Legal
8. Ms Wrenelle Stander	Managing Director – Sasol Gas	Business
9. Ms Nombulelo "Pinky" Moholi	Managing Director - Telkom SA Business	Business
10. Mr Vijay Raman *1 (See end of table)	Director – Chakra Infrastructure Consultants	Rail Specialist
11. Mr Ben Magara *2 (See end of table)	Anglo Platinum -Executive Director for projects and engineering	Project Management
12. Mr Harry Gazendam	Senior Executive Advisor – Toyota Motor Corporation Japan and Toyota South Africa	Human Resources

Not named by rail, but that party is and have been in contact with rail

*1 Indian National

*2 Zimbabwean National with SA citizenship

5.6 The profiles of the proposed candidates address the skills gap that currently exists on the Board. These appointments will strengthen the Board's capacity in fulfilling Transnet's mandate and implementing the company's business strategy.

5.7 The appointment of the new Non-Executive Directors will be for a three (3) year term, subject to annual review by the Minister of Public Enterprises.

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SECRET

BH

- 5.8 With these appointments, the new Transnet Board (attached as Annexure C) will consist of seventeen (17) Directors comprising of fifteen (15) Non-Executive Directors and two (2) Executive Directors. There will be one (1) vacancy on the Board which will be filled at a future date.
- 5.9 Excluding the international candidates (rail specialist and project management candidate) the Board composition will consist of 53% African, 27% White, 13% Indian and 7% Coloured with 65% being male and 35% being female.
- 5.10 With respect to the one (1) vacancy that will remain on the Board, it should be noted that the Department is currently in the process of identifying a suitable candidate to fill this position which has been earmarked for a ports specialist.
- 6 IMPLEMENTATION PLAN**
- Following Cabinet concurrence, the Minister of Public Enterprises will appoint the new Non-Executive Directors to the Transnet Board for a term of three (3) years, subject to annual confirmation.
- 7 ORGANISATIONAL AND PERSONNEL IMPLICATIONS**
- None
- 8 FINANCIAL IMPLICATIONS**
- None. The financial obligation with respect to the new appointments will be to the cost of Transnet.
- 9 COMMUNICATION IMPLICATIONS**
- The Minister of Public Enterprises will communicate the appointment of the new Non-Executive Directors to the existing Transnet Board, the new nominees and other relevant stakeholders, after obtaining Cabinet approval.
- 10 CONSTITUTIONAL IMPLICATIONS**
- None

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11 IMPLICATIONS FOR VULNERABLE GROUPS

None

12 SECURITY IMPLICATIONS

None

13 DEPARTMENTS AND PARTIES CONSULTED, RESPONSES AND COMMENTS

13.1 Department of Public Enterprises

13.2 The memorandum was not finalised in consultation with the Director Generals' Cluster.

14 RECOMMENDATIONS

It is recommended that Cabinet –

14.1 Concurs with the appointment of Dr. Mandla Gantsho as a Non-Executive Director and Chairperson of the new Transnet Board for a term of three (3) years, subject to annual confirmation by the Minister of Public Enterprises. This appointment will be effective from 15 November 2010.

14.2 Further concurs with the appointment of Mr Joel Netshitenzhe, Mr Peter Malungani, Mr Israel Skosana, Ms Nazmeera Moolia, Mr Michele Fannuchi, Ms Doris Tshepe, Ms Wrenelle Stander, Ms Nombulelo Moholi, Mr Vijay Raman, Mr Ben Magara and Mr Harry Gazendam as Non-Executive Directors to the Transnet Board for a term of three (3) years, subject to annual confirmation by the Minister of Public Enterprises. This appointment is effective from 15 November 2010.

14.3 Notes that Mr MJ Hankinson, Ms NA Matyumza and Ms NBP Gcaba will be retained from the current board for purposes of continuation and knowledge of the business. They will be retained for a term of three (3) years subject to annual confirmation by the Minister of Public Enterprises.

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6

15 OFFICIAL RESPONSIBLE FOR THE MEMORANDUM

I declare that the memorandum adheres to the guidelines provided by the Cabinet for drafting of memoranda.

Name: Ms Raisibe Lepule

Designation: Acting Deputy Director General

Telephone: 011 431 1099

Cellular: 082 885 7100

16 HEAD OF DEPARTMENT

Name: Dr. Andrew Shaw

Designation: Acting Director General

Telephone: 011 431 1075

Cellular: 082 941 6257

17 AUTHORISATION FOR PROCESSING THE MEMORANDUM

**BARBARA HOGAN, MP
MINISTER**

27 October 2010

Is there a need for an electronic presentation to be done in addition to the memorandum? No

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ANNEXURE "L"



MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: 012 431 1118 Fax: 012 431 1039
Private Bag X9079, Cape Town, 8000 Tel: 021 461 6376/7 Fax: 021 465 2381/461 1741

Hon. J G Zuma
The President of the Republic of South Africa
Private Bag X 1000
PRETORIA
0001

Dear President Zuma,

Re: Transnet Chairperson

1. Thank you for speaking to me telephonically last night about this matter.
2. For over a year now, Transnet's Board has been operating with an Acting Chair. At its AGM this year on 24 July 2010, the terms of Board members and the Acting Chair had to be extended until such time that a new Board is appointed. In my view, any extension of longer than two months would not be ideal as in these circumstances it would open the company and government to further reputational risk.
3. As discussed with you previously, Transnet's work has far-reaching consequences for the South African economy. Transnet has to focus on its build programme within the context of a constrained balance sheet, leveraging private sector investment capacity, attracting freight from road to rail and improving efficiency. The success of the implementation of Transnet's five year expenditure of ZAR84 billion clearly requires a strong Board.

BH

4. Given the importance of Transnet to the SA economy, and the need for stable leadership at the Board level, it is absolutely necessary to proceed with the appointment of a Chairperson and other Board members with the requisite skills. To this end, my department has prepared a Cabinet Memorandum for discussion at Cabinet but which it has not yet submitted. This is because we agreed that we would discuss the matter first so that I can ascertain your final views on the composition of the Board and in particular the Chairperson.
5. To confirm, in respect of the position of the Chairperson, I raised the following potential candidates: Mr Mandla Gantsho and Mr John Copelyn. Both of their CV's are attached for your ease of reference.
6. I kindly request an appointment at your earlier convenience to discuss this matter further with the Deputy Minister and myself in order that we are able to discuss your views on the preferred candidate for Chairperson and thereby expeditiously deal with this matter in the interests of Transnet, government and the country.

