



EXHIBIT BB 16

**SIYABULELA XHANTI
MAPOMA**



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

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**IN THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING
ORGANS OF STATE**

AFFIDAVIT

I, the undersigned,

SIYABULELA XHANTI MAPOMA

do hereby state under oath and say:

1. I am an adult male, and an advocate in private practice. In that capacity I am a member of the Bhisho Society of Advocates and the Mthatha Bar.
2. The facts contained herein are both within my personal knowledge and belief, save where the context indicates to the contrary, and are both true and correct.
3. I started working at Transnet on 1 February 2007 as a Legal Advisor: Litigation and Administrative Law. Later I was appointed as the General Manager: Group Legal Services, which position I occupied from 1 September 2008 to 31 January 2012. I was based at the Carlton Centre, Johannesburg, which was the 'head office'



of Transnet at the time. I resigned from Transnet to do pupillage at the Johannesburg Bar, after which I have been in practice since.

4. I occupied other positions of responsibility at Transnet during my time there. I was a member of the Transnet Forensic Working Group (a Sub-Committee of the Group Internal Control Committee); I was a member of the Crisis Committee (a committee under Group Risk); I chaired the Transnet Acquisition Council for some time (I am not sure if this is the correct name of the Committee); I also acted as CEO of Autopax (Pty) Ltd, (then a subsidiary of Transnet) for about eight months, managing the transfer of Autopax to PRASA (doing both my duties as a General Manager and Acting CEO of Autopax at the same time); I was also Trustee of Transmed and a Board member of Comazar (Pty) Ltd, a company that Transnet had an interest in. I might have been in one or other committee that I have forgotten now.
5. I initially reported to Mr Vuyo Kahla, a member of the Group Executive Committee ("EXCO") during the time that Ms Maria Ramos was the CEO, and later when Mr Chris Wells acted as Group CEO. When Messrs. Kahla and Wells left Transnet Ms Zola Stephen replaced Mr Kahla, and then I reported to her.
6. I have been requested by the Judicial Commission of Enquiry to provide a full account of my involvement in the matter between Mr Gama and Transnet, including such instructions as I may have received, and all I know about how it



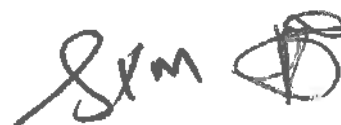
came about that Mr Gama's unfair dismissal dispute was settled on the terms on which it was settled. The request came through a letter I received on 30 July 2020, dated 23 July 2020 (see paragraph 2 of the letter). The letter itself is attached to this affidavit as Annexure "A".

7. Paragraph 2 of the letter from the Judicial Commission also states:

"In this regard it seems prima facie strange that Transnet agreed to not only reinstate Mr Gama despite him having been found guilty of three serious acts of misconduct but also that he was to be paid his full back pay and Transnet was to pay 75% of his unsuccessful High Court application and 75% of his costs relating to his unfair dismissal dispute. It would seem that Transnet abandoned its costs that the High Court had ordered Mr Gama to pay Transnet"

8. Attached to such letter was a copy of a Draft Settlement Agreement, dated 23 February 2020, where I witnessed the signature of Mr Mafika Mkhwanazi, who at the time, was both Acting Chief Executive Officer and Chairman of Transnet SOC Ltd (Transnet). The Draft Settlement Agreement is attached to this affidavit as Annexure "B".

9. My recollection of the events of the time might not be as accurate as one would have liked, but I will state out the facts as I recall them from memory. In particular I might be mistaken about the sequence of events. I acknowledge I might be required to provide a supplementary affidavit when more documentary evidence in re the events comes to my possession. I have none at the moment.

A handwritten signature in black ink, appearing to be 'SXM' followed by a stylized circular flourish.

10. Initially when the disciplinary hearing of Mr Gama was initiated the matter was dealt directly by Mr Kahla. I was not involved at all. The reasoning, as I understood it at the time, was that Mr Gama was an EXCO member and it was not deemed appropriate that a junior employee should be directly involved. However I know that Mr Brian Biebuyck, then of Routledge Modise Attorneys (now known as Hogan Lovells) was initially consulted.
11. However, I was later informed that Mr Chris Todd of Bowman Gilfillan Attorneys (now known as Bowmans Attorneys) handled the disciplinary matter. The latter attorneys had somewhat of a monopoly on labour matters at Transnet. The Human Resources Department at Transnet at the time, under Sue Albertyn, managed all labour related litigation and almost exclusively briefed Bowman Gilfillan Attorneys for all such labour matters. They flatly refused to use other attorneys on the Transnet panel, despite all my protestations and interventions I sought from my superiors at the time.
12. Coming to the issue at hand. Mr Mkwanazi came on board after Messrs. Kahla and Wells had left. My involvement with Mr Gama's matter came only after Mr Mkwanazi joined Transnet. Mr Gama had laid a complaint with the Public Protector. As was the case with other matters where complaints were laid with the Public Protector against Transnet, the matter was brought to my office to prepare a response from Transnet. In doing so, as I recall, I engaged the services of Mr Sbu Gule, at Norton Rose Attorneys (I think they were still called Deneys Reitz

Handwritten signature and initials in black ink.

Attorneys at the time) to assist with the response. We also engaged the services of Adv Dumisa Ntsebeza SC to assist.

13. Mr Mkwanazi took some interest in the matter. I saw nothing untoward about that as Mr Gama had been an EXCO member of Transnet and there were some serious allegations made about Transnet which Mr Mkwanazi, (fairly new at the time) naturally had to have an interest in. I think the matter was also receiving fair media attention at the time. I kept him Mr Mkwanazi briefed on the developments. We ultimately provided the response to the Public Protector and I don't know what happened to the complaint.

14. Around about the same time (either before or after the complaint to the Public Protector) Mr Gama also referred his dismissal to the Bargaining Council. I took no part in the Bargaining Council litigation.

15. I was then advised by Mr Mkwanazi that the Board had decided to reinstate Mr Gama, and I should assist him (Mr Mkwanazi) to do so. Mr Mkwanazi initially did not give me any details about the reinstatement. I came to know about that later. I must mention that at this time, I was reporting to Ms Stephen as Mr Kahla had already left. I advised Ms Stephen of the development, i.e the reinstatement of Gama. Ms Stephen was already aware and indicated (at least to me) that she had no problem with Mr Mkwanazi working directly with me on the matter.