I look forward to hearing from your offices shortly.

Sincerely,



MS B HOGAN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 8 September 2010



ANNEXURE 'M'



Eskom Board

Chief Executive Strategy Document
Board Breakaway

Date:
29 October 2009

Enquiries:

Dear Board Members

I have reflected on this matter overnight. I believe this is a matter of national importance.

This matter is about the role of the SOE's in this phase of the democracy. It is about the future of this country. It is not about the relationship between the Chairman and the Chief Executive.

My remarks of frustration in the Board meeting can in no way be construed to be an offer to resign. The Chairman has expressed similar frustrations numerous times and has not been treated in this manner.

I was stunned by the response of the Board to say they accept my offer and wish to communicate with immediate effect.

The real issues are the following:

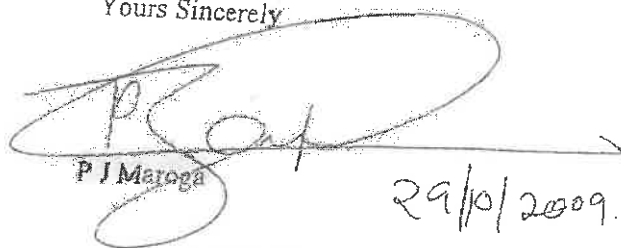
1. I have put before the Board a very comprehensive Strategy Document about the direction I propose Eskom should take.
2. The Strategy articulates very key matters of national importance relating to our contribution to this developing democracy.
3. I am of the firm view that the Board must engage on the matters articulated in this Strategy Document as this is most important duty of the Board
4. The real issues between the Chairman and myself are rooted in differences on the role of Eskom in this phase of our democracy and role clarity between the Chairman and the Chief Executive.
5. I believe as a Board we will be failing the country if we do not show leadership on this matter.

Conclusion

I have not offered to resign and I am not offering to resign.

I believe the role of Eskom is key to the development of our country during this phase of the democracy. It is a view I believe strongly in and a view I am willing to fight for whatever the consequences.

Yours Sincerely



P J Maroga

29/10/2009.

cc Minister Barbara Hogan
Minister Dipuo Peters



ANNEXURE "N"



Minister Barbara Hogan
The Eskom Board

Date:
9 November 2009

Enquiries:

Dear Minister,

I wish to affirm the following with regard to my status as Chief Executive and Director of Eskom:

1. I remain the Chief Executive and Director of Eskom.
2. The shareholder, at the highest level, have confirmed that any action regarding my status as Chief Executive and Director of Eskom, must be requested formally and granted by the shareholder. I have affirmed that no request has been formally lodged and none has been granted.
3. I have been told that all unauthorized actions taken by the Board of Directors since the 28 October 2009 are rescinded.
4. I am at work in my office in Megawatt Park.
5. Everyone should cease and desist from any action or communication that undermines the confidence in Eskom and demoralises the employees during this critical time.
6. As a Director, I will fully participate in all Board activities.

In the interest of Eskom and the country, I am continuing the leadership process that is transparent and collaborative, as well as moving forward with the Vision I have outlined and the changes I intend to make to build the Eskom required for this critical economic developmental stage of our democracy.

Yours sincerely,


P.J. Mariga
Chief Executive: Eskom

Cc

Board
EXCO
Managing Directors
Minister, Department of Energy
Portfolio Committee Chair, DPE
Portfolio Committee Chair, DOE

Head Office
Megawatt Park, Macoswell Drive, Sunninghill, Sandton, PO Box 1091, Johannesburg 2000 SA
Tel +27 11 800 3161 Fax +27 11 800 5603 www.eskom.co.za

Directors: RM Goolbsy (Chairman), P.J. Mariga (Chief Executive), LCZ Cole, SO Dube, LG Josefsson (Swedish)
HJ Lee (Korean), WE Loo (Malay), PM Makhanya (Minister), RJ Molefe, AJ Morgan
J Nene, Company Secretary, 1st Floor
Eskom Holdings Limited Reg No 2002/015327/05





**MINISTER
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA**

Private Bag X15, Hatfield, 0028 Tel: 012 431 1119 Fax: 012 431 1039
Private Bag X9079, Cape Town, 8000 Tel: 021 461 6376/7 Fax: 021 465 2381/461-1741

Hon. J G Zuma
The President of the Republic of South Africa
Private Bag X 1000
PRETORIA
0001

Dear *President Zuma,*

Re: Safcol Chairperson

Thank you for taking the time to speak to me about this matter last night. As discussed with you, in order for us to have a more meaningful opportunity to discuss this position before taking it to Cabinet, early yesterday, I withdrew the item from the agenda of today's ESEID Committee meeting.

However, given the urgency of the matter as a result of:

- the AGM for SAFCOL being scheduled for 28 September 2010
- new appointments to the Board that have to be made
- Parliamentary and other legislative reporting requirements

I trust then that you will revert to me with your views on the proposed candidate for Chairperson quite soon and before the next cabinet meeting.

Kindly note that I have written to your office for permission to submit the memo to the next cabinet meeting

I am available to meet with you at any time once you have had an opportunity to peruse the said CV.

BJT

I trust that this is in order and look forward to hearing from your offices shortly.

Sincerely,



MS B HOGAN, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 8 September 2010.



Carolus Cheryl (3/17):

ANNEXURE "P"

Hi, had good mtg with Andrew to conclude outstanding KPMG matter we discussed. Have asked him to discuss final with you so we can conclude before 31Mar. Cheryl

Me (6/2):

Cheryl, I am in India w President now. Is there any truth to rumour that SAA is going to terminate its route to Mumbai? This is a rumour here, and we need clarity.

Carolus Cheryl (6/2):

No. We will not be terminating Mumbai. It must be Jet Airways still lobbying for this. We remain on the route with 4 frequencies. All best for India

Me (6/2):

thnks

Carolus Cheryl (6/5):

Ms B, hope u recovering frm trip. I need to talk re KPMG procedures, processes and timings. Sun a.m or eve best for me. Have lunch guests. Rgds, cheryl

Carolus Cheryl (7/16):

We sent letter late afternoon outlining steps to

[Handwritten signature]

ANNEXURE "Q"



SMS / MMS



13:01

Carolus Cheryl (8/30):

Hi B, FYI SAA is at SCOPA tomorrow. Also note CEO/ Chairman from Jet Airways (India) will be in SA for India SA mtg. He's lobbying hard for SAA to end Mumbai flite. We reject this. Pls let me know if he is trying to meet you so we can brief. I apologised for mtg. Said he should talk to Siza. rgds cheryl

Me (8/30):

Good luck w Scopa. No he has not tried to meet with me

Me (9/30):

Hi, apparently Fani has said on 702 that SAA is pursuing a jv with Ethiopian Airlines?

Carolus Cheryl (10/1):

Hi, Ethiopian now joined Star Alliance. So new co-op options for us. Confusing media interpretations about possibilities. Apparently dpe comms was briefed

Me (10/1):

thks

Me (10/19):

ANNEXURE "R"

1 Me (6/6):

thinks

2 Me (6/6):

Gama guilty on 3 out of 4 counts. Report handed in Friday. 200 pages

2 Fatima Hassan (6/6):

What is the 4th?

3 Me (6/6):

Signing off on contract without Board authority

2 Fatima Hassan (6/7):

Rumours

Dm becomes min

U dm for health

vm the dm for dpe

or

Dm stays dm

Fikile becomes min

2 Fatima Hassan (6/8):

They wanna know if u can sign petition? What did sue recommend? Or will you be the lone minister again....?

2 Fatima Hassan (6/8):

Apparently we are being approached by contractors

Cherise Walker

From: Barbara Hogan <hogan.private@gmail.com>
Sent: 08 October 2018 17:58
To: Rethabile Makhetha
Cc: Peter Harris
Subject: Fwd: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan

Begin forwarded message:

From: Shaheda Seedat <shaheda@kathradafoundation.org>
Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
Date: 14 June 2017 at 10:08:14 AM SAST
To: hogan.private@gmail.com
Cc: Neeshan Balton <neeshanb@gmail.com>

----- Forwarded message -----

From: **Zohra Areington** <zohra.areington@gmail.com>
Date: 11 July 2011 at 12:08
Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
To: bahogan <bahogan@mweb.co.za>, Neeshan Balton <neeshanb@gmail.com>, shaheda seedat-
 <shadesseedat@gmail.com>

----- Forwarded message -----

From: **Odhav, H : New Delhi First secretary** <OdhavH@dirco.gov.za>
Date: Mon, Jul 11, 2011 at 11:27 AM
Subject: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
To: Zohra Areington <zohra.areington@gmail.com>
Cc: amkathrada@mweb.co.za.

Dear Zohra,

Attached the e-tickets for Mr Kathrada and Ms Hogan. Finally.

With Best Regards

Hema Odhav | South African High Commission : New Delhi

Office Tel: 91 11 2614 9411 - 20 | Fax: 91 11 2614 3605 | Email: odhvh@foreign.gov.za

Please consider the environment before printing this e-mail.

----- Forwarded message -----

From: "nafisa" <Inb12@flywell.co.za>

To: "Ashu" <ashu@sahara.co.za>

Date: Mon, 11 Jul 2011 14:42:20 +0530

Subject: Re E ticket KATHRADA/AHMEDMR



171, 7th Avenue, Mayfair, Johannesburg
P.O Box 1456, Johannesburg, 2000
Tel: +27 11 830 1500
Fax: +27 86 680 9286

Afterhours Nos: +27 82 571 6501

+27 82 562 2700

+27 82 227 3072

Website: www.flywell.co.za

Electronic Ticket Receipt and Itinerary

Passenger:	KATHRADA/AHMEDMR	Agency Reference:	T5GQC8
------------	------------------	-------------------	--------

This receipt will be required at check-in, and must be presented to customs and immigration if requested.

Your identity document / passport is required for all passengers on all flights both domestic and international.

Electronic Ticket Details										
Airline Reference					ECCHMB					
Electronic Ticket Number					5895188928402					
Issuing Airline					Jet Airways India					
Date of Issue					Monday, 11 July 2011					
Passenger Name					KATHRADA/AHMEDMR					
Frequent Flyer Number										
Travel Agency and IATA Number					XL FLYWELL TRAVEL		77233531			
Coupon	Carrier	Flight	Date	Class	From	To	Departs	Fare Basis	Status	Bag
1	9W	241	Fri, 15 Jul	P	JNB(A)	BOM(2)	11:00	P4RTSAHA	OK	40K
2	9W	2237	Sat, 16 Jul	I	BOM(1)	DEL(3)	02:25	P4RTSAHA	OK	40K
3	9W	2067	Tue, 19 Jul	J	DEL(3)	BOM(1)	22:05	P4RTSAHA	OK	40K
4	9W	242	Wed, 20 Jul	P	BOM(2)	JNB(A)	02:05	P4RTSAHA	OK	40K

Flight Details										
Flight	Date	Class	From	To	Departs	Arrives	Status	Seat	Meals	Bag
9W241	Friday, 15 Jul 11	P	O R Tambo International Arpt, Johannesburg, Terminal A	Chhatrapati Shivaji, Mumbai, Terminal 2	11:00	23:35	Confirmed	005A		40K
9W2237	Saturday, 16 Jul 11	I	Chhatrapati Shivaji, Mumbai, Terminal 1	Delhi Indira Gandhi Intl, Delhi, Terminal 3	02:25	04:25	Confirmed	001A		40K
9W2067	Tuesday, 19 Jul 11	I	Delhi Indira Gandhi Intl, Delhi, Terminal 3	Chhatrapati Shivaji, Mumbai, Terminal 1	22:05	00:05#	Confirmed	001A		40K
9W242	Wednesday, 20 Jul 11	P	Chhatrapati Shivaji, Mumbai, Terminal 2	O R Tambo International Arpt, Johannesburg, Terminal A	02:05	07:40	Confirmed	007G		40K

Denotes Next Day Arrival

Flight 9W2237 - Operated By Jet Airways Connect

Flight 9W2067 - Operated By Jet Airways Connect

General Remarks

**** THANK YOU FOR BOOKING AT XL FLYWELL TRAVEL ****

Important Notice For Travellers With Electronic Tickets:

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby incorporated by reference.

These conditions may be obtained from the issuing carrier.

Agent Details:

Nafisa Wadiwala

Travel Consultant

Tel: [+27 11 830 1500](tel:+27118301500)

Fax: [+27 86 680 9286](tel:+27866809286)

Email: jnb12@flywell.co.za

All transactions processed are subject to our Standard Terms and Conditions.