16. Indeed Mr Mkwanaazi engaged me on many other issues not related to Mr Gama where he wanted information and documents etc, and explanation/s on certain decisions that were taken before his time and where I could assist him I did so. I am sure he did so with other employees as well. When Mr Mkwanaazi came in, he was Chairman of the Board and Acting CEO.
17. Initially when Mr Mkwanaazi first mentioned the matter of Mr Gama to me the Board had not taken any decision yet to reinstate Mr Gama, hence Mr Mkwanaazi could not share any details with me. Later when the Board made the decision Mr Mkwanaazi advised me that I needed to assist him in implementing the Board decision regarding Mr Gama's legal fees which had to be paid back. I requested a copy of the Board Resolution to that effect. I was provided with a Board excerpt that related only to the fees of Mr Gama.
18. Before anything could be done by Group Legal, as I was not aware how much was to be paid as Mr Gama's fees, at some time Mr Mkwanaazi invited me to an EXCO meeting that was to be held outside the office at some resort in the Magaliesberg Area (again I might not be accurate as the exact location area) where Mr Gama's matter was on the agenda.
19. During a break Mr Mkwanaazi briefed me that Mr Gama was to be reinstated and that we have to meet Mr Gama. Later Mr Mkwanaazi asked me to accompany him to meet Mr Gama at Inanda Estate on a day which was a weekend. I am not sure



if it was a Saturday or Sunday. The meeting happened between Mr Gama and Mr Mkwanzai. I waited for them to finish. There was nothing to do after this meeting as apparently Mr Gama and Mr Mkwanzai could not reach consensus on the terms of the reinstatement. According to Mr Mkwanzai at the time, Mr Gama wanted to be reinstated as CEO of Transnet and Mr Mkwanzai was not agreeing to that condition. They also could not agree on the issue of the fees that had to be repaid.

20. I advised Mr Mkwanzai that whatever terms he agreed with, in his negotiation with Mr Gama in his capacity as CEO (implementing the Board decision), he should take it to the Board for approval. In my view at the time, what Mr Gama wanted, to be appointed CEO, was tantamount to asking Mr Mkwanzai to employ him in that position, which Mr Mkwanzai had no authority to do, either in his capacity as Acting CEO or as Chairman of Transnet.

21. In any event my assistance was required in the implementation of the payment of legal fees because apparently someone had decided that the legal fees should come from the Group Legal's budget, which budget was under my control, the reasoning being that since its legal fees being paid, and therefore attorneys and advocates being paid, the money should be paid from my budget. My protests that that the money should come from HR, from Sue Albertyn's budget, came to nothing.

Handwritten signature "Sxm" in black ink, followed by a circular stamp that appears to be a signature or initials inside a circle.

22. Subsequently I received a 55 (fifty five) page document from Mr Themba Langa, Mr Gama's attorney, purporting to be the legal costs of Mr Gama that had to be paid back. I perused the document and realized that it had many faults. There were duplications, false calculations of kilometers, charged hours of counsel for consultations not matching with those of the attorney, and other issues I cannot not recall. I discussed this with Mr Gule. At some stage Mr Gule and I visited Mr Langa's offices to discuss the fees. We did not agree on the issues. At some stage we decided with Mr Gule to write Mr Langa a letter saying he must choose a cost consultant of his choice to tax the bill as I simply was refusing to pay it as it was.
23. The other thing is that Mr Langa no longer wanted Transnet to pay 75% of the bill, which was my instruction, but wanted Transnet to pay the whole amount, which was more than R12 million (twelve million rands). To start with, I found this amount ridiculous as fees for a disciplinary hearing and told Mr Langa in no uncertain terms that I will not pay it. Further I argued that Mr Gama had been disciplined for failing to comply with a Board instruction, and I therefore did not understand how he could expect me to pay his total untaxed legal bill, contrary to the Board instruction.
24. At some stage I indicated to Mr Langa that I would report him to the Law Society for overreaching. During this period there were several telephone calls and email correspondence discussing the bill after my refusal to pay. The heat was on. I later received a letter from Mr Langa hurling all sorts of insults at me, accusing me of



anti-transformation, refusing to assist black people, having a cushy job that made think I was better and so on. I cannot recall the exact words. When the letter was received Mr Gama was already back at work.

25. At about the same time the Public Protector wrote a letter to Transnet asking who was dealing with the enquiry from her office, as I had resigned. At this time I had not resigned, nor even thinking about it. I followed that up, and it turned out that someone had peddled false information that I was no longer at Transnet.

26. Sometime during this period, I received two or three calls from Mr Siyabonga Mahlangu, who at the time was working as a Legal Advisor to the Minister of Public Enterprises, Mr Malusi Gigaba MP. I am certain he called me more than once. He would call in the evenings, and as luck would have it, every time when I was on my way home. I had known Mr Mahlangu since his time as an attorney and partner at Mahlangu, Nkomo, Mabandla and Ratshimbilani Attorneys before they merged with Edward Nathan Sonnenbergs Attorneys. He would visit Transnet and come to my office as his firm of attorneys was on the Transnet panel. I must mention that he was friends with a certain gentlemen, younger than me, but whose family I know very well from the Eastern Cape, who had been with him at university. I never met Mr Mahlangu socially though we were familiar with each other.



27. Mr Mahlangu called and put pressure on me to finalise the reinstatement of Mr Gama, accusing me of causing the delay, telling me 'No. 1' wanted to get it done quickly. He never mentioned any name. He stopped calling me when I sternly told him to stop calling me, and that I did not report to him, nor to the Minister, nor to No. 1, and that I was assisting Mr Mkwanazi to implement the Board decision, and I told him never to call me again.
28. I told Mr Mkwanazi about this situation the following morning as I was anticipating that the Minister might call him and report that I had spoken in an unbecoming manner to his legal advisor. Such was my last conversation with Mr Mahlangu that I anticipated some talking to from my superiors at the time. In any event Mr Mahlangu never called again and I have not spoken to him since.
29. I recall the agreement (Annexure 'B') at the time I had to witness Mr Mafika's signature. The other signatures I recognize are that of Ms Stephen and Debbie van der Walt, the latter who was Ms Stephen's PA at the time as witnesses to Mr Gama. I don't recall seeing Mr Gama signing the document. In fact I have never spoken to him, except the obligatory greeting when we met. I would have seen Mr Mkwanazi sign it. From the document it appears that they signed on different days.
30. I brought the letter from Mr Langa to the attention of Ms Stephen. I indicated to her that the letter was written on behalf of Mr Gama, and as such it was Mr Gama,



an EXCO member, who was insulting me. Her reaction was to laugh and say nothing. I asked Ms Stephen to intervene on my behalf and talk to Mr Gama about it. I don't know if she did so as I never engaged her again about the matter. Her reaction when I showed the letter to her made me realise I would be wasting my time to engage her any further on the matter. So I left it at that. However I showed it to my colleagues at my office at the time.