----- Forwarded message -----

From: "nafisa" <Jnb12@flywell.co.za>

To: "Ashu" <ashu@sahara.co.za>

Date: Mon, 11 Jul 2011 14:42:42 +0530

Subject: Re E Ticket HOGAN/BARBARAANNEMS



171, 7th Avenue, Mayfair, Johannesburg
P.O Box 1456, Johannesburg, 2000
Tel: +27 11 830 1500
Fax: +27 86 680 9286

Afterhours Nos: +27 82 571 6501

+27 82 562 2700

+27 82 227 3072

Website: www.flywell.co.za

Electronic Ticket Receipt and Itinerary

Passenger:	HOGAN/BARBARAANNEMS	Agency Reference:	T5GQC8
-------------------	---------------------	--------------------------	--------

This receipt will be required at check-in, and must be presented to customs and immigration if requested.

Your identity document / passport is required for all passengers on all flights both domestic and international.

Electronic Ticket Details

Airline Reference	ECCHMB
Electronic Ticket Number	5895188928403
Issuing Airline	Jet Airways India
Date of Issue	Monday, 11 July 2011
Passenger Name	HOGAN/BARBARAANNEMS
Frequent Flyer Number	
Travel Agency and IATA Number	XL FLYWELL TRAVEL 77233531

Coupon	Carrier	Flight	Date	Class	From	To	Departs	Fare Basis	Status	Bag
1	9W	241	Fri, 15 Jul	P	JNB(A)	BOM(2)	11:00	P4RTSAHA	OK	40K
2	9W	2237	Sat, 16 Jul	I	BOM(1)	DEL(3)	02:25	P4RTSAHA	OK	40K
3	9W	2067	Tue, 19 Jul	I	DEL(3)	BOM(1)	22:05	P4RTSAHA	OK	40K
4	9W	242	Wed, 20 Jul	P	BOM(2)	JNB(A)	02:05	P4RTSAHA	OK	40K

Flight Details

Flight	Date	Class	From	To	Departs	Arrives	Status	Seat	Meals	Bag
9W241	Friday, 15 Jul 11	P	O R Tambo International Arpt, Johannesburg, Terminal A	Chhatrapati Shivaji, Mumbai, Terminal 2	11:00	23:35	Confirmed	005D		40K
9W2237	Saturday, 16 Jul 11	I	Chhatrapati Shivaji, Mumbai,	Delhi Indira Gandhi Intl,	02:25	04:25	Confirmed	001C		40K

9W2067	Tuesday, 19 Jul 11	I	Terminal 1 Delhi Indira Gandhi Intl, Delhi, Terminal 3	Delhi, Terminal 3 Chhatrapati Shivaji, Mumbai, Terminal 1	22:05	00:05#	Confirmed	001C	40K
9W242	Wednesday, 20 Jul 11	P	Chhatrapati Shivaji, Mumbai, Terminal 2	O R Tambo International Arpt, Johannesburg, Terminal A	02:05	07:40	Confirmed	007K	40K

Denotes Next Day Arrival

Flight 9W2237 - Operated By Jet Airways Konnect

Flight 9W2067 - Operated By Jet Airways Konnect

General Remarks

**** THANK YOU FOR BOOKING AT XL FLYWELL TRAVEL ****

Important Notice For Travellers With Electronic Tickets:

Carriage and other services provided by the carrier are subject to conditions of carriage, which are hereby incorporated by reference.

These conditions may be obtained from the issuing carrier.

Agent Details:

Nafisa Wadiwala

Travel Consultant

Tel: [+27 11 830 1500](tel:+27118301500)

Fax: [+27 86 680 9286](tel:+27866809286)

Email: jnb12@flywell.co.za

All transactions processed are subject to our Standard Terms and Conditions.

Rethabile Makhetha

From: Barbara Hogan <b.hogan2@me.com>
Sent: Monday, 08 October 2018 12:05
To: Rethabile Makhetha
Subject: Fwd: Please print out from Barbara

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: Fwd: kathy in India
Date: 07 June 2017 at 4:17:07 PM SAST
To: richpop@me.com

Hi Richard,

We flew to India on 15/07 2011, arriving in Mumbai 16/07/2011. We must have travelled on to Delhi that same night.

We left Mumbai on 19th July 2011 and arrived in South Africa on 20 July 2011. It appears that we travelled Jet Airways. We paid our own travel insurance for what that is worth!

It seems to be a trip to commemorate Madiba's birthday on 18th July and was organised by:

India International Centre
 Gandhi Peace Foundation
 South African High Commission
 United Nations Informatics Centre
 Working Group on Alternative Strategies.

best wishes,
 Barbara

Begin forwarded message:

From: "Sahm Venter" <Sahmv@nelsonmandela.org>
Subject: kathy in India
Date: 19 July 2011 at 10:02:08 AM SAST
To: "Ahmed Kathrada" <amkathrada@mweb.co.za>, "Barbara Hogan" <hogan.private@gmail.com>, "Neeshan Balton" <neeshanb@gmail.com>, "shaheda seedat-" <shadesseedat@gmail.com>

Students raise a toast to Mandela's spirit

Harsha Baruah, Hindustan Times

New Delhi, July 18, 2011


✉ Email to Author

First Published: 23:44 IST(18/7/2011)

Last Updated: 23:46 IST(18/7/2011)

Share more...

1 Comment

✉ Email  print

It was a highly insightful meeting that students from 18 schools in and around the Capital had on Monday with Ahmed Kathrada, a close associate of Nelson Mandela, South Africa's first black president and icon of the country's anti-apartheid movement. During his meeting with the members of GenY, which coincided with the worldwide celebrations of Mandela's 93rd birthday, the 81-year-old Kathrada touched upon a wide range of subjects which included his long stints behind bars lasting nearly 25 years for his role in the anti-apartheid movement and the role he played after his release from prison in 1990, including his role as a member of South African parliament. Kathrada, born in South Africa to parents who had migrated there from Gujarat, highlighted the struggle waged by the country's majority black and coloured communities against discrimination at the hands of the minority whites. Citing such an example, he said that black prisoners like Mandela had to wear short trousers while he, being an Indian, was made to wear long ones.

When he referred to his initiation to politics at the age of 12, curious students were eager to know what prompted him to take the plunge at such a young age. Kathrada replied: "I had friends whose parents were politically active. They sometimes used to give us work like sticking posters. That's what got me started."

Referring to a short phase when he and some companions made the transition from peaceful protest to militant struggle against apartheid, he explained, "We, at first, used passive resistance. But when they did not yield, we trained soldiers to make bombs and sabotage institutions that were symbols of apartheid. But we ensured that this was carried out in such a way that no one was hurt."

As to what motivated him during the struggle, he said, "Inside the jail, we were protected. No policeman was going to come and shoot us. It was our comrades outside who were being killed and tortured. Once, in a place called Soweto, 600 young students were killed. All this kept us motivated."

Kathrada also referred to the strong ties between India and South Africa, where Mahatma Gandhi had launched his Satyagraha in South Africa in 1906, and anti-apartheid campaigners like Mandela drew inspiration to fight inequality from the former.

Asked if Gandhi's brand of non-violence would work in today's world, where war and conflict seem to be the order of the day, he said, "We would not advise other

countries on the best course of action to resolve conflicts. But yes, we struggled through passive resistance, and we succeeded."

The interaction was preceded by the inauguration of an exhibition of paintings by the students of Blue Bells International School, and cultural programmes, including the recital of We Shall Overcome, in which the audience joined in.

The event was jointly organised by the India International Centre, the Gandhi Peace Foundation, the South African High Commission, the United Nations Informatics Centre and the Working Group on Alternative Strategies.

[more from this section](#)

Best,

Sahm Venter
Senior Researcher
Nelson Mandela Foundation
Tel: +27 11 547 5600
Fax: +27 11 728 1111
Web: www.nelsonmandela.org

**Nelson
Mandela**

By Himself

"The purpose of freedom is to create it for others."
-Nelson Mandela

Nelson Mandela

Rethabile Makhetha

From: Barbara Hogan <b.hogan2@me.com>
Sent: Monday, 08 October 2018 12:14
To: Rethabile Makhetha
Subject: Fwd: India Correspondence regarding July 2011 trip

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: India Correspondence regarding July 2011 trip
Date: 10 June 2017 at 12:02:06 PM SAST
To: richpop@me.com

Hi Richard,

I have been trying to find details of the trip you referred to. I found this correspondence in Kathy's papers. Zohra Areington was Kathy's PA and is also his niece.

Best wishes,
Barbara

Main Identity

INDIA J

From: "Zohra Areington" <zohra.areington@gmail.com>
 To: "amkathrada" <amkathrada@rweb.co.za>
 Sent: 11 July 2011 10:30 AM
 Attach: ATT00016.htm
 Subject: Fwd: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan

----- Forwarded message -----

From: Odhav, H : New Delhi First secretary <OdhavH@dirco.gov.za>
 Date: Mon, Jul 11, 2011 at 10:19 AM
 Subject: FW: Flight Reservation : Mr. Ahmed Kathrada & Ms. Barbara Anne Hogan
 To: Zohra Areington <zohra.areington@gmail.com>
 Co: "Balatseng, D : Delhi, Minister Counsellor" <BalatsengD@dirco.gov.za>,
 "Reynhardt, M : New Delhi Counsellor Multilateral" <ReynhardtM@dirco.gov.za>

Dear Zohra,

Below is the reservation for Dr Kathrada and Ms Hogan. As I had discussed with on the telephone, the Mission had stipulated that we would prefer a more time friendly routing and that they should depart on Friday evening, however the company that is assisting with this reservation indicated that this was the best that they could do. We have requested for the e-tickets and will mail it to you upon receipt.

2 * Business Class Tickets

Here is the itinerary for the Mr. Kathrada.

1.1KATHRADA/AHMEDMR - 2.1HOGAN/BARBARAANNEMS
 1. 9W 241 P 15JUL JNB BOM HK2 1100 2335 O
 2. 9W 2237 P 16JUL BOM DEL HK2 0225 0425 O
 OPERATED BY JET AIRWAYS KONNECT
 3. 9W 2067 P 19JUL DEL BOM HK2 2205 #0005 O
 OPERATED BY JET AIRWAYS KONNECT
 4. 9W 242 P 20JUL BOM JNB HK2 0205 0740 O

With Best Regards,
 Hema Odhav

Fax
 011 852-8786

2011/07/11

Rethabile Makhetha

From: Barbara Hogan <hogan.private@gmail.com>
Sent: Monday, 08 October 2018 18:04
To: Rethabile Makhetha
Cc: Peter Harris
Subject: Fwd: Story not worth following

Begin forwarded message:

From: Barbara Hogan <hogan.private@gmail.com>
Subject: Re: India Correspondence regarding July 2011 trip
Date: 10 June 2017 at 12:16:12 PM SAST
To: Richard Poplak <richpop@me.com>

Its interesting that it was from DIRCO staff and they appear to be quite coy about who was arranging the flights.

On 10 Jun 2017, at 12:09 PM, Richard Poplak <richpop@me.com> wrote:

Thanks Barbara

We've all agreed that this isn't a story worth pursuing. That said, I think it's interesting, and I want to thank you for following up on it. I'll let you know if you and Kathy pop up in any more emails or documents as more stuff becomes searchable.

Rich

Sent from my iPhone

On Jun 10, 2017, at 12:02 PM, Barbara Hogan <hogan.private@gmail.com> wrote:

Hi Richard,

I have been trying to find details of the trip you referred to. I found this correspondence in Kathy's papers. Zohra Areington was Kathy's PA and is also his niece.

Best wishes,
Barbara

See attached file(s)<170610115540.jpeg>

Time Line Transnet

November 2007

Public Service Commission (PSC) receives a tip-off about 212 locomotive tender irregularities at Transnet Freight Rail (TFR). Minister Erwin verbally refers the matter to GCEO at Transnet, Maria Ramos. (MR)

31 January 2008

Minister Erwin writes to the Chair of Transnet, Mr Fred Phaswana, regarding the allegations and requests an investigation. Transnet Internal Audit (TIA) is instructed to investigate.

First half of March 2008

Investigations commence.

During May 2008

Disciplinary Action instigated against the General Manager in Transnet Freight Rail, the person believed to be primarily responsible for the irregularities. He resigns.

During the course of the investigation it appeared that the CEO of TFR, Mr Gama had done the final sign off on a locomotive contract with a company called Sibambene Trade Services (STS) with on the strength of a Board Resolution, but that he had not complied with a *specific* condition of that resolution namely that Transnet Rail Engineering i.e. not STS would carry out all engineering on assembly and maintenance on the locomotives. This was to strengthen Transnet's engineering and maintenance in its engineering division.

18 September 2008

The GCEO of Transnet, Maria Ramos, receives an anonymous letter about irregularities with a security contract given to General Nyanda Security (Pty) Ltd. There are several further related follow-up tip-offs in the ensuing weeks.