31. After the letter I was visited at different times at my office by Ms Cleopatra Shiceka and Kenny Diedricks, who were both working at Transnet Freight Rail at the time, both who came to enquire about Mr Gama's legal fees that I was refusing to pay. I also explained my reasons to them.

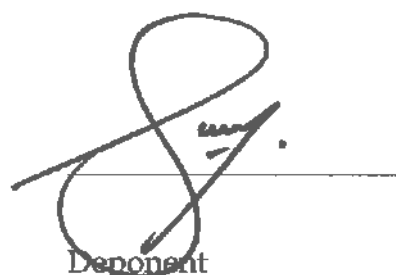
32. Mr Molefe was then appointed as CEO. He never asked me about the legal fees of Mr Gama. The only matter Mr Molefe engaged me on relating to Mr Gama was the response to the Public Protector.

33. In as far as the terms of the agreement for reinstatement of Mr Gama, I did not negotiate them, and I was not party to their negotiation. I advised Mr Mkwana, which advice I think he took, that all the terms of the agreement should be approved by the Board. I always assumed that all the term of the agreement were approved by the Board at the time.



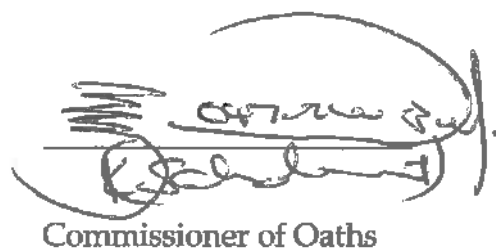
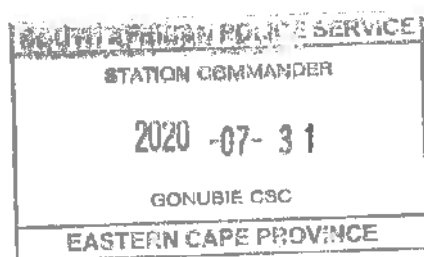
34. The only thing Mr Mkwana asked to me assist was the implementation of the agreement in as so far as it concerned the payment of the legal costs of Mr Gama, which ultimately I did not pay for the reasons set out above.

35. When I left Transnet the legal fees of Mr Gama had not yet been paid. Further, when I Transnet I had not approved such payment.



Deponent

Thus signed and sworn to before me at Gautier on this 31 day of July 2020, the deponent having acknowledged that she knows and understands the contents of the affidavit, which are true and correct and that she has no objection in taking the prescribed oath, which she considers to be binding on her.



Commissioner of Oaths

"A"



2nd Floor, Hillside House
17 Empire Road
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email: info@commissionsc.org.za
Website: www.commissionsc.org.za

**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

Date: 23 July 2020

Our reference: Ms Farrhah Khan

Email: farrhahk@commissionsc.org.za

Advocate Siyabulela Mapoma

By Email: advocate@siyabulela.co.za

Dear Sir

Request for Affidavit or Affirmed Declaration

1. I refer to the telephone conversation that you have recently had with Ms Farrhah Khan of the Office of the Chairperson of the Commission.
2. I confirm that part of the Commission's investigation relates to a settlement agreement concluded between Transnet and Mr Siyabonga Gama in February 2011 in terms of which Mr Gama, who had been dismissed as CEO of TFR at Transnet in June 2010, was reinstated to that position. For your convenience I attach a copy of that agreement to this letter marked "A".
3. I have been directed by the Chairperson of the Commission to request you to depose to an affidavit or an affirmed declaration in which you give a full account

of your involvement in the matter between Mr Gama and Transnet including such instructions as you may have received and all you know about how it came about that Mr Gama's unfair dismissal dispute was settled on the terms on which it was settled. In this regard it seems *prima facie* strange that Transnet agreed to not only reinstate Mr Gama despite him having been found guilty of three serious acts of misconduct but also that he was to be paid his full backpay and Transnet was to pay 75% of his unsuccessful High Court application and 75% of his costs relating to his unfair dismissal dispute. It would also seem that Transnet abandoned its costs that the High Court had ordered Mr Gama to pay to Transnet.

4. It will be highly appreciated if you would furnish the Commission with your affidavit or affirmed declaration on or before 29 July 2020.
5. Your kind co-operation will be highly appreciated.

Yours sincerely



MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud in the Public Sector including Organs of
State



"B"

DRAFT

"A"

IN THE TRANSNET BARGAINING COUNCIL

In the matter between:

SIYABONGA GAMA

APPLICANT

and

TRANSNET LIMITED

RESPONDENT

AGREEMENT OF SETTLEMENT

IT IS AGREED:-

1. DEFINITIONS

- 1.1 In this agreement, the following words shall have the meanings assigned to them hereunder, unless the context indicates otherwise:-
- 1.1.1. "Mr. Gama" means: Mr Siyabonga Gama;
- 1.1.2 "Transnet" means: Transnet Limited, registration number 1990/000900/06;
- 1.1.3. "the parties" means: both Siyabonga Gama and Transnet Limited;
- 1.1.4. "TFR" means: Transnet Freight Rail;

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2. PREAMBLE:-

- 2.1. An unfair dismissal dispute has arisen between the parties following the dismissal of Mr Gama as Chief Executive Officer (CEO) of TFR on 29 June 2010.
- 2.2. Mr Gama has referred an unfair dismissal dispute to the Transnet Bargaining Council. It is in respect of such unfair dismissal dispute that the parties have engaged in settlement discussions.
- 2.3 The parties have agreed to settle the dispute between them amicably without the need to resort to further litigation.
- 2.4 The agreement reached between the parties is on the terms and conditions set out hereunder.