2 October 2008

Ramos instructs Chris Wells, the Chief Financial Officer (CFO) and Vuyo Kahla, the Company Secretary, to investigate matters referred to in the anonymous letter. The matter is referred to Transnet Internal Audit and Ernest and Young get involved with a Mr Oates heading the team.²¹

21 November 2008.

Maria Ramos resigns as Group CEO (GCEO) of Transnet, effective end February 2009.

Board embarks on search for new CEO in close engagement with Minister of Public Enterprises, Bridget Mabandla.

26 November 2008

First meeting with Minister and Transnet delegation to discuss the search process for new CEO. Discuss criteria, process, time-lines etc.

Invite Minister to nominate possible names that can be added to the search. Emphasized that each short-listed candidate will be put through various professional and competency tests. (Saville and Holdsworth).

From 26 November 2008 to 25 March 2009

Extensive engagements ensued between Chair of Transnet and Minister Mabandla on CEO search.

9 December 2008

Chris Wells (CFO) puts his name forward as one of the candidates for CEO position.

10 December 2008

Meeting between Group Forensic Manager of Transnet Mr Naicker, Mr Oates, and Mr Gama to inform him of the coming investigation in respect of security tender and to hear his views.

12 December 2008

Chris Wells withdraws his candidature for CEO position before shortlisting took place. Shortlisted candidates included 2 internal candidates, one of whom was Mr Gama, and 3 external candidates.

9 – 11 February 2009.

Sub-committee of the Board, including the Chair, does CEO interviews.

On the last day, Minister Jeff Radebe, then Minister of Transport, and Minister Mabandla accidentally met up with the Chair of Transnet and Minister Radebe had sight of the list of names on the short-list on Minister Mabandla's instructions to the Chair.

On 12th February 2009,

Mr Oates of TIA forwards draft status report to Ms. Ramos at her request relating to both investigations, on locomotives and security tenders.

13th February 2009

At a closed meeting of *non-executive* directors, the Transnet Board agrees that only **ONE** candidate, Pravin Gordhan, is suitable for recommendation to the Minister based on the outcomes of the interviews, reference checks and competency assessments of all candidates. **There is no shortlist of other possible candidates.**, only Mr Gordhan. The other candidates were not considered suitable/ready for a job of this complexity, a fact corroborated by the professional tests and assessments that were done. Mr Gordhan was considered to be head and shoulders above the rest.

After the closed Board meeting M. Ramos briefed the Directors on the status of both forensic investigations. This was *after* the decision to appoint Mr Gordhan. Amongst other things, the Draft Report had identified concerns about Mr Gama's role and conduct in relation to each of the investigations.

20 February 2009

Pravin Gordhan withdraws as a candidate. A few months later he becomes the Minister of Finance after the General Elections of May 2009. Letter to Min Mabandla says that Transnet has engaged a second search agency to find a new candidate that may have been missed in the first round.

27 February 2009.

After private discussions between Chair and Minister, Transnet announces Mr Chris Wells (CW) is appointed the acting GCEO of Transnet and Anoj Singh , an employee at Transnet in Finance Division , the acting CFO.

02 March 2009

Minister Mabandla says that before they commence with the search she wants the profiles and a detailed report sent to her so that she can assess and respond comprehensively. If a new process is necessary then the criteria, profiles and recommendations of the Board of each candidate will be submitted to a **government panel**. She receives the Report. Various correspondences ensue between Chair and Minister on the matter, whereby Minister is also fully briefed about investigation of tender irregularities, which include Mr Gama.

25 March 2009

Mr Phaswana, Chair of the Transnet Board resigns with effect from 31 July 2009.

26 March 2009

Edward Nathan Sonnenberg (ENS) provides a legal opinion to the Board saying that the allegations against Mr Gama warrant disciplinary action.

22 April 2009

General Elections. ANC wins nationally.

23 April 2009

Board passes both of these investigations over to Mr Chris Wells, the acting CEO for follow up action.

10 May 2009

President Zuma is inaugurated as President of South Africa.

11 May 2009

I am sworn in as Minister of Public Enterprises.

29th May 2009

A second legal opinion from Bowman Gilfillan states that the issues are serious, Needed to be dealt with through an appropriate process which would give Mr Gama an opportunity to respond to the specific issues.

9 June 2009

I meet with a Transnet delegation led Mr Phaswana. They went ahead with a search for a new candidate as they could not ignore their fiduciary duties as a Board and "sit and wait and do nothing". Recommend Mr Sipho Maseko as their candidate for CEO position. He was the

18 June 2009

Wells puts allegations in writing to Gama requesting a written response. Gama asks for extension.

Mid-June

Brief President in full. He insists that Gama must be the GCEO.

Mid-July 2009

At DPE Preparations for AGM: 4 Board members standing down+CEO appointment.

Quorum is 10.;MOI allows 14

20 July 2009

Gama responds in writing to allegations.

29 July 2009

Min Hogan "Decision Memo to Pres. Zuma providing a comprehensive report of all Transnet and Gama related matters . Request President to approve appointment of Gama. No response.

24 August 2009

Formal charges are drawn up and handed over to Gama after considering his written responses.

27 August 2009

In a speech given at UKZN Minister Jeff Radebe "denounced the Transnet Board and the decision to suspend Gama as a "gross injustice." Sunday Times 30 August 2009

30 August 2009

Headline in Sunday Times 30 August 2009: "ANC Backs Suspended Transnet Boss Gama"

31 August 2009

Themba Langa Attorneys, on behalf of Gama, contest his suspension: letter cc'd to Min Hogan. Eversheds Reply. *

1 Sept 2009.

Transnet formally suspends Gama and a little later in the month he launches an application in the High Court to challenge his suspension.

2 September 2009

Randall Howard, the General Secretary of the South African Transport and Allied Workers Union (SATAWU) issues a statement in support of Gama.

"SATAWU will ensure that no puppet appointment takes place until the disciplinary process of Gama is completed even though at the cost of keeping the untransformed cabal in place a little longer. SATAWU is in the processto clean up the lily white Transnet Capital Projects....."

7 September 2009

SACP issues a statement in support of Gama .

"We wish to express serious concerns about what appears to be an attempt by certain elements within and outside Transnet to clearly frustrate the appointment of Mr Gama as CEO despite his illustrious career, commitment to public service and strong credentials."

11 September 2009

ANCYL issues a statement.