3. NOW THEREFORE IT IS AGREED THAT:-

- 3.1. Mr. Gama return to Transnet, with effect from 23 February 2011 and he is to resume duties as CEO of TFR on 1 April 2011.
- 3.2. Any employment benefits that were due to him for the intervening period of 30 June 2010 to 23 February 2011 in terms of his employment contract shall be deemed to be fully restored.
- 3.2.1 The full restoration of benefits entails the following:
- 3.2.1.1 payment of Mr Gama's short term benefits which were due to him in the intervening period of 29 June 2010 to 23 February 2011, and payment thereof to be made by no later than 31 March 2011.
- 3.2.1.2. payment of Mr. Gama's long term benefits which were due to him in the intervening period of 29 June 2010 to 23 February 2011, and payment

thereof to be made by no later than 31 March 2011

3.2.1.3 restoration of Mr Gama's salary for the intervening period of 29 June 2010 to 23 February 2011, and payment thereof to be made by no later than 31 March 2011.

3.2.1.4 The aforesaid payments shall be made into the following bank account:-

S Gama
Standard Bank
Briardene Branch
Account number . 250 768 585
Branch code: 043626

- 3.3. Mr Gama is deemed to have served the six months Final Written Warning. The Final Written Warning will be deemed to have been effective from 29 June 2010 to 29 December 2010.
- 3.5. Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council.
- 3.6. Transnet undertakes that such contribution towards the legal costs incurred by Gama will be made within a period of 14 days after submission by Gama of the relevant supporting documents.
- 3.7. The parties have agreed to formulate and present a common statement to the media in regard to the resolution of this matter.
- 3.8. Upon signature of this agreement, by both parties, it shall be deemed that all the respective consents required and authority needed to sign this agreement had been duly



obtained and exercised.

4 CONFIDENTIALITY

- 4.1 The parties to this agreement shall keep the terms of the agreement confidential and shall not disclose such terms to any third party, other than with the express written authority of the other party, save where such disclosure is required by law or in order to enforce the provisions of the agreement.

5. FULL AND FINAL SETTLEMENT

- 5.1 All the payments made and received herein are in full and final settlement of all and any claims Mr Gama may have against Transnet, whether such claims arise out of the termination of the contract of employment or employment relationship, or whether such claims arise in contract, delict, in terms of any statutory enactment, due to the award of any tribunal or body or otherwise, irrespective of whether any such claim would ordinarily arise in terms of the law of the Republic of South Africa or elsewhere.
- 5.2 Mr Gama agrees that Transnet has, subject to the discharge of its obligations in terms of this agreement, discharged all and any legal obligations that it may have towards him as a result of his employment relationship with the Company, its termination and/or any subsequent award, and that he has no other claim against Transnet arising out of the employment contract.
- 5.3 Nothing in this agreement shall be construed as constituting any admission by Transnet of any liability whatsoever to Mr Gama other than specifically contained in this agreement.



AGREEMENT OF SETTLEMENT

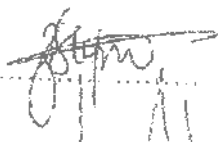

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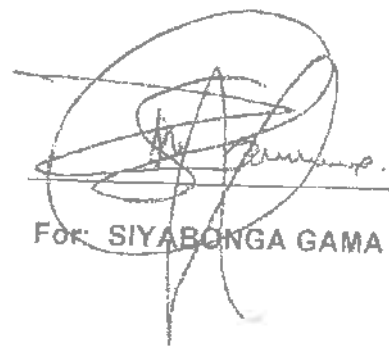
6. GENERAL

- 6.1 This agreement constitutes the entire agreement between the parties.
- 6.2 No party is bound by any representation, warranty, promise or the like not recorded herein.
- 6.3 No addition, variation, amendment or alteration of this agreement will be of any force or effect unless reduced to writing and signed for by or on behalf of the parties.
- 6.4 The parties agree that the terms of this Settlement agreement are in final settlement of any claims and disputes, which each party to the agreement may have against the other in respect of Mr Gama's employment as CEO of TFR.
- 6.5 This agreement shall be deemed to have the full force and effect in a manner that is equal to any order made by a court of law. This agreement shall be presented to the arbitrator to be made a final award between the parties.

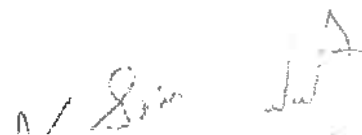
THUS DONE AND SIGNED AT Johannesburg on this the 23 day of February 2011

AS WITNESSES:

1 
2 


For: SIYABONGA GAMA





AGREEMENT OF SETTLEMENT

PAGE 6

THUS DONE AND SIGNED AT JOHANNESBURG on this the 23rd day of February 2011


AS WITNESSES:

1.

2.


FOR: TRANSNET LIMITED
Chairman, Duly Authorised





**IN THE JUDICIAL COMMISSION OF ENQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING
ORGANS OF STATE**

AFFIDAVIT

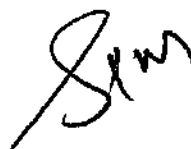

I, the undersigned,

SIYABULELA XHANTI MAPOMA

do hereby state under oath and say:

1. I am an adult male, and an advocate in private practice.
2. The facts contained herein are both within my personal knowledge and belief, save where the context indicates to the contrary, and are both true and correct.
3. I previously submitted an affidavit to the Judicial Commission, which I deposed to on 31 July 2020. At paragraph 9 of that first affidavit I stated as follows:

"9. My recollection of the events of the time might not be as accurate as one would have liked, but I will state out the facts as I recall them from memory. In particular I might be mistaken about the sequence of events. I acknowledge I might be required to provide a supplementary

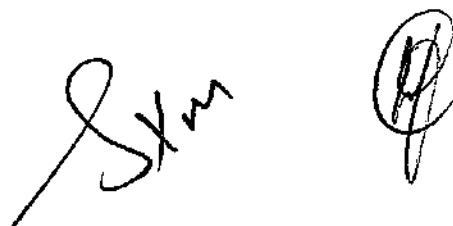
 

affidavit when more documentary evidence in re the events comes to my possession. I have none at the moment."

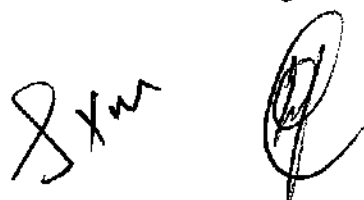
4. I have now received two affidavits from the Judicial Commission, one from Makwena Pertunia Mohlabi ("Mohlabi"), the Group Company Secretary of Transnet SOC Ltd (with several annexures), and one from Siyabonga Mahlangu ("Mahlangu"), and have been asked to comment thereon. I deal with both affidavits below.

The Mohlabi Affidavit

5. The Mohlabi affidavit, in particular its annexures, assists my recollection on the sequence of events, mainly that Mahlangu would have called me before the Settlement Agreement between Mr Gama and Transnet, dated 28 February 2011; that the demand for payment by Langa Attorneys occurred after the latter date; and that I authorized payment to Langa Attorneys of various amounts, which I explain below.
6. The information sought is about payments related to (a) the unsuccessful High Court application by Mr Gama, and (b) costs relating to his unfair dismissal dispute. In my first affidavit I dealt with the second issue, that of payments in relation to his unfair dismissal dispute.





7. In the High Court application Mr Gama had sued all the Board members of Transnet, who had opted to be defended by different legal firms. The costs reflected in Annexure MP2 of the Mohlabi Affidavit relate to payments made to Langa Attorneys, which payments were the legal costs of Mr Gama in the High Court Application
8. These legal costs were supposed to be paid by Mr Gama to Transnet (i.e to Bowman Gilfillan Attorneys and Eversheds Attorney who had represented some of the Board members in the High Court application), but the Board had decided that Transnet would make a contribution 75% of taxed legal costs incurred by Mr Gama in the High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council.
9. Simply put, Transnet was to pay to Mr Gama what it was supposed to recover from him as its costs in the High Court application (and in the Transnet Bargaining Council). I cannot explain the logic behind the Board Decision. I was not party to it and was not there when it was taken. However, I actioned it as instructed. I also refer the commission to the hand written notes (dated 28 March 2011) I made at the time on the two bills (one from Bowman Gilfillan and one from Eversheds).
10. I would have discussed the matter with Mr Anoj Singh at the time as my note states. However I don't recall the details of that conversation. The Commission is also referred to the memorandum I wrote to Mr Singh, dated 23 March 2011, where



I recommended payment to be made as per the settlement agreement in respect of the High Court Application, which was also recommended by my immediate supervisor at the time, Ms Stephen and approved by the then CEO Mr Molefe.

11. At paragraph 22 of my first affidavit, I stated that I subsequently received a 55 page document from Langa Attorneys, purporting to be the legal costs of Mr Gama that had to be paid back. I no longer have a copy of this document. As I recall, it sought costs for the disciplinary matter at the Transnet Bargaining Council, which were in excess of R12m. I am certain that this document was received, even if the Commission has not yet received it.
12. At this juncture I refer the Commission to Annexure MP 7 of the Mohlabi Affidavit. In paragraphs 6 – 10 of the memorandum I wrote (dated 17 August 2011), I explain to Mr Molefe how the payments to Langa Attorneys were made. This is after Mr Molefe had received a complaint from the Department of Public Enterprises ("DPE") about Transnet's alleged refusal to pay as agreed. As will be seen from the first page of Annexure MP 7, Mr Molefe asked me to draft a response for him to the DPE. The reference to 'Saks' is to me. I am commonly known as 'Saaks'.
13. I would have drafted the response Mr Molefe wanted. I note from the hand written note that my draft was amended after Mr Molefe consulted my immediate supervisor (who would have been copied on my draft). I stand by the correctness of the memorandum I wrote at the time. I also reiterate that I don't recall Mr Molefe



asking me or putting me under any sort of pressure to effect the payment, (neither did Mr Mkwanaazi).

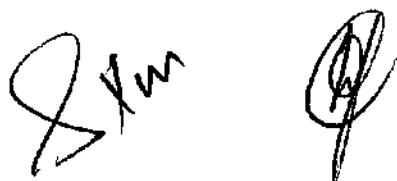
14. In paragraphs 8 - 10 of the memorandum to Mr Molefe, I explain how payment was done in respect of the Mr Gama's legal costs in relation to the Transnet Bargaining Council matter. After such payment, as explained in the memorandum, Mr Langa continued to ask that we pay the whole amount, and the pressure from other people continued. I would have been after such payment that a complaint was made to the DPE.

15. In paragraph 35 of the first affidavit I stated the following:

"35. When I left Transnet the legal fees of Mr Gama had not yet been paid. Further, when I [left] Transnet I had not approved such payment."

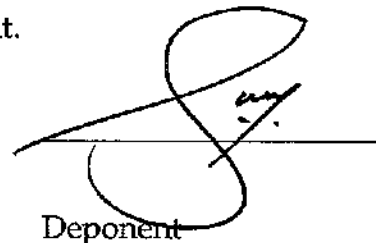
16. When I so stated I was referring to any further payment that might have been made in respect of legal fees, over and above what is reflected in the memoranda annexed to the Mohlabi Affidavit. Any further payment would have been made without my knowledge or after I left Transnet.

17. The documents annexed to the Mohlabi Affidavit have assisted in my recollection. If there are other documents relating to the matter I would appreciate copies of the same to assist further where deemed necessary.



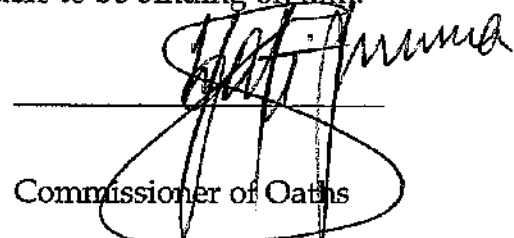
The Mahlangu Affidavit

18. I take note of the contents of Mahlangu's affidavit. I acknowledge that I referred to him as a legal advisor to the Minister and should have correctly referred to him as a Special Advisor. I meant no disrespect to his portfolio. It was a genuine error on my part.
19. However, I expressly deny its contents where he disagrees with the averments I made in my first affidavit. If he denies or does not recall there is nothing much I can do about that. In any event, on the issue at hand, the payment of the fees, Mr Mahlangu never interacted with me.
20. I therefore stand by the contents of my first affidavit.



Deponent

Thus signed and sworn to before me at *EAST London* on this 31st day of **August 2020**, the deponent having acknowledged that he knows and understands the contents of the affidavit, which are true and correct and that he has no objection in taking the prescribed oath, which she considers to be binding on him.