"Siyabonga Gama should be appointed a GCEO and business goes on as usual in Transnet. Any attempt to persecute and isolate him will be met with massive resistance from the youth of South Africa. The suspension of Gama is a with-hunt to block him from the GCEO position and should be immediately withdrawn."

13 September 2009

"Minister of Communications and ANC heavyweight General Sphiwe Nyanda says suspended Transnet executive is being persecuted in the same manner as Jacob Zuma." Sunday Times 13 September 2009

13 September 2009

[" The controversy over who is to become chief executive of Transnet is proving to be damaging to the parastatals and the individual who may get to occupy the hot seat. It has also become a political hot potato that could scorch Public Enterprises Minister Barbara Hogan.

" Barbara must go. She is still going to give us problems going forward.....an ANC National Working Committee said this week." City Press 13 September 2009.

13 September 2009

" The level of political interference at Transnet does not bode well for the effective management of parastatals.....The question of who is right and who is wrong is not for the ANC to determine. Neither is it terribly good practice to level the race card at the Board and the executive team at Transnet. The Board is diverseTheir reputations are being sullied and it will be little surprise if they walk in the next fortnight." Editorial City Press.

7 October 2009

Justice J Spilg dismisses Gama's application with costs in South Gauteng High Court.

"Paragraph 107 There is also no case made out of the perceived bias that can affect the legality of the process. Much less that of institutional bias.

13 January 2010 - 25 February 2010

Gama Disciplinary Hearings

31 January 2010

Themba Langa lawyers send Letter of Complaint from to Speaker about Hogan "bias " contained in an answer given by her in Parliament.

Sunday Argus 31 January 2010* "Hogan goes for Gama" or something to that effect.

Sunday Times 31 January 2010*

5 March 2010

Cassim Findings of Disciplinary Hearings Senamela and Khanye *

4 June 2010

Findings made in Gama Disciplinary Hearings (Antrobus)* Guilty on 3 Charges.

- EXCEEDING OF DELEGATED AUTHORITY IN APPROVING GNS CONTRACT.
- GAMA'S ALLEGED FAILURE TO COMPLY WITH THE BOARD STIPULATE CONDITION FOR THE 50 LIKE NEW CONTRACT
- UNWARRANTED CRITICISM OF TRANSNET EXECUTIVES

28 June 2010

Findings on Sanctions in Disciplinary Case. *

Gama dismissed on all three counts.

27 October 2010.

Cabinet Memo 9/2000 Requesting Approval for The Appointment of the Chair and new Non-Executive Directors for Transnet. MEMO WITHDRAWN By Cabinet Secretariat, after I have been through the same due processes as before. Phone-call with President, MEMO sent onwards to him, no reply, formal letter to him requesting permission to expedite, Cabinet Secretariat withdraw Memo.

31 October 2010

President Zuma removes me from Cabinet and offers me the Ambassadorship of Finland which I decline.

8 December 2010

Minister Gigaba gets Cabinet Approval for new Board at Transnet. On the Board is Iqbal Sharma.

STATEMENT OF BARBARA HOGAN

THE PURPOSE OF THIS STATEMENT

1. The purpose of this statement is to set out the reasons for my dismissal as the Minister of Public Enterprises as well as my experiences relating to the conduct of the former President of South Africa, President Jacob Zuma ("President Zuma"), in respect of his involvement in the affairs of State Owned Entities ("SOEs"), which I believe influenced President Zuma's decision to remove me from office.

PERSONAL HISTORY

2. I was born and schooled in Benoni, and I obtained an Honours degree in Development Studies from the University of the Witwatersrand.
3. I joined the African National Congress ("ANC") as an underground political activist in 1977. In 1979, I enrolled for a Master's degree focusing on unemployment in South Africa.
4. In 1981, I was detained and sentenced to ten years imprisonment, having been found guilty of high treason. During my incarceration, I enrolled for a Bachelor of Commerce degree and midway through my degree, I was released, a week after the ANC was unbanned on 9 February 1990.
5. In April 1990, I was appointed by the Interim Leadership Core of the ANC to sit on the Interim Leadership Committee ("ILC"), which was mandated to set up the structures of the ANC in Gauteng. I was later elected as the full-time

General Secretary of the Gauteng ANC, a position I held until the end of 1992.

6. In 1994, I was elected as an ANC MP in the National Assembly and served mainly on the Portfolio Committee on Finance (which I chaired from 1999 to 2004) and on the Standing Committee on Public Accounts. I also chaired the Audit Commission that oversaw the work of the Auditor-General.
7. I participated in the Finance Theme Committee that dealt with the financial aspects of the Constitution for the duration of the Constitutional Assembly, and I was later appointed to the Accounting Standards Board.
8. In September 2008, the former President of South Africa, President Kgalema Motlanthe, appointed me to cabinet as the Minister of Health.
9. In May 2009, following the national elections, President Zuma appointed me as the Minister of Public Enterprises and Mr Enoch Godongwana was appointed as the Deputy-Minister of Public Enterprises.
10. I served as the Minister of Public Enterprises until 31 October 2010, when I was removed from office by President Zuma. I have no knowledge of the reasons for my dismissal, as they were not explained to me. As such, I am only in a position to provide information relating to the events leading to my dismissal as the Minister of Public Enterprises, which are set out below.

SOEs FALLING UNDER MY JURISDICTION

11. A total of 9 (nine) SOEs and public entities fell within the jurisdiction of the Department of Public Enterprises ("DPE"), including Eskom, Transnet, SAA, SA Express, Denel, Infraco, PBMR, Alexkor, and SAFCOL.
12. The DPE also had several specialised units, which were headed mainly by Deputy Director-Generals under the supervision of a Director General - who

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at the time of my appointment was Ms Portia Molefe. The specialised units were responsible for the close monitoring of the SOEs that fell under the DPE's jurisdiction and would advise and report directly to me.

PRESIDENT ZUMA'S DIRECT INTERVENTION IN THE APPOINTMENT OF CHIEF EXECUTIVE OFFICERS ("CEOs") AT SOEs

13. President Zuma took a very active, and at times, inappropriate interest in who was to be appointed to the Boards of SOEs. I shall give two illustrations in relation to Eskom and Transnet.