Commissioner of Oaths

LINDILE FALITHENJWA
PRACTISING ATTORNEY
COMMISSIONER OF OATHS
9 SCHERWITZ ROAD
BEREA
EAST LONDON

**IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE
CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING
ORGANS OF STATE ("THE COMMISSION")**

AFFIDAVIT

I, the undersigned,

SIYABULELA XHANTI MAPOMA

do hereby state under oath:

1. I am an adult male, and an advocate in private practice.
2. The facts contained herein are both true and correct, and unless the context indicates otherwise, within my personal knowledge and belief.
3. I have already deposed to two affidavits that are before the Commission – the first on 31 July 2020 and the second on 31 August 2020.
4. In preparation for me giving evidence before the Commission on 14 October 2020, I held a consultation with a member of the Transnet stream's legal team and investigation team, respectively, on the afternoon of 7 October 2020. Following the consultation, I was invited to put up this further affidavit, which deals with two things: new documents; and the payment of Mr Gama's legal fees.

NEW DOCUMENTS

5. During to consultation referred to above, I was provided with three documents: a Deneys Reitz consultation note dated 22 January 2010 (annexure **SM1** hereto); an email that I sent to Deneys Reitz on 14 February 2011 together with an attachment (annexure **SM2**

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hereto); and an email that Deneys Reitz sent to me on 15 February 2011 together with an attachment (annexure **SM3** hereto).

6. In relation to annexure **SM1**, I confirm that I attended the meeting and that the note is an accurate reflection of what transpired. In particular, I confirm that Mr Mkwanazi stated what is recorded in paragraph 4 of the note at the outset of the caucus.
7. In relation to annexure **SM2**, I confirm that I sent the email (and attachment) to Deneys Reitz in order for them to finalise / settle the attachment, which I drafted at the request of Mr Mkwanazi in preparation for the board meeting on 16 February 2011. In relation to paragraph 7 of the attachment, Mr Mkwanazi himself had requested me to insert the sentence reading: *"The Chairman of the Board, with the support of the Shareholder Minister has within his rights and obligations decided to revisit the matter of the disciplinary proceedings against Mr Gama."*
8. I mention in this regard that from the outset of my interactions with Mr Mkwanazi, he made it clear to me that he had been instructed to reinstate Mr Gama, and that he wanted to find a way to do so "*cleanly*". Although I did not consider it my place to ask who had instructed him, I assumed that it must have been former President Zuma.
9. In relation to annexure **SM3**, I confirm that I received the email and attachment from Deneys Reitz, with the attachment having been finalised / settled by them. It will be noted that Deneys Reitz added new paragraphs 10 and 11.
10. Following receipt of the settled document, I passed it on to Mr Mkwanazi, with it always having been my understanding that he intended to table it (as his view) at the board meeting on 16 February 2011. However, I do not know whether he did so.

PAYMENT OF LEGAL FEES

11. Clause 3.5 of the settlement agreement (annexure **B** to my first affidavit) reads:

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"Transnet will make a contribution equivalent to 75% of Mr Gama's taxed legal costs incurred during Gama's High Court application and in respect of his unfair dismissal dispute referred to the Transnet Bargaining Council."

12. I wish to clarify the following.

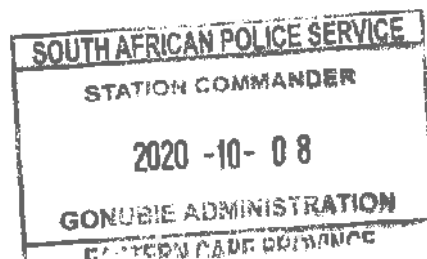
- 12.1 Two payments were made to Langa Attorneys while I was at Transnet. Firstly, they were paid R1 016 564.90 on 28 March 2011, being 75% of the taxed costs incurred by Transnet (with Bowman Gilfillan and Eversheds) in the High Court litigation. Secondly, they were paid R1 720 220.76 on 9 June 2011, being 75% of the taxed costs (by a private tax consultant) incurred by Mr Gama in the High Court litigation, his disciplinary inquiry and his referral to the Transnet Bargaining Council.
- 12.2 Regarding the first payment, it came about as follows. Following my dealings with Langa Attorneys (who presented a ridiculously inflated bill), I was opposed to paying Mr Gama's fees. This was an unpopular decision and I came under pressure within the organisation to finalise the issue. In this context, I held a discussion with Mr Mkwana (who I dealt with closely on the issue), which culminated in him instructing me to pay 75% of Transnet's taxed costs to Mr Gama (on the basis that he had incurred liability for such costs). Given that I was unhappy with this, I escalated the matter to Mr Singh, who approved of the payment. I refer in this regard to my handwritten annotations dated 28 March 2011 on the various taxed bills attached to Ms Mohlabi's affidavit on costs. The decision is also recorded in the memoranda to Mr Singh and Mr Molefe referred to in paragraphs 10 and 12 of my second affidavit. None of the recipients ever questioned the contents; to the contrary, they approved of the decision to pay.
- 12.3 Regarding the second payment, my interpretation of clause 3.5 of the settlement agreement was that the costs incurred by Mr Gama at his disciplinary inquiry fell

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within the reach of *"his unfair dismissal dispute referred to the Transnet Bargaining Council"*, and that 75% of such taxed costs were payable. This was also Mr Mkwana's interpretation.


SIYABULELA XHANTI MAPOMA

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at EAST LONDON on this the 8th DAY of OCTOBER 2020, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

1
DENEYS REITZ
ATTORNEYS

SMJ

CONSULTATION
NOTE

PRESENT: Siyabulela Mapoma (Transnet)
Mafika Mkhwanazi (Transnet)
Themba Langa
Siyabonga Gama
Sbu Gule
Sabu Sangoni

TIME: 09h00

VENUE: Indaba Hotel - Fourways

REF: TNL65 - S Gama : Settlement Negotiations

DATE: 22 January 2010

1. Sbu and I met with Siyabulela Mapoma and Mafika Mkhwanazi during the course of the morning on Saturday, 22 January 2011 to discuss the possibility of the settlement of the impasse that exists surrounding the dismissal of Mr Gama from Transnet as the Transnet Freight Rail Chief Executive.
2. Themba Langa and Siyabonga Gama were also in attendance but we initially had a caucus meeting between Sbu, Mr Mapoma, Mr Mkhwanazi and myself.
3. During the course of that discussion Mr Mapoma confirmed that the proposal that had been made from the Company (which has been rejected) still stands. There is no counter-proposal.
4. Mr Mkhwanazi explained that he would like to assist Mr Gama where reasonably possible. His intention is to bring him back into his (the Chairman's) office. He wants Mr Gama to assist him on a number of strategic issues. He however needs a good motivation to do so. His view is that if he is provided with an opinion setting out that there had been some unfairness towards Mr Gama, at the Board meeting on 16 February he would persuade the other Board members to make the decision to bring Mr Gama back into the organisation.

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ATTORNEYS

5. He was to discuss the details of such return to Transnet with Mr Gama in a one and one meeting to be held between them. There are details however that he is unfamiliar with such as:
 - 5.1 When Mr Gama was fired?
 - 5.2 When Mr Gama was suspended and the like?
6. Once he is clear on those details he can then formulate a proposal. He confirmed with Mr Mapoma that Mr Gama was the highest paid Executive at Transnet at the time of his dismissal. However because he is not going back to Transnet (and as he will be in the Chairman's office) they would need to negotiate a lower remuneration package. He had in mind that Mr Gama be paid on the same scale as Pradeep Maharaj.
7. Sbu explained his view that the "devil is in the detail." Both parties agreed that he ought to return to the Company. The problem is in which position he will be returning. The other sticky point is the question of the remuneration. A further sticky point is that of Mr Gama agreeing to resign after 6 months from his return.
8. Mr Mkhwanazi explained that the insistence that he resign after 6 months is no longer an insistence of the Company. He said "it is not an issue anymore".
9. Sbu responded that a further complication would be that of Mr Gama agreeing not to be a contender for the Group Chief Executive position.
10. Mr Mkhwanazi explained that the appointment of the new Group Chief Executive will be made next Saturday (29 January 2011) and he is fully aware that Mr Gama's name is not on the list of contenders that he was provided by the Minister.
11. Sbu also brought to Mr Mkhwanazi's attention that there have been rumblings on the issue of costs. Mr Gama and his attorney (Mr Langa) have suggested that the Company ought to assist in respect of the costs, both the costs that were awarded against him by the Gauteng South High Court as well as a contribution towards his legal costs.
12. Mr Mkhwanazi acknowledged this and added that when the new Group Chief Executive starts, virtually all of the structures within the organisation will be turned around. He is aware of 5 people who sit on the Executive Committee who will not have jobs subsequent to the restructuring. His view is that Transnet Freight Rail has been a "non-performer" for the last 7 years. He suspects that the new Group Chief Executive would not put Mr Gama back into Transnet Freight Rail.
13. Sbu also mentioned (as discussed at the consultation with Dumisa and Kameshni) that the timing of the settlement should perhaps be delayed (for public relations purposes) until at least the conciliation stage in the Bargaining Council. The matter is at this stage still an internal matter and the Company has accepted and implemented the recommendation of the chairman (Mark Antrobus) that he be dismissed.
14. It would appear that Mr Gama and Mr Langa do not take issue with the fact that Mr Gama is guilty of the complaints as charged. All they intend to challenge is the sanction that was imposed.

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ATTORNEYS

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15. Mr Mapoma also suggested to Mr Mkhwanazi that insofar as there are alternative positions to be considered for Mr Gama upon his return they could either consider the Group Executive position in the Chairman's office. The position is not a Junior Executive position and is in fact a Senior Executive position. He also mentioned the Chief Operating Officer position which has been vacant for sometime.
16. At that point the caucus ended so that Mr Mkhwanazi could meet alone with Mr Gama.

SABU SANGONISXM
S.B.

10

Anton Myburgh

From: Siyabulela.Mapoma@transnet.net
Sent: Monday, 14 February 2011 16:16
To: SBU GULE; SABU SANGONI
Attachments: Gama settlement 14 February 2011.doc

SM 2

Sbu,

The Chair has asked that we prepare a two pager for him for the Board meeting. I have started the process. Please look at the attachment and finalise / settle.

Saaks

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S.M.
S.B.

S.X. Mapoma : General Manager Group Legal Service

TRANSNET

11

Background.

1. The Investigations that preceded disciplinary action against Mr Gama related to two separate procurement contracts. The first was the acquisition of the 50 "Like New" locomotives from a joint venture known as the Electro -Motive Sibanye Joint Venture (EMS Joint Venture). The second was the procurement of security services from an entity known as General Nyanda Risk Advisory Services (Pty) Ltd ("GNS").
2. In a letter dated 31 January 2008, the then Minister of Public Enterprises (Minister Alec Erwin) requested the Transnet Board to investigate allegations of corruption and procurement irregularities relating to the procurement of locomotives. That letter followed a "tip off" directed to the Public Service Commission relating to both the acquisition of the 50 "Like New" locomotives and a separate procurement process for the acquisition of 212 locomotives.
3. On 1 December 2008, a separate complaint was referred to Transnet Internal Audit (TIA) through the fraud hotline Tip-Offs Anonymous, which is an independent organisation contracted to Transnet to receive on confidential basis any complaints in relation to Transnet. Complaints received via this hotline and involving fraud or corruption or very sensitive matters are typically referred to TIA to investigate.
4. Investigations from these complaints led to the institution of disciplinary proceedings against Mr Gama. The latter instituted High Court proceedings to interdict the disciplinary process. The Application was dismissed with costs.
5. The disciplinary hearing took place over 14 days between 13 January and 25 February 2010. The findings were delivered on the 5th June 2010. The conclusion was that Mr Gama was guilty of all three charges presented in the enquiry (misconduct in relation to the GNS contract; misconduct in relation to the 50 "Like New" contract; and making statement critical of the motives, conduct and integrity of senior executives and members of the board which were unjustified and unreasonable, and calculated to cause harm).
6. The recommended sanction was summary dismissal. Mr Gama was then dismissed, and has referred a dispute to the Transnet Bargaining Council alleging the dismissal was unfair. He has admitted guilt of all three charges that he has been found guilty of, and the only ground on which he claims that his dismissal was substantively unfair is that dismissal was not a fair sanction. The bargaining council arbitration that will determine this question has been postponed indefinitely pending finalisation of the settlement negotiations between the parties.

Settlement Negotiations.