Eskom

14. In 2009, Eskom's CEO, Mr Jacob Maroga ("Mr Maroga"), resigned during a Board meeting. Despite Mr Maroga's subsequent insistence that I reinstate him, I refused. Labour issues of CEOs in relation to their Boards fell outside my jurisdiction as the Minister, and also the Board of Eskom had unanimously refused his request for reinstatement after he had resigned.
15. President Zuma placed considerable pressure on me to persuade the Board to reinstate Mr Maroga. Finally on the day that the Board informed staff that Mr Maroga was leaving, President Zuma angrily phoned me to tell me to instruct the Board to cease this process immediately, just as the Board was about to address a press conference to communicate Mr Maroga's departure. The press conference was hastily cancelled, causing considerable embarrassment and huge press speculation about the actual employment status of Mr Maroga, and considerably diminishing the reputation of Eskom.
16. A while later, Mr Maroga returned to his office at Eskom in a much-publicised event, on President Zuma's instructions. On the same day, Mr Maroga released a letter to the Press, addressed to myself as Minister, which essentially stated that he was reinstated as CEO of Eskom at the behest of

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President Zuma and that, in future, he could be removed only with the approval of President Zuma. Under pressure, President Zuma was constrained to phone Mr Moroga to instruct him to immediately vacate his office in Eskom, saying he could only return with my approval.

17. Not only was President Zuma behaving inappropriately by actively intervening in matters that are essentially the prerogative of a Board, but it was also apparent that President Zuma had been privately meeting with Mr Maroga behind my back and finalising a deal with him without my knowledge or input. He exhibited no loyalty or honesty with a Minister in his Cabinet. Mr Maroga later sued Eskom and myself for R85million and lost with costs.

Transnet

18. President Zuma insisted that Siyabonga Gama ("Mr Gama"), an employee of Transnet, be appointed as the CEO of Transnet. At the time, there was an acting CEO. The Board had considered Mr Gama as a candidate but had nominated another excellent candidate to be CEO. Mr Gama was facing an inquiry regarding certain irregularities and the Board was also of the opinion that he was not yet CEO material. When I refused to put Mr Gama's name to Cabinet until the findings of the disciplinary process had been concluded, President Zuma prevented me from nominating both the Board's chosen candidate, as well as designating a new Chairperson of the Transnet Board, when the term of office of the latter expired. Transnet had to endure a considerable period of instability, having both an Acting Chairperson and an Acting CEO. Mr Gama was later found guilty on 3 out of 4 counts, each count warranting a dismissal, and was dismissed from Transnet.
19. Since my appointment, I, and my Deputy-Minister, refused to cooperate with President Zuma's inappropriate interference with the Boards of SOEs and his apparent disregard of proper corporate governance. I believe that our resistance to the interferences of President Zuma was one of the factors that lead to my removal from office and the assignment of the Deputy-Minister to another Department.

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PRESIDENT ZUMA'S DISREGARD FOR CORPORATE GOVERNANCE

20. High standards of corporate governance in SOEs are essential, not only for the good governance of the company and its investors and borrowers, but also for the proper functioning of the economy, given the strategic position in the economy of many SOEs. As such, Boards are expected to adhere to the highest standards of corporate governance as exemplified in the King Code of Corporate Governance.
21. The Shareholder's Agreements that govern the relationship between the DPE and SOEs empower the Minister to hold SOEs accountable by providing certain key performance areas and requiring Ministerial approval for certain decisions taken by the Board. As the Minister of Public Enterprises, I engaged with the SOEs on strategies, policies, financial and operating results. My engagements with the SOEs were always through the Board or the Chairperson. I would only engage with the CEO of a SOE on issues delegated to them by the Board.
22. As the Minister of Public Enterprises, I was responsible for the appointment of the Board of Directors and the Chairpersons of each SOE that fell under my jurisdiction. Unless otherwise stipulated in legislation or Memorandums of Incorporation, it was my strong view, in line with KING III, that CEOs are appointed and accountable to their Boards. The practice was that Boards provided the Minister of DPE with a recommendation for their preferred candidate/s for a CEO position, and the Minister takes their proposal to Cabinet for approval. Once appointed, CEOs should not go over the heads of their Boards to a Minister on their issues; nor should they lobby Cabinet Ministers, ANC structures or political leaders or, similarly allow themselves to be lobbied by outside nefarious interests. Regrettably, this standard principle of CEO accountability was not universally honoured, and CEOs

would sometimes by-pass Boards, and even Ministers, in pursuit of their objectives.

23. Political interference is extremely damaging to a SOE, because it disempowers the Board and Senior Management, often forcing them to constantly second-guess proposals and approvals. In addition, no political authority or civil servant has the entire skill set or the resources to manage SOEs on a day to day basis, or to provide the requisite strategic direction and leadership to the SOE. In corporatized SOEs there has to be a respectful delineation of powers and authority between the SOE and the Board and its Senior Managers, otherwise proper management and leadership will fail.
24. It is crucial that politicians and civil servants provide an enabling environment for SOEs to accomplish their work. However, the manner in which President Zuma conducted himself in relation to constantly interfering with executive appointments to SOEs reflected a deep lack of understanding and disregard for corporate governance.

PRESSURE TO TERMINATE SAA'S SOUTH AFRICA-MUMBAI ROUTE

25. In June 2010, I was part of an official State visit to India, led by President Zuma. Whilst I was there, I heard rumours that SAA intended to terminate its South Africa-Mumbai route. As such, I sent a text message to then Chairperson of the SAA Board, Cheryl Carolus ("Ms Carolus"), enquiring whether the rumours were true. Ms Carolus responded to my text message, stating that the rumours were untrue, saying it must be Jet Airways still lobbying for this. However, it should be noted that during my India visit, the Chairperson of Jet Airways was persistently following me around, trying to meet with me. I declined to engage with him as I did not have the authority to make any business decisions on behalf of the SAA Board.
26. In August 2010, Ms. Carolus sent me another text message informing me that the CEO of Jet Airways was in South Africa and would be lobbying for

SAA to end its Mumbai flight, and that SAA rejected this. She also requested me to inform her if the CEO of Jet Airways requested to meet with me, so that I could be briefed accordingly. In October 2010, I was removed from office by President Zuma. My successor, Malusi Gigaba, later cancelled SAA's Mumbai flight.

CONCLUSION

27. In the circumstances, I am unable to provide definitive reasons for my removal as the Minister of Public Enterprises; however, the information set out herein serves to highlight some of the events leading up to my removal from office, as well as the inappropriate conduct of President Zuma in addressing issues relating to the governance of the DPE and the SOEs for which it was responsible.

Dated at JOHANNESBURG on this 30th day of July 2018.


BARBARA HOGAN