7. The current Transnet Board commenced its duties on the 13 December 2010. The Chairman of the Board, with the support of the Shareholder Minister has within his rights and obligations decided to revisit the matter of the Disciplinary proceedings against Mr Gama. This decision was informed by a number of reasons stated hereunder.

Transnet Limited
Registration Number
1990/000900/06

Carlton Centre
150 Commissioner Street
Johannesburg
2001

P.O. Box 72501
Parkview, Johannesburg
South Africa, 2122
T +27 11 308 3962/3927
F +27 11 308 2348

Directors: ME Mkhwanazi* (Chairman and Acting Group Chief Executive) MA Fanuochi HO Gezendam NBP Gaba MP Makungani SD Mkhwenesi T Mnyaka
H Mooli MP Moyo NR Ntshingila JM Sharma Prof JE Schreiner* JB Skosana E Tshabalala DLJ Tshupe A Singh* (Acting Chief Financial Officer)
*Executive *German

www.transnet.net

Group Company Secretary: ANC Calde

81M
Sib.

8. On the 22 December 2010, Transnet received a complaint from the Public Protector's office. The complaint related mainly to the disciplinary processes followed in the Gama matter, alleging unfairness in the manner in which he was treated. The complaint also covered other areas in the business of Transnet. Transnet has employed a firm of attorneys and two firms of auditors to investigate the allegations made.
9. Risk is always a part of litigation. It is trite that the overriding consideration in determining whether or not to settle a legal dispute is the discounting of risk. A party discounts its risk taking into account, amongst others, that despite its considered confidence in its case there is always the risk that the presiding officer might come to a different conclusion than anticipated.
10. The judicial processes are extremely slow, and if one takes into account that the matter may go up to the Constitutional Court (through the various appeal processes), and will take on the average more than three years to be finalised, with no assurance of a success, the settlement option was a factor to be considered.
11. There various Acting appointments in the company which were necessitated by the suspension of Mr Gama in August 2009. Mr Tau Morwe has been acting as the CEO of TFR since the suspension, Mr Karl Socikwa has been Acting in the place of Mr Morwe as CEO at TPT, and Mr Mark Gregg – MacDonald has been acting in the place of Mr Socikwa as head of Transnet Group Commercial.
12. These Acting appointments are not conducive to an effective operational environment and contribute to instability. The re-instatement of Mr Gama would contribute to some stability in the organisation, which is highly desirable considering that there is a new Board and there will be a new GCE soon.
13. Good corporate governance requires stability and avoidance of long Acting appointments.
14. Mr Gama is a highly experienced executive in the Transnet Executive and the company is still in need of his skills as it embarks on the anticipated growth path and contribution to the national fiscus and job creation.
15. The company continues to incur legal costs on the matter.

Solution

16. The solution is the proposed settlement. (See the attached document).

13

Anton Myburgh

From: SABU SANGONI <sbs@deneystreitz.co.za>
Sent: Tuesday, 15 February 2011 11:10
To: Siyabulela.Mapoma@transnet.net; Zola.Stephen@transnet.net
Subject: TNL64 [IWOV-Deneys JHB.FID871233]
Attachments: TNL64 Gama settlement 150211 - CLEAN.DOC

SM3

Dear All

Please find herewith the document which Mr Mapoma sent to us yesterday with our amendments.

Kind regards
Sabu Sangoni
Associate
Employment & Labour
Deneys Reitz Inc

Telephone: +27 11 685 8928

Telefax: +27 11 301 3345

Switchboard: + 27 11 685 8500

15 Alice Lane, Sandton, 2146, South Africa PO Box 784903, Sandton, 2146, South Africa Reg No: 1984/003385/21

sabu.sangoni@deneystreitz.co.za<blocked::mailto:sabu.sangoni@deneystreitz.co.za>

www.deneysreitz.co.za<http://www.deneysreitz.co.za/>

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Background.

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S.A.

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7. The current Transnet Board commenced its duties on the 13 December 2010. The Chairman of the Board, with the support of the Shareholder Minister has within his rights and obligations decided to revisit the matter of the Disciplinary proceedings against Mr Gama. This decision was informed by a number of reasons stated hereunder.
8. On the 22 December 2010, Transnet received a complaint from the Public Protector's office. The complaint related mainly to the disciplinary processes followed in the Gama matter, alleging unfairness in the manner in which he was treated. The complaint also covered other areas in the business of Transnet. Transnet has employed a firm of attorneys and two firms of auditors to investigate the allegations made.
9. Risk is always a part of litigation. It is trite that the overriding consideration in determining whether or not to settle a legal dispute is the discounting of risk. A party discounts its risk taking into account, amongst others, that despite its considered confidence in its case there is always the risk that the presiding officer might come to a different conclusion than anticipated.
10. In the arbitration before the Bargaining Council Mr Gama has challenged the appropriateness of the sanction of dismissal. The issue of sanction is a very complex and perplex matter to which there is no clear and straightforward answer. This is demonstrated by, amongst other cases, the celebrated case of *Sidumo v Rustenburg Platinum Mines*¹ in which the Labour Courts and the Constitutional Court on the one hand and the Supreme Court of Appeals on the other hand came to different conclusions on sanction. The other cases dealing with the issue of sanction which also demonstrate the complexity of consideration of appropriate sanction are the Shoprite Checkers cases² in which the facts in the two separate cases were similar but the Labour Appeal Court in each of the cases came to a different conclusion on sanction. In the one case the finding of the Labour Appeal Court was endorsed by the Supreme Court of Appeal.
11. It is accordingly our view that there is a probability that the Bargaining Council or a court considering the appropriateness of the sanction of dismissal of Mr Gama may reach the conclusion that dismissal was not appropriate having regard to the challenge on sanction advanced by him. In that instance the court may either award compensation to Mr Gama or find that a lesser sanction ought to have been imposed and therefore order his reinstatement.

¹ *Rustenburg Platinum Mines Ltd v CCMA & Others* (2004) 1 BLLR 34 (LAC)
Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2006) ILJ 2076 (SCA)
Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2008) 2 All SA24 (CC).
² *Shoprite Checkers (Pty) Ltd v CCMA & others* (2008) 9 BLLR 838 (LAC)
Shoprite Checkers (Pty) Ltd v CCMA & others (2008) 12 BLLR 1211 (LAC)
Shoprite Checkers (Pty) Ltd v CCMA and others (2009) 3 ALL SA 466 (SCA).

SXM

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S.B